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No Trespassing: The Legal Origins of Louisiana's Water Access Dispute

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ABSTRACT

Since the birth of the civil law tradition, the public's right to access and use running waters has been recognized and protected through written legal sources, statutes, and codes. However, although the State of Louisiana is often lauded as the "Sportsman's Paradise," the current judicial interpretation of water access rights has restricted the public's ability to use waterways, in particular running waters, for recreational pursuits such as fishing and hunting. The purpose of this essay is first to highlight the trajectory of the development of the law relative to the public's right to access and use running waters. The analysis ranges from the time of Emperor Justinian to present day Louisiana in order to underline the deviance of Louisiana's current jurisprudence, which steps away from the original and/or legislative intent regarding running waters. This Article also aims at offering legal solutions with minimal impact to address the aforementioned discrepancy in the law moving forward.

Keywords: trespassing, water access, recreation, Louisiana Civil Code, Louisiana Revised Statutes, navigability, original intent, Roman law, *corpus iuris civilis*

I. INTRODUCTION

As we sped down the Intracoastal Waterway—wind whipping our cheeks and the hot Louisiana sun warming our upturned faces––I took a moment to admire the view around me. The canal, lined by stately cypress trees laden with springy Spanish moss, framed the expanse of muddy blue waters. Our Champion sliced through the mirror slick calm, pushing wake against the banks and into the myriad of smaller waterways connecting to the Intracoastal Canal.

The boat slowed as Dad spotted the entrance to our honey-hole, and my mouth watered with anticipation at the thought of the fried fish filets we would eat tonight. Idling slowly into the opening, dad expertly navigated the canal until we reached our favorite spot. We both grabbed our poles, rigged a spinner bait onto our lines, and tossed out a few test casts. On the second cast (this was the honey-hole, after all), I felt the familiar, exciting tug on my line. Eagerly as I reeled in my fish, I turned to my dad, ready to triumphantly announce my catch.

Rather than focusing on his own pole and my hooked fish, Dad's attention was fixated on an approaching boat. The Gatortail, holding two passengers, pulled up next to our boat. One of the men pulled out his phone and began taking pictures of our boat and license plate number while a large, older bald man yelled, "I've seen you two here before. This is private property, and y'all are trespassing. I'm callin' the sheriff."

"If we're on private property, we'll leave. I was here fishing today with my son as we have done many times before. There are no signs or gates on the entrance to the waterway, so we did not realize this was private property," my dad calmly stated as he began picking up his pole.

"Like I said, this is private water, so you can't be here. I'm sick of fishermen thinkin' they own any waters they can access with a boat. Expect a visit from the sheriff because I will be pressing trespassin' charges," said the bald man.

Our fishing trip ruined, Dad and I headed home. Upon arrival at our house, a sheriff's deputy was waiting in the driveway with a citation that read "R.S. 14:63 Criminal Trespass."[1]

Louisiana, affectionately nicknamed "Sportsman's Paradise" by her residents, boasts one of the most unique ecosystems in the United States of America. By virtue of the marshlands, swamps, and a vast array of water bodies dominating the landscape, Louisiana is a veritable oasis of exceptional wildlife species, ranging from crawfish to speckled trout, wood ducks to muskrats. The state's unique wildlife and aquatic species captivate native residents and visitors alike, generating both economic revenue and public enjoyment throughout the state.

However, not all is well in "Paradise." Recently, the current state of property law regarding Louisiana waterways has created conflict between private landowners, who claim ownership to certain canals and waterways, and recreational sportsmen who wish to use such waterways for fishing and hunting. The water access dispute has resulted in the proliferation of criminal trespassing tickets assessed upon anglers for the "crime" of fishing, boating, or hunting in waterways used by generations of Louisianians prior to the exclusion of access by these private landowners.

This privatization of coastal waterways—though, in part, stemming from coastal erosion and land loss—has been bolstered and upheld by Louisiana courts, rendering Louisiana one of the only jurisdictions in the world where navigable, running waters may be subject to private ownership and where traversing these waters can trigger trespassing charges. These court rulings run counter to the plain statutory language of Louisiana law regarding the classification of waters and water bodies, namely Civil Code article 450, which provides that all running waters are a public thing subject to public use. However, courts have consistently upheld the exclusion

1. This introduction is based on a true story which resulted in the assessment of criminal trespassing charges on South Louisiana recreational anglers.

of the public from waterways claimed by private owners, despite the fact that these waterways contain running waters, which are subject to public use.[2]

This essay aims to confront this line of jurisprudence as contrary to Louisiana law, the original legislative and historical intent of article 450, and basic principles of civilian equity. To accomplish these goals, this essay will compare the current state of water law—focusing on the law regarding the public's rights in relation to running waters—in Louisiana with previous iterations in the Louisiana Civil Code. It will also focus on the European and Roman source materials which provided the drafters of the Louisiana code with guidance, to discern the original legislative intent regarding public interaction with running waters of the state. This essay will consider American sister-state jurisdictions as well to examine how other states regulate public access to natural resources such as water and water bodies. Furthermore, this essay will discuss steps that could be taken to remediate this crisis, addressing solutions that range from proposing legislative changes to Louisiana's water law to more creative legal arguments, such as servitude rights to the disputed waterways acquired by the public through acquisitive prescription. Ultimately, this essay does not contend that the public should be able to access all waterways, such as a private pond in the middle of someone's landlocked property. Rather, this essay asserts that waterways which support recreational pursuits like fishing or pleasure boating and contain running waters should be subject to public use.

Part I of this Article will explain the extent of the problem referenced by the phrase "water access crisis," providing historical background to highlight the roots from which this problem stems. Part II, on the other hand, will provide an overview of the current law regarding the public's rights to water access. This will involve

2. *See* Part IV for a detailed examination of the jurisprudence supporting this assertion.

examining both the legal definition of navigability and running waters; addressing Louisiana law found in legislation, jurisprudence, and doctrine; and comparing the common law equivalent for reference. Part III of this Article will provide analysis of previous versions of article 450 of the Louisiana Civil Code to discern the original intent of its meaning and application. Part IV will examine historical civil law sources, which inspired article 450, to provide context and perspective on the development of property law applicable to water and water bodies, from the first promulgations of written laws to the modern codification in certain European civil law jurisdictions. Part V will discuss possible options to address the water access crisis moving forward, which, thanks to an erroneous "precedent" created by the National Audubon[3] jurisprudence and its progeny, likely requires action by the Louisiana legislature. One option includes recognition by the legislature of public servitudes of surface water passage acquired through acquisitive prescription. As a second option, the Louisiana legislature should recognize public recreational navigation servitudes, which would grant the public access rights to surface waters while recognizing and protecting the private ownership of the immovable water bottom itself. Finally, to address the burgeoning number of water trespass citations being issued in Louisiana, the legislature should consider amending La. R.S. 14:63 to reinstate the law, including posting requirements and affirmative defenses to trespass as it existed for many decades prior to its change by Act 802 of 2003. While changing the language of 14:63 will not address the core issue of the public's right of access to running waters, it may serve to alert the general public and reduce the threat of criminal prosecution.

3. *See* National Audubon Society v. White, 302 So. 2d 660 (La. App. 3d Cir. 1974), *writ denied* 305 So. 2d 542 (La. 1975).

II. WHAT IS THE WATER ACCESS CRISIS, AND WHY IS IT A PROBLEM?

A. Water Access Crisis

The "water access crisis" encapsulates the growing trend in coastal Louisiana of private landowners asserting ownership claims over bodies of accessible water. With increasing frequency, both canals and naturally occurring, navigable waterways, which have been open to the public for generations, have been gated off, allowing the waters and fish through the gates while barring the public from access. In certain areas, fishermen are criminally prosecuted for trespassing upon entering allegedly "private" waters, even though these "private" waters are indistinguishable from the adjoining public waters.

Recreational sportsmen are increasingly frustrated by the derogation of public rights in favor of alleged ownership rights asserted by private landowners over water bodies. By asserting these claims, private landowners are taking natural resources and codally designated "public things" as private property. Natural, navigable waterways, including their waters and bottoms, running waters, and the seashore along with its overflow, are all designated as public things subject to public use by the Louisiana Civil Code.[4] Thus, any naturally occurring waterway that is "navigable" should be a public thing, though the current definition of navigability creates some of the access problems discussed in this essay.[5] Any body of water that contains running waters should be considered a public thing, separately and distinctly from the classification of underlying beds and bottoms of the water body itself.[6] Any area designated as the seashore should also be a public thing. Despite the plain text of the

4. LA. CIV. CODE art. 450 (2023).

5. *See* Part III, Section A, Subpart 2, for a discussion of the definition of navigability.

6. "Running water is distinguishable from the space it occupies and from the bed that contains it. The bed of a non-navigable river is a private thing whereas the water of the non-navigable river is a public thing subject to public use."

Louisiana Civil Code designating them as public things, private landowners are still allowed to assert ownership over public things and use Louisiana's criminal trespass law to enforce their claims of exclusion.

The true problem arises when waterways are classified as non-navigable, which means their beds and bottoms can be alienated and subjected to private ownership. Even though beds are deemed private things, the waters flowing over these beds—running waters—are public things subject to public use. In fact, the trend followed by Louisiana courts is to prohibit public access to running waters that flow over private beds and bottoms. This author asserts that the interpretation followed by Louisiana courts is erroneous and violates the historical and original intent of the public's right to use public things.

B. Historical Background

Approximately 80% of Louisiana's coastal region is currently under private ownership, and the pervasiveness of the private ownership of coastal regions is at the heart of the water access crisis.[7] The rationale for this phenomenon is rooted in historical legislation as well as modern and natural causes.

Historically, legislation passed by the United States and Louisiana governments in the nineteenth century contributed to Louisiana's unique property ownership in coastal regions. In 1849 and 1850, the United States government passed the Swamp Land Grant Acts, in which the federal government conveyed to Louisiana an estimated nine million acres of "swamp lands subject to overflow," lands which were unfit for cultivation.[8]

Through a series of state legislative acts, Louisiana then

RONALD J. SCALISE JR. & A.N. YIANNOPOULOS, LA. CIV. L. TREATISE, PROPERTY § 3:13 (5th ed. 2015-2022).

7. Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 LA. L. REV. 889, 920 (2016).

8. A.N. YIANNOPOULOS, PROPERTY: THE LAW OF THINGS – REAL RIGHTS – REAL ACTIONS, § 66-67 (4th ed. 2001); Mestayer, *supra* note 7.

conveyed much of these lands to private owners so that they could be used for more productive private purposes. One act in particular––Act 75 of 1880—authorized the sale of "sea marsh or prairie, subject to tidal overflow" to private entities, and created confusion regarding classifications of private waters versus public waters.[9]

To explain the law at stake, one must keep in mind that while areas subject to the ebb and flow of the tide are considered seashore and public things, areas merely subject to tidal overflow can be alienated as private things.[10] These alternative definitions, while distinguishable in the abstract, are hard to differentiate in practice on the Louisiana Gulf coast where the character of water bodies is constantly in flux due to the ever-shifting coastline. Thus, it is likely that part of the property alienated by this act should have been classified as public, rendering it inalienable by the state.

Presently, the most pervasive causal event contributing to the water access dispute is the dynamic nature of Louisiana's fluctuating coastline. A familiar refrain repeated throughout the state is that Louisiana loses the equivalent of a football field of coastal land every hour,[11] while a new statistic has indicated that it actually does every hour and a half.[12] Regardless of the modest improvement in the rate of coastal land loss, subsidence and erosion are still serious issues faced by the state, especially in relation to the water access dispute. As once dry tracts of land become submerged and permanently accessible by boat, private landowners attempt to maintain ownership claims to the land now covered by water and access to the water above said land. This author argues that this amounts to a violation of the Louisiana Civil Code.

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9. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 66-67.
10. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 4:12 (5th ed. 2021).
11. *See* Mark Schleifstein, *Louisiana is Losing a Football Field of Wetlands Every Hour, New U.S. Geological Survey Study Says*, THE TIMES-PICAYUNE (June 2, 2011), available at: https://perma.cc/S8XT-ZADB.
12. *See* Elizabeth Kolbert, *Louisiana's Disappearing Coast*, THE NEW YORKER (March 25, 2019), available at: https://perma.cc/V8TM-A7WP. The impact of the 2020 and 2021 hurricane seasons, which devastated the Louisiana coastline, were not taken into consideration by this statistic.

In 2006, the Louisiana Legislature realized that the privatization of submerged lands was a problem for public access to waterways.[13] Under authority of Civil Code article 450, the Office of State Lands engaged in a large-scale mapping project to clarify public versus private lands and water bottoms, but it immediately faced backlash from angry landowners trying to defend their land and threatening lawsuits the state could not afford.[14] The Office of State Land's "solution" to the problem was to classify disputed submerged lands as "claimed by the state and the adjoining property owner," and advise the public citizens to enter the waterways at their own risk. These lands are commonly referred to as "dual claimed lands."[15]

Because of the rapidly changing landscape of Louisiana waterways, areas that historically were uplands or non-navigable waters owned by private landowners are now transforming into waterways that are accessible by boat. To fishermen, these areas are indistinguishable from the surrounding waters, but to the landowner who purchased the property and pays taxes on it, it is considered as private property upon which the fishermen are trespassing.[16]

Prior to the rise of "marsh management plans" in the 1970s and 1980s, landowners were more inclined to tolerate the presence of recreational fishermen on their submerged property.[17]

With growing frequency over the last fifty years, more landowners have posted "no trespassing" signs on their property, forcing fishermen to keep out of waterways that many anglers claim to have

13. Mestayer, *supra* note 7, at 889-91.
14. *Id*.
15. *Id*.
16. In 2003, Louisiana repealed the prior law requiring landowners to post signs declaring that certain waterways were private if the landowner wanted to exclude the public from recreational pursuits in the area. Tristan Baurick, *Lawmakers reject effort to make Louisiana coastal waters public*, THE TIMES-PICAYUNE (July 12, 2019), available at: https://perma.cc/U32M-LU5M.
17. Marsh management plans rose to prominence as a mechanism to protect private land from coastal erosion using levees, weirs, and flood gates on marsh to retard erosion. These protective mechanisms isolated the marshes, cutting off public access to the marshlands as well as obstructing public access to natural waterways within the marshes. Kathy Ketchum, *Waterways of the Marsh: Marsh Management Plans and Public Rights*, 1 TUL. ENVTL. L.J. 3 (1988).

fished for decades.[18] Members of the Louisiana legislature have proposed bills to settle this dispute between sportsmen and landowners; however, due to the effects of the COVID-19 pandemic, these bills were never heard.[19] The issue was again brought before the Louisiana legislature during the 2022 legislative session in the form of HB 754, which was withdrawn from the files of the House prior to debate in committee hearings due to political pressure over this issue.[20] During the 2023 Regular Session, H.B.4, proposed by Representative Bacala, offered an amendment to Louisiana's criminal trespassing statute to bar its applicability when a person is "operating a watercraft on running water of the state in accordance with Civil Code Article 450, 452, 455, or 456." Unfortunately, H.B.4 died after being referred to the Committee on Administration of Criminal Justice.[21]

Although the legislature has placed priority on other issues in past sessions, the water access dispute is surging in importance, creating further problems in coastal Louisiana. As the issue has

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18. *See* Drew Miller, *Orange Grove is Closed to the Public; Future Gates might make Sure of That*, HOUMA TIMES (May 29, 2020), available at: https://perma.cc/8YTE-ZNYS.

19. The 2020 Regular Legislative Session proposed a variety of bills designed to alleviate some of the contention between recreational water users and private landowners. *See* S.B. 176, 2020 Leg., Reg. Sess. (La. 2020), which allows for the state and private landowners to enter into boundary agreements concerning disputed property; *See* S.B. 177, 2020 Leg., Reg. Sess. (La. 2020), a proposal Pending Senate Natural Resources to amend the constitution and allow the state to enter into agreements with riparian owners to establish permanent and fixed boundaries between state owned and privately owned water bottoms notwithstanding the navigability of the water body in question to preserve the mineral rights of the land; *See* S.B. 320, 2020 Leg., Reg. Sess. (La. 2020), a proposal Pending Senate Judiciary C to allow the occupant of a watercraft traveling on state waters and engaged in any lawful activity to remain on those waters unless forbidden to do so by the owner; *See* S.B. 479, 2020 Leg., Reg. Sess. (La. 2020), a proposal Pending Senate Judiciary C to allow people engaged in commercial fishing over waters that are navigable in fact to have an affirmative defense to the crime of trespassing; *See* H.B. 627, 2020 Leg., Reg. Sess. (La. 2020), which provides for an affirmative defense to the crime of trespass when certain property is not properly posted; *See* H.B. 650, 2020 Leg., Reg. Sess. (La. 2020), which provides for the regulation of gates across waterways in the coastal areas.

20. *See* H.B. 754, 2022 Leg., Reg. Sess. (La. 2022). For full disclosure, this author was involved in the drafting of H.B. 754, although the original text provided on the legislature's website is placeholder language for the actual bill text, which did not have a chance to be amended prior to its withdrawal.

21. *See* H.B. 4, 2023 Leg., Reg. Sess. (La. 2023).

received national attention, the Bass Anglers Sportsman Society ("BASS"), an influential bass fishing organization, announced that they will no longer allow Louisiana to host Bassmaster tournaments. This decision is due to the difficulty distinguishing public from private waterways to ensure participants do not break Louisiana law.[22]

III. CURRENT APPLICABLE WATER ACCESS LAW IN LOUISIANA AND SISTER JURISDICTIONS

A. Louisiana

As a mixed law jurisdiction adhering more closely to civil law than to common law,[23] the primary source of law in Louisiana regarding water access rights rests in legislation and custom,[24] while jurisprudence and doctrine are deemed to be secondary sources of law. However, an examination of these sources shows that while a plain language reading of Louisiana law provides for public use of running waters, the jurisprudence has improperly—both from a procedural and substantive legal perspective—limited the public's rights of use.

Examination of this improper interpretation will begin with review of various applicable legislative texts, followed by jurisprudential and doctrinal gloss to impute meaning to the legislative texts. The analysis will culminate with case law focusing on the courts' interpretation of the public's rights to use running waters, especially when the waterbody is not natural or navigable.

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22. James Varney, *BASS pulls Bassmaster Tournaments from Louisiana Over Coastal Lawsuits*, THE WASHINGTON TIMES (May 10, 2018), available at: https://perma.cc/G4MW-QMJ6.

23. This adherence to the civil law tradition is true with regard to Louisiana private law. Louisiana public law aligns more closely with the common law. *See generally*, A.N. YIANNOPOULOS, CIVIL LAW SYSTEM, LOUISIANA AND COMPARATIVE LAW: A COURSEBOOK: TEXTS, CASES, AND MATERIALS (2nd ed., Claitor's Pub. Division 1999).

24. LA. CIV. CODE art. 1 (2023).

1. Legislation

Article 9 of the Louisiana Constitution provides the general public policy regarding natural resources in the state of Louisiana. The article reads,

> [t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.[25]

Taking this article into consideration, Louisiana recognizes the protection of natural resources for the good of all Louisianians as a desired public policy.

Book II of the Civil Code, which addresses property law, begins with a division of things that provides the structure of property ownership in Louisiana, including the ownership of natural resources. The Code divides things into three categories: common things, public things, and private things.[26]

Common things—such as the air and high seas—may not be owned by anyone, not even by the state, and may be freely used by everyone in the manner nature intended.[27] Public things—including running waters,[28] the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore[29]—are owned by the state or its political subdivisions in their capacity as public persons.

As such, public things are subject to public use, in accordance with applicable laws and regulations, which includes the right to fish.[30] Running waters, a central focus of this essay, are defined by the Mineral Code as follows: "'Running surface waters means the

25. LA. CONST. art. IV, § 1.
26. LA. CIV. CODE art. 448 (2023).
27. LA. CIV. CODE art. 449 (2023); LA. CIV. CODE art. 449 (cmt. b) (2023).
28. *See* Part III, Section A, Subsection 2 for jurisprudential and doctrinal gloss on the definition of running waters.
29. Seashore is codified as "the space of land over which the waters of the sea spread in the highest tide during the winter season." LA. CIV. CODE art. 451 (2023).
30. LA. CIV. CODE art. 450 (2023); LA. CIV. CODE art. 452 (2023).

running waters of the state, including the waters of navigable water bodies and state owned lakes."[31] Private things—including banks of navigable rivers or streams[32] and inland non-navigable water beds or bottoms[33]—may be owned by individuals and the state or by its political subdivisions in their capacity as private persons. Owners of private things may freely dispose of them so long as the actions comply with the law.[34] Thus, where common things are insusceptible of any ownership and may be freely used by everyone, public things are owned by the state, subject to public use in accordance with applicable laws and regulations.[35] The chief distinction between the classification of a thing as common versus public is the increased ability of the state to impose restrictions and regulations on the public thing to determine the scope of its use.

Beyond the rights of the general public to use running waters in its capacity as a public thing, owners of estates fronting a river or stream have additional riparian rights—or natural servitudes—for the use of running waters. According to article 657 of the Civil Code, the owner of such an estate may use the running waters "for the purpose of watering his estate or for other purposes."[36] However, a riparian owner does not have absolute rights to the running waters bordering his estate.

Article 658 states that a riparian owner may make use of the running waters when running over his lands. However, "he cannot stop

31. LA. REV. STAT. ANN. § 30:962 (2023). Note that although Louisiana law provides a definition of running waters, the fact that the definition appears in the Mineral Code raises the possibility that this definition only applies in the context of mineral rights and mineral law, rather than property and water law.

32. According to LA. CIV. CODE art. 456 (2023), while banks of navigable rivers or streams are private things, they are subject to public use. Banks in this context are defined as the land lying between the ordinary low and high-water level of the river or stream. However, when a levee is in proximity to a river or stream, this rule does not apply, and the levee forms the bank.

33. "Inland non-navigable water bodies are those which are not navigable in fact and are not sea, arms of the sea, or seashore." LA. REV. STAT. ANN. § 9:1115.2 (A) & (B) (2023).

34. LA. CIV. CODE art. 453 (2023); LA. CIV. CODE art. 454 (2023).

35. *See* LA. CIV. CODE art. 449, 452 (2023).

36. LA. CIV. CODE art 657 (2023).

it or give it another direction and is bound to return it to its ordinary channel where it leaves his estate."[37] Riparian owners may not exclude the public use of running waters by exhausting the supply, rendering the water unsuitable, obstructing the flow, or taking substantial enough quantities of the water to cause damage.[38] If an owner of an estate does not return the running waters to their ordinary channel before the waters leave his estate, and if the area is located within the coastal area and involves integrated coastal protection, the owner may even be subject to fines and imprisonment.[39] Based upon a plain reading of these provisions as well as the public policy espoused in the Louisiana Constitution, running waters—as a public thing—should be subject to public use, which includes the use of fishing[40] and arguably other recreational pursuits, in accordance with applicable laws and regulations.

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37. LA. CIV. CODE art. 658 (2023); *see* LA. REV. STAT. ANN. § 38:218 (2023) ("No person diverting or impeding the course of water from a natural drain shall fail to return the water to its natural course before it leaves his estate without any undue retardation of the flow of water outside of his enclosure thereby injuring an adjacent estate.").

38. A.N. YIANNOPOULOS, PREDIAL SERVITUDES § 2:8 (4th ed. 2019 update), *citing* LA. CIV. CODE art. 657 (2023) (providing "he may use it as it runs"); LA. CIV. CODE ANN. art. 658 (2023) (providing he may "make use of it while it runs"); *see generally* McFarlain v. Jennings Heywood Oil Syndicate, 43 So 155 (La. 1907); s*ee generally* Maddox v. International Paper Co., 47 F. Supp. 829 (W.D. La. 1942).

39. LA. REV. STAT. ANN. § 38:218 (2016) ("Every person who is convicted of a violation of this Section shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned for not less than ten days nor more than thirty days, or both."). Coastal area is defined as "the Louisiana Coastal Zone and contiguous areas subject to storm or tidal surge and the area comprising the Louisiana Coastal Ecosystem as defined in Section 7001 of P.L. 110-114." Conservation and restoration are defined as

> conservation, protection, enhancement, and restoration of coastal resources including but not limited to coastal wetlands, marshes, cheniers, ridges, coastal forests, and barrier islands, shorelines, coastal passes, or reefs through the construction and management of coastal resources enhancement projects, including privately funded marsh management projects or plans, and those activities requiring a coastal use permit which significantly affect such projects or which significantly diminish the benefits of such projects or plans insofar as they are intended to conserve or enhance coastal resources consistent with the legislative intent as expressed in R.S. 49:214.1.
>
> LA. REV. STAT. ANN. § 49:214.2 (4) & (5) (2012).

40. LA. CIV. CODE ANN. art 452 (2023).

2. Jurisprudential and Doctrinal "Gloss"

The legislative provisions above have been further interpreted and defined by jurisprudence and doctrinal writings from civil law scholars regarding running waters. Both jurisprudence and doctrine place limitations upon the rights of the public to access running waters. To begin, three concepts must be defined with help from these secondary sources: navigability, standing waters, and running waters.

The concept of navigability must be examined because the classification of water bodies in general as a public or private thing typically hinges upon whether the water body is "navigable" in the legal sense of the term. The term "navigable" is not clearly defined by the Civil Code, and indeed holds different definitions depending upon the context in which it is used. According to the jurisprudence and doctrine, for a water body to be "navigable," the water body must be "capable of being used for a commercial purpose over which trade and travel are or may be conducted in the customary modes of trade and travel."[41] This definition is distinguishable from the definition of navigability as it relates to ownership, which examines whether the water body was capable of being used for commercial purposes in 1812, when Louisiana became a state and was granted ownership of the beds and bottoms of navigable waterways under the Equal Footing Doctrine.[42] This essay deals solely with the first definition because use of the waterways is the core of the arguments set forth, rather than ownership.

Louisiana courts have expressly rejected the use of a water body for recreational purposes as sufficient to satisfy the definition of navigability.[43]

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41. Walker Lands, Inc. v. E. Carroll Parish Police Jury, 871 So.2d 1258, 1264-65 (La. Ct. App. 2004); Ramsey River Rd. Prop. Owners Ass'n v. Reeves, 396 So. 2d 873, 875 (La. 1981).

42. *See* Pollard v. Hagan, 44 U.S. 212 (1845).

43. Clinton Lancaster, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to*

The current definition also does not account for commercial trades such as commercial oystering, charter hunting, or charter fishing, where the water merely needs to be deep enough to float a Gatortail or mud boat to support commercial activities. The inadequacies in the definition of navigability have led water access advocates to turn to running waters. According to article 450, running waters qualify as a public thing subject to public use, providing the public with the right to fish and hunt in accessible running waters deep enough to float their boats, even if such water bodies are not considered navigable under Louisiana's strict definition of navigability. Modification to the concept of navigability has been identified as one solution to the water access crisis and is discussed in further detail in Part VI.

This author argues that running waters should be both defined and contrasted with standing waters, which is challenging due to the lack of clear definitions of the terms in the doctrine and jurisprudence. Standing waters—the waters in non-navigable lakes, swamps, and ponds—are presumed to be owned by the owner of the ground through accession and are *not* public things.[44] Water bodies filled with standing waters are not included in the scope of the discussion of this essay because they are unarguably private things when over private water bottoms.

In contrast, running waters have been defined as "running waters of the state, including the waters of navigable water bodies and state-owned lakes."[45] This legislative definition is vague, non-exhaustive, and merely illustrates examples of types of running waters. Unfortunately, the doctrine and jurisprudence do not provide much clarity, merely supplying characteristics and general principles regarding running waters. The jurisprudence provides that classifying waters as running requires a judicial determination in which the judge

Waterways and Its Effect on Riparian Owners, 33 U. ARK. LITTLE ROCK L. REV. 161, 164-65 (2011).

44. YIANNOPOULOS, PREDIAL SERVITUDES, *supra* note 38; CODE CIVIL [C. CIV] [CIVIL CODE] (2023) art. 558 (Fr.).

45. LA. REV. STAT. ANN. § 30:962 (2023).

makes a factual inquiry, examining, for example, whether the waters contain a continuous current.[46] One principle that appears clear from the doctrine and jurisprudence is that running waters are a separate and distinct entity from their beds.[47] For example, even running waters over a non-navigable and private riverbed are a public thing subject to public use.[48]

However, there is a consensus in the doctrine that this does not provide the public with access to running waters—though a public thing—when the waters are on private land. According to Professor Yiannopoulos,[49]

> [l]andowners and members of the general public thus have the right to use running water for their needs, if they have access to it. Neither landowners nor members of the general public have the right to cross private lands in order to avail themselves of running water. Such a right may only be established by agreement, destination of the owner, or prescription.[50]

Professor Yiannopoulos' quote indicates that the public can commit a trespass by crossing private lands to access running waters on private lands, but many fishermen cited for trespass in recent years had merely been navigating their boats from one body of water to the next, never actually touching dry land.

Based on the characteristics and vague definitions provided, it appears that running waters must have a current or "flow" rather

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46. Verzwyvelt v. Armstrong-Ratterree, Inc., 463 So. 2d 979, 985 (La. App. 3d Cir. 1985).

47. SCALISE, *supra* note 6.

48. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 3:13 (5th ed. 2019 update).

49. Cited by more than 700 cases and countless law review articles, dubbed "Louisiana's Most Influential Jurist in Our Time," and remembered for the extensive work done serving as the Reporter for revisions for many portions of the Louisiana Civil Code, Athanassios Yiannopoulos is one of the most impressive and decorated professors to have ever graced the institutions of both Tulane and Louisiana State University's law schools. Elizabeth R. Carter, *In Memoriam: Professor A.N. Yiannopoulos*, 78 LA. L. REV. 1103, 1104 (2018). Consequently, the opinions of Professor Yiannopoulos carry significant weight in Louisiana's legal debates.

50. YIANNOPOULOS, PROPERTY, *supra* note 8, at § 79 (3rd ed. 1991).

than remain stagnant. Running waters include the waters in navigable rivers and streams but are not limited to waters contained in those water bodies. Running waters are also separate and distinct from the bed over which they flow. The definition of running water is important because this author asserts that all running waters are public things subject to public use based upon the clear language of the Civil Code, which has been misinterpreted by Louisiana courts.

3. "Precedential" Jurisprudence of Running Waters Decisions

The jurisprudence supports and expounds upon these doctrinal viewpoints, consistently holding that the public does not have access rights to water over private land merely because the water flowing through the water body is a public thing.[51] Louisiana courts have also stipulated that while the classification of running water as a public thing imposes certain obligations upon riparian owners through whose estates running waters pass—namely the obligation to allow the water to exit the estate through its natural channel without diminishing its flow—those obligations do not mandate that the landowner allow public access to the waterway.[52] These holdings, discussed below, appear counterintuitive to the spirit of the legal definition of a public thing, namely that public things are subject to public use.

Although the jurisprudence has repeatedly ruled that the public does not have rights of access to running waters—though a public thing—over private lands, support for this *jurisprudence constante* is unsubstantiated by appropriate civilian legal analysis and source materials from the authoring judges, who rely instead on inconsistent and unpersuasive precedent. In a civil law jurisdiction such as Louisiana, the common law concept of *stare decisis*, in which a

51. *See* National Audubon Society v. White, 302 So. 2d 660, 665 (La. App. 3d Cir. 1974), *writ denied* 305 So. 2d 542 (La. 1975); Buckskin Hunting Club v. Bayard, 868 So. 2d 266, 274 (La. App. 3d Cir. 3/3/04).

52. *See* People for Open Waters, Inc., v. Estate of J.G. Gray, 643 So. 2d 415, 418 (La. App. 3d Cir. 10/5/94).

court is bound to make decisions based upon case precedent, is not applicable.[53] Rather, Louisiana judges are required to independently examine and interpret the factual circumstances of every individual case, applying the relevant legislation to reach the most equitable interpretation of the legislation.

Indeed, an illustrative quote from the Louisiana Supreme Court states that "[i]n Louisiana, this court has never hesitated to overrule a line of decisions . . . when greater harm would result from perpetuating the error rather than from correcting it."[54] While jurisprudence is "invaluable as previous interpretation of the broad standard . . . [it] is nevertheless secondary information."[55] The only caveat to

53. Instead, Louisiana follows a concept called *jurisprudence constante* in which three courts must come to the same conclusion on a particular area of the law for there to be any precedential value. However, Louisiana courts are still willing to overrule cases even in areas of the law substantiated by *jurisprudence constante*. State v. Thornhill, 188 La. 762, 810 (La. 1937) ("There is no such doctrine as *stare decisis* to stand in the way of correcting errors"); Lee v. Jones, 224 La. 231, 248-49 (La. 1953) ("Our common law brothers have the rule of *stare decisis*. Such does not prevail in Louisiana. Each case must stand or fall on its own facts."); State v. Cenac, 241 La. 1055, 1073 (La. 1961) (Hawthorne, J., dissenting) ("this court had occasion to declare forcefully and clearly that even in regard to the rules of property the maxim of *stare decisis* is not absolutely inflexible, particularly when it is shown that by following rather than by disregarding previous erroneous decisions from which evil resulted the community would suffer greater damage") (*citing* Miami Corp. v. State, 186 La. 784 (La. 1936); Carter v. Moore, 258 La. 921, 959 (La. 1971) (Barham, J., *concurring*) ("That concept stems from the theory of *stare decisis*, is founded entirely upon common law, and finds no basis in our Constitution, in our Civil Code, or in our statutory law. A study of the jurisprudence will show that the rule has been used in order to obtain a result in some cases but just as quickly discarded in other cases."); Eubanks v. Brasseal, 310 So. 2d 550, 555 (La. 1975) (Barham, J., *concurring*) ("In this civilian jurisdiction we do not follow decisional 'law.' Neither *stare decisis* nor *jurisprudence constante*, are in and of themselves *loi* in Louisiana. Jurisprudence may create custom, and jurisprudence penned by an astute judge may become doctrine, but jurisprudence can only supersede the Code when that jurisprudence has become entrenched as custom and the Code provision has fallen into complete desuetude."); Ardoin v. Hartford Acc. & Indem. Co., 360 So. 2d 1331, 1334 (La. 1978) ("the notion of *stare decisis*, derived as it is from the common law, should not be thought controlling in this state"); Doerr v. Mobile Oil Corp., 774 So. 2d 119, 128 (La 2000); Unwired Telecom Corp. v. Par. of Calcasieu, 903 So. 2d 392, 405–06 (La. 2005); Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n, 903 So. 2d 1071, 1105–06 (La. 2005), adhered to on reh'g (June 22, 2005); Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 79 So. 3d 246, 256 (La. 2012).

54. Miami Corp., 173 So. 315, 320.

55. Hartford Acc. & Indem. Co., 360 So. 2d 1331, 1334.

this general rule is that "[i]n a civilian system, especially amidst the extraordinary development of contemporary legislative action, the highest court has the mission of guarding and regulating the unity and regularity of the interpretation of law."[56] Thus, Louisiana courts must make decisions using their judicial discretion to delve into the facts of the case before their court to reach an equitable decision, limited only by guiding decisions rendered by the Louisiana Supreme Court.

Based upon the body of jurisprudence in Louisiana regarding running waters, the Louisiana courts rendering decisions on running waters ignore these principles, instead following the common law principle of *stare decisis* on numerous occasions while ignoring the weight of an applicable Louisiana Supreme Court decision. To explore the judicial rationale for the claim that running waters over private lands may not be used by the public, it would be beneficial to mention the relevant judicial holdings to isolate the "sources" comprising this line of jurisprudence.

The running waters jurisprudence in Louisiana, held in part because of the use of precedent as the main support of the holdings, consists of a chain of cases that build from each other and use the precedent of prior cases as the main support for the decisions. Turning to the oldest decision, the author was able to identify that *National Audubon Society v. White* directly addressed whether the public may use running waters based on its characterization as a public thing. The case involved an injunctive proceeding by a landowner to enjoin a farmer from trespassing in a man-made canal.[57] The canal was constructed on private land with private funds and further widened and maintained with private funds, but the canal also contained running waters.[58] The court in *National Audubon* held "that the canal was not a common or public thing and that title to the canal

56. Bergeron v. Bergeron, 492 So. 2d 1193, 1199 (La. 1986).
57. National Audubon Society v. White, 302 So. 2d 660, 662 (La. App. 3d Cir. 1974).
58. *Id*.

should not be 'vested in a whole nation' because it contains running waters," making this statement by analogy to a quote from Professor Yiannopoulos.[59] The court here reasoned that because a road built on private property for private purposes is privately owned, a canal built on private property with private funds should therefore also be considered as privately owned.[60] This analogy is fundamentally flawed because while a road may arguably be similar to a water bottom, a road does not contain a separate and distinct thing that can be independently classified as public or private.

The *Audubon* court did allow for the future possibility that:

> if a navigable canal should be constructed with public funds, or if it should be located on a publicly owned right-of-way or on public property, then it at least arguably is a public canal, and the owner of adjacent property would have no right to regulate or prevent its use by anyone else.[61]

As a brief aside, the classification of canals should be addressed as well. While the Civil Code does not mention whether canals are public or private things, the jurisprudence and doctrine provide some guidance to fill in this gap and explain how the public is able to use canals.[62]

According to doctrinal sources, a navigation canal constructed by public authorities on public lands should be classified as a public thing.[63] Conversely, a canal built entirely on private property for private purposes is a private thing, as articulated by the *National Audubon* court.[64] However, to further complicate the issue, the Supreme

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59. *Id.* at 665, *writ denied* 305 So. 2d 542, ("Vol. 2, Yiannopoulos, Civil Law Treatise, Sec. 31.5") (no longer available on Westlaw).

60. *Id*. at 662.

61. *Id.* at 665; the current law regarding access to canals is set forth in Vaughn v. Vermilion Corp., which held that the public is not afforded any rights of use via the Commerce Clause when a canal is built on private property with private funds even if ultimately joined with other navigable waterways. Vaughn v. Vermilion Corp., 444 U.S. 206, 208–09 (1979).

62. A canal is an artificial waterway constructed by public authorities or by private persons.

63. A.N. Yiannopoulos, *The Public Use of the Banks of Navigable Rivers in Louisiana*, 31 LA. L. REV. 563 (1971).

64. *Id*.

Court of the United States has held that a navigable water body made by a private person on his land with his own funds that alters pre-existing natural, navigable waterways is subject to a federal navigation servitude.[65] This indicates that even canals which are dug on private land with private funds could be subject to public use depending on the manner in which the private canal alters the natural hydrology of the particular area.

Turning back to jurisprudence, *Chaney v. State Mineral Board*[66] is one of the few cases in Louisiana supportive of public access rights to waterways using the running waters argument. However, judges in Louisiana have continuously and inexplicably declined to follow this Louisiana Supreme Court case. The *Chaney* case involved a consolidated possessory action between landowners and the state disputing ownership of the bed and bottom of the judicially determined non-navigable Amite River. The court held that the landowners failed to meet their burden to prove corporeal possession of the bed of the non-navigable river, finding that posting signs, dredging for sand and gravel, wading, and other recreational uses were not sufficient acts of possession to prevail on the possessory action.[67] Most relevant to this essay, the court also addressed in dicta the "peculiar" nature of the land and its use in the case.[68] The *Chaney* court described the Amite river as "a unique juxtaposition of private and public things" because while the bed was a private thing, the water that traversed the private bed was a public thing, and the riparian owner "may not interfere with, nor prevent, its use by the general public."[69] The court supported this dicta through analysis and interpretation of article 450.[70]

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65. Vaughn v. Vermilion Corp., 444 U.S. 206, 100 S. Ct. 399, 62 L. Ed. 2d 365 (1979).
66. Chaney v. State Mineral Board, 444 So. 2d 105 (La. 1983).
67. *Id.* at 107.
68. *Id.* at 109.
69. *Id.* at 109-10.
70. *Id.* The holding of *Chaney* has been addressed in other doctrinal sources. In a law review article delineating the public's access rights to marsh waterways in the context of marsh management plans, the article states:

While technically non-binding dicta, the case provides an example of the Louisiana Supreme Court recognizing a few principles which are central to this essay: (i) running waters are a separate and distinct thing from their bed, (ii) non-navigable waterways can contain running waters, and (iii) possessors or owners of the bed may not impede the use of running waters by the public. Despite this recognition by the Louisiana Supreme Court, subsequent courts have declined to implement similar rationale in their decisions.

All of the following decisions were rendered after both *National Audubon* and *Chaney* were decided and follow the rationale of *National Audubon* rather than the Louisiana Supreme Court decision of *Chaney*. The *People for Open Waters* case is one such case that references *National Audubon*, specifically regarding the court's holding in relation to running waters.

Identical to the facts at issue in *National Audubon*, this case involved a navigable-in-fact, man-made canal built on private land with private funds for private purposes. The court stated that although the owner of an estate which has water running through the estate has an obligation to allow that water to leave his estate undiminished, this civil code rule does not "mandate that the landowner allow public access to the waterway."[71]

> In this case, the Supreme Court clearly contemplates that the public not be denied access to non-navigable waterways. While marsh landowners may exercise their rights of ownership to deny the public access to their land, they may not legally deny access to the waterways. As the trustee of public things, the State has a duty to ensure that the waters are kept open. Not only are landowners illegally denying the public access to non-navigable waterways, but the state . . . is breaching its fiduciary duty as public trustee . . . . Under the *Chaney* reasoning, whether the channel is a natural non-navigable waterway or a man-made canal is irrelevant. Thus, the public should be assured access to the running waters contained therein. Public access to the waters of the canals also may be provided via federal law. As noted earlier, the federal government regulates navigable waters. In Louisiana, most of the man-made canals are in fact navigable.
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> Ketchum, *supra* note 17.

71. People for Open Waters, Inc., v. Estate of J.G. Gray, 643 So. 2d 415, 418 (La. App. 3d Cir. 10/5/94).

To continue following the applicable jurisprudence, *Buckskin Hunting Club v. Bayard* depicts a case in which the plaintiffs brought suit to enjoin the defendants from hunting on property—a portion of which allegedly included man-made navigable streams, banks along natural, navigable rivers, and man-made pipeline canals—leased by the plaintiff hunting club in the Atchafalaya Basin.[72]

Regarding the running waters argument, the court held that the mere fact that running waters flow through the channels does not give the public any rights of use.[73] The court's holding regarding running waters was a direct restatement of the holding in *People* without any further analysis of the factual circumstance unique to the present case, namely the fact that very different bodies of water and even areas of dry land were at issue in the case. [74]

In *Amigo Enterprises*, plaintiff landowners sought an injunction to prevent the defendants from trespassing on Amigo's property, namely a man-made canal constructed on private land but burdened by a government servitude and dug by the Army Corp of engineers with public money. There are two important arguments asserted by the defendants in this case.

First, the defendants claimed that the canal should be classified as a public thing "by virtue of its having been built with public funds on land over which the United States had a servitude."[75]

Second, the defendants asserted the running waters argument. Regarding the first argument, the court dismissed their contention because the defendants offered no jurisprudential or doctrinal

72. Buckskin Hunting Club v. Bayard, 868 So. 2d 266 (La. App. 3d Cir.).
73. *Id.* at 274.
74. Note that factual circumstances such as those presented in *Buckskin* where the alleged trespass occurs over dry land are not encompassed by the arguments presented in this essay. This essay advocates for access only to waterways which connect to navigable-at-law waterways and can be reached by boat without touching dry, private lands. The purpose of the *Buckskin* citation is to highlight how the courts sloppily apply prior decisions and holdings to dissimilar circumstances without true analysis of the facts.
75. Amigo Enterprises, Inc. v. Gonzales, 581 So. 2d 1082, 1084 (La. App. 4th Cir. 1991).

support for their position that the public was owed a servitude of passage.[76]

Further, the court noted that the canal could not be considered a natural, navigable waterway because it was created by man rather than nature.[77] Regarding the running waters argument, the court stated that *Chaney* does not apply because it involved a possessory action, and the instant case was more analogous to *Brown v. Rougon,* which dealt with a drainage canal servitude.[78]

In the *Rougon* case, two commercial fishermen sued defendant landowners and the parish sheriff, seeking recognition of public use rights over a drainage canal constructed and maintained over private property with public funds by the State.[79] The canal was built to allay flooding from False River and was only accessible part of the year when the water from the river was high.

Thus, the waterway was man-made, only seasonally accessible, and non-navigable. The court held that the fact that the canal contained running waters did not grant the fishermen access to the canal, relying most heavily upon a statute that dictates that "no person shall . . . use the [drainage] channels for transportation or navigation except under authority of and in agreement with the levee or drainage districts."[80]

Because the water body in question was an artificial drainage canal with additional legislative regulations, this holding is only applicable to the narrow factual circumstances presented in this

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76. Arguably, the court overlooked prior helpful jurisprudence that existed to support their contention. National Audubon Society v. White, 302 So. 2d 660, 665:

> If a navigable canal should be constructed with public funds, or if it should be located on a publicly owned right-of-way or on public property, then it at least arguably is a public canal, and the owner of adjacent property would have no right to regulate or prevent its use by anyone else.

Based on the *Audubon* opinion, the court had jurisprudential support to reach the opposite decision.

77. Amigo Enterprises, Inc., 581 So. 2d 1082, 1084.

78. *Id.*

79. Brown v. Rougon, 552 So. 2d 1052, 1054-55 (La. Ap. 1st Cir. 1989).

80. *Id.* at 1058 (*citing* La. R.S. 38:219(8)).

particular case and is not binding on circumstances that do not include drainage canals subject to this additional statutory regulation.

In *Dardar v. Lafourche Realty Co., Inc.*,[81] commercial fishermen sought access to use a system of navigable waters controlled by the defendants who claimed they artificially created access to the waterways through the dredging of an artificial canal, rendering the natural waterways private.[82]

First, the issue of navigability was addressed, and the court found that since none of the waterways were navigable in 1812, the waterways could not presently be classified as navigable or as public things, despite being navigable at the time of the trial.[83] Upon failure of the navigability argument, the appellants asserted the running waters argument, namely that the waterways were public because they contained running waters. The *Dardar* court simply stated that "such arguments [referring to the running waters argument] have failed to carry the day in Louisiana courts," citing *Amigo Enterprises v. Gonzales* and *Brown v. Rougon* without providing any additional rationale or analysis.[84] Because the factual circumstances in *Dardar* did not include a drainage canal, the court's citation to *Rougon* was inappropriately applied to a factually dissimilar circumstance, and the citation to *Amigo* constitutes a flimsy citation to a precedent with no new legal analysis on the facts in the instant case.

Parm v. Shumate[85]—one of the most cited, often taught, and recent cases regarding water law in Louisiana—also addresses the issue of running waters.[86] As one argument, plaintiffs in the case

81. Although a federal case, the court in *Dardar* applied Louisiana's substantive law.
82. Dardar v. Lafourche Realty Co., Inc., 985 F. 2d 824, 826 (5th Cir. 1993).
83. *Id.* at 827. One should note that the definition of navigability used by the court in this case was arguably improper because the issue examined was the issue of access and use rather than that of ownership.
84. *Id.* at 834.
85. Although a federal case, the court in *Parm* applied Louisiana's substantive law.
86. Parm v. Shumate, 513 F. 3d 135 (5th Cir. 2007).

claim that Gassoway Lake, a water body three and a half miles from the Mississippi River which only held water during the springtime due to the influx of rainfall and snowmelt waters, was filled with running waters of the Mississippi River. Therefore a public thing, the plaintiffs argued that it gave them the right to fish in the waters.[87] The court discounted this argument, finding that the waters were not navigable and holding that "although an owner must permit running waters to pass through his estate, [Louisiana] law does not mandate that the landowner allow public access to the waterway."[88]

Instead of providing original analysis and original factual determinations of the situation of the parties in regard to the running waters argument, the only rationale provided by the court was to cite to the precedential cases of *Dardar v. Lafourche Realty Co., Inc*[89] and *Buckskin Hunting Club v. Bayard*[90], as well as to decline to follow the rationale in *Chaney v. State Mineral Board* without providing any further analysis.

In sum, the controlling *jurisprudence constante* governing the use of running waters dictates that the public has no rights of access or use to running waters that flow over private land or man-made canals. However, the entire jurisprudence regarding running waters hinges upon *National Audubon*, a string of precedential case citations with little legal analysis, and an erroneous interpretation of Louisiana law.

Every case subsequent to *National Audubon* endorsed the court's rationale for refusing to recognize the running waters public access argument, by lazily claiming "precedent" and little else, which is not how the Louisiana jurisprudence—as a *civil* law jurisdiction—should operate. No case in the Louisiana jurisprudence has provided a truly satisfactory explanation for why the public cannot access running waters when over private lands, refusing to address

87. *Id.* at 138.
88. Parm, 513 F. 3d 135.
89. Dardar, 985 F. 2d 824 at 826.
90. Buckskin Hunting Club v. Bayard, 868 So. 2d 266.

that running waters are a public thing and must be analyzed separately from their beds.[91]

Additionally, Louisiana courts have willfully turned a blind eye to the exception provided in *National Audubon*—namely that a navigable canal constructed with public funds or located on a publicly owned right of way is arguably a public thing—as well as the strong dicta of the only Louisiana Supreme Court case within this line of jurisprudence, *Chaney*. The entire jurisprudence regarding running waters is a cyclic loop that continues to turn based upon the utilization of one 1974 Third Circuit case that has been imperfectly interpreted.

B. United States of America

Examination of water law in the United States shows that Louisiana's sister-state jurisdictions provide much more expansive rights to the public to use natural resources than Louisiana. In the United States, the recreational use of water and natural resources is governed by the common law public trust doctrine rather than by statutory provisions or codes, and stipulates generally "that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people."[92]

The word "trust" in the title references the legal definition of a trust, with the corpus of the trust being navigable waters, the lands beneath the waters, living resources within the waters, and the public

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91. SCALISE, *supra* note 6.

92. Coastal States Organization, *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters and Living Resources of the Coastal States* at 3 (1997), available at: https://perma.cc/8C9M-Y66A. The Public Trust Doctrine has been further bolstered by case law. Matthews v. Bay Head Improvement Association, 471 A.2d 355 (N.J. 1984), *citing* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972):

> The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses . . .

property interests.[93] The state legislatures, state coastal commissions, and state municipalities are the trustees with the duty to protect the trust and preserve the beneficiary's, otherwise the public's ability to fully use and enjoy the lands, waters, and resources encompassed within. While widespread and general guiding principles do exist, the public trust doctrine has fifty different interpretations that depend upon the state in which the waters and lands are located.[94]

In general, public trust lands—comprising lands below navigable waters, including tidelands, shorelands of navigable lakes and rivers, and the lands below oceans, navigable lakes, and navigable rivers—are designated as such because of their unsuitability for commercial agriculture and their role as water highways of commerce.[95]

In many common law jurisdictions, navigable waters are those that support not only water commerce, but also recreational activities such as fishing, hunting, and pleasure boating.[96]

To clarify which "assets" are actually included within the public trust, a few key terms require definitions. Aptly named, tidelands are lands subject to the ebb and flow of the tide, regardless of whether those tidal waters are navigable-in-fact.[97] The definition of shorelands, while slightly varying by state, may be described as "the more or less narrow band where, on salt water, the tide ebbs and flows, and, on freshwater, fluctuations in the water level cover and uncover the upland edge."[98]

The lands below oceans, navigable lakes, and navigable rivers comprise the bottoms of the water bodies which—depending on the state—include the land up to either the low water mark or the high-

93. Coastal States Organization, *supra* note 92.
94. *Id.*
95. *Id.* at 5.
96. *See* Part VI, Section B.
97. Coastal States Organization, *supra* note 92, at 26-7.
98. William B. Stoebuck, *Condemnation of Riparian Rights, A Species of Taking without Touching*, 30 LA. L. REV. 394-95 (1970).

water mark.[99]

Also included in the public trust are the waters—namely navigable waters, not non-navigable waters or the lands beneath them—that can be divided into tidewaters and navigable freshwaters.[100] Similarly to tidelands, tidewaters are those which fluctuate based on the influence of the oceanic tide.[101] Regarding navigable freshwaters, the only defining criteria is that such waters are navigable.[102]

All waters and lands encompassed by the above definitions are included within the Public Trust, regardless of public or private ownership.[103] Private ownership and public use of waters was made compatible by subjecting the use of such waters to a public servitude.[104] These waters and lands are protected by state governments, and preserved so that the public may have free access to and use of these resources, regardless of ownership. Based on the general tenets of the public trust doctrine, recreational fishermen should not be prohibited from fishing in waters where the definition of navigation includes recreational pursuits. However, Louisiana operates differently than the majority of the United States.

How does the public trust doctrine operate in Louisiana, if at all? In this state, the scope of the public trust doctrine is implicit within

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99. In Louisiana, public ownership extends to the high water mark. A.N. YIANNOPOULOS, PROPERTY, *supra* note 8, at §4:1 (5th ed. 2020 update).

100. Coastal States Organization, *supra* note 92, at 30.

101. *Id.* at 31.

102. Like the Public Trust Doctrine in general, different states may have different variations on the definition of navigability. When Louisiana became a state, the United States government granted the Louisiana government ownership of all of the beds and bottoms of navigable waterways. *See* Coyle v. Smith, 221 U.S. 559 (1911). The state of Louisiana was granted ownership of the beds and bottoms in 1812, therefore the status of navigability hinges upon whether the waterway in question was navigable when Louisiana was admitted for statehood. *See* Pollard v. Hagan, 44 U.S. 212 (1845). In Louisiana, navigability is further defined by the jurisprudence. For a body of water to be navigable, the waterway must be used or be susceptible of being used as a highway of commerce over which trade and travel are or may be conducted. *See* Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258, 1265 (La. App. 2d Cir. 2004); Coastal States Organization, *supra* note 92, at 30-31.

103. Coastal States Organization, *supra* note 92, at 3.

104. YIANNOPOULOS, PROPERTY *supra* note 8*,* at § 4:19 (5th ed.).

the aforementioned provisions from the Louisiana Constitution and Louisiana Civil Code.[105]

Waters, water bodies, and lands classified as common things or public things in the Louisiana Civil Code are encompassed in the public trust doctrine within the state of Louisiana.[106] From the legislative texts, it would appear that running waters as well as any other navigable body of water is encompassed within the Louisiana public trust doctrine, and subject to public use. Furthermore, private landowners should not have the authority to restrict this right of use of running waters and navigable water bodies from the public. However, as explained above, this is not the manner in which the courts have interpreted the available use of running waters, primarily due to the restrictive manner in which Louisiana defines navigability, as discussed above.[107]

IV. RUNNING WATERS: COMMON OR PUBLIC? AN EXAMINATION OF PRESENT AND PAST ITERATIONS OF ARTICLE 450

The previous Part of this essay examined the current version of the Louisiana Civil Code,[108] which provides that running water is a public thing owned by the state and indicates that running water is subject to public use.[109] However, in previous iterations of the code, running waters were classified differently. Since the first official codification of Louisiana law, running waters were classified as a

105. *See* LA CIV. CODE art. 450, cmt. b (2023) ("'[public things] [are] dedicated to public use, and held as a public trust, for public use'. City of New Orleans v. Carrollton Land Co., 60 So. 695, 696 (La. 1913); 'The parochial authorities are mere trustees for the benefit of the inhabitants of the parish.' Kline v. Parish of Ascension, 33 La. 652, 656 (La. 1881)").

106. James G. Wilkins and Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 868 (1992).

107. *See* Part III, Section A, Subsection 2.

108. Whereas the common law developed through case law and precedent, the hallmark of a civil law system is a written and comprehensive system of rules and principles, usually arranged in codes. A civil code is well organized, avoids excessive detail, and contains general legal principles that permit adaption to change. LSU Law, *What is the Civil Law*?, available at: https://perma.cc/M7HW-FZQE.

109. LA CIV. CODE art. 450 (2023).

"common thing," which bolsters the arguments of this essay, namely that running waters are intended for public use.

Since becoming an American territory in 1803, Louisiana has revised and rewritten its civil code on multiple occasions. The three major iterations of Louisiana law are as follows: The Digest of the Civil Laws now in Force in the Territory of Orleans ("The Digest of 1808"), the Louisiana Civil Code of 1825, and the Louisiana Civil Code of 1870 (supplemented by the 1978 Revision of the Louisiana Civil Code).

The first body of law promulgated by the Louisiana territory was the Digest of 1808.[110] After becoming a territory of the United States and receiving permission to remain a civil law jurisdiction rather than adopting US common law, the Louisiana government commissioned attorneys James Brown and Louis Moreau-Lislet to compile all laws in force in the territory that were not contrary or irreconcilable to the United States Constitution.[111] The laws in force at the time were Spanish, although Louisiana scholars debate whether the Digest of 1808 was more heavily influenced by French or Spanish laws.[112] The Digest of 1808 was not a civil code; rather, the document served to compile the laws of the territory into one cohesive body after the rapid regime changes from French to Spanish to French to American.[113]

The Digest of 1808 addressed the classification of running water, reading: "Things which are *common* are those whose property belongs to nobody, and which all men may freely use, conformably to the use for which nature has intended them, such as air, *running water*, the sea and its shores."[114] This 1808 version of article 450

110. John W. Cairns, *Spanish Law, the Teatro de la legislación universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808*, 3132 TUL. EUR. & CIV. L.F. 79 (2017).

111. John Tucker, *Source Books of Louisiana Law; Part IV – Constitution, Statutes, Reports and Digests,* 9 TUL. L. REV. 2 (1935).

112. *Id.* at 5.

113. *Id.* at 3.

114. Louisiana, "Title I. Of Things (Art. 448 - 487)" (1940). *Book II*. 6, available at: https://perma.cc/BP4U-924L (emphasis added).

presents a dramatically different article from the current article, classifying running waters as a common rather than a public thing. Common things are insusceptible of any ownership and may be freely used by all men.[115]

The idea according to which running waters should be reclassified from common to public existed as far back as the nineteenth century. The jurisconsults tasked with the *Projet of 1823*[116] proposed an amendment to the precursor of article 450 to read as follows: "Things which are common, are those of which the property belongs to nobody in particular, and which nature has intended them, such as air, the sea, and its shores."[117] The draftsmen recommended omission of the term "running waters" in the code's definition of common things because "[w]e have thought proper to omit *running water* in the enumeration of things which are common, lest it should be thought that one has a right to enter and take water from the premises of a person without his permission."[118] The Louisiana legislature—when incorporating the recommendations proposed by the jurisconsults for the revision of article 450—disagreed with this recommendation, and kept running waters in the classification of common things.

The official article from the 1825 Louisiana Civil Code reads: "Things, which are common, are those of which the property belongs to nobody in particular, and which all men may freely use,

115. *See* LA. CIV. CODE art. 449 (2023).

116. The "Additions et amendements au Code civil de l'état de la Louisiane; proposés en vertu de la résolution de la législature du 14 Mars, 1822, par les juristes chargés de ce travail," or *Projet of 1825*, which was published in 1823, was a precursor to the Louisiana Civil Code of 1825. Louis Moreau-Lislet, Edward Livingston, and Pierre Derbigny comprised the group of jurisconsults whom the legislature tasked with providing recommendations, revisions, and amendments to the Digest of 1808. The legislature then discussed the proposals by the jurisconsults and promulgated the Louisiana Civil Code of 1825. LOUISIANA LEGAL ARCHIVES, REPUBLICATION OF THE PROJET OF THE CIVIL CODE OF LOUISIANA OF 1825, p. xxiii-xxiv (1936).

117. LOUISIANA LEGAL ARCHIVES, *supra* note 116, at 35.

118. *Id.* Note that the concern expressed by the jurisconsults in the *Projet* was the threat of trespass over private land and a taking of the water itself. Advocates of water access are arguing for the use of waters for navigation and recreation purposes, not access to private land.

conformably to the use for which nature has intended them, such as air, *running water*, the sea and its shores."[119] The legislature made the conscious and deliberate decision to disregard the recommendation of the *Projet* jurisconsults. Instead, the legislature kept the law the same, indicating that they believed that running waters should be classified as a common thing, and should be used freely by all men for the purposes nature intended.[120]

The next major revision of the Civil Code occurred in 1870, but the text of Article 450 remained identical to the version presented in the Civil Code of 1825. The original text of the Civil Code of 1870 provided as follows: "Things, which are *common*, are those the ownership of which belongs to nobody in particular, and which all men may freely use, conformably with the use for which nature has intended them; such as air, *running water*, the sea and its shores."[121]

The reclassification of running waters from common to public began in the early 1900s as a result of the legislature passing Act 258, which provided:

> [t]he waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the state … it is hereby declared that the ownership of the water itself and the beds thereof in the said navigable waters is vested in the state.[122]

In 1978, the legislature undertook a substantial revision of the Code and revised article 450 to reflect the changes to the ownership of running waters reflected in this statute.

Upon examination of the history of Civil Code article 450, it is clear that the original intent of the Louisiana legislature was for running waters to be freely enjoyed by all men and insusceptible of

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119. Louisiana, "Title I. Of Things" *supra* note 114.

120. Any articles from the Digest of 1808 not adopted by the Code of 1825 were expressly repealed by Act 40 of 1828, so the drafters and the legislators made the conscious decision to preserve the provision of Article 450 from the Digest of 1808 into the Code of 1825. Tucker*, supra* note 111.

121. Louisiana, "Title I. Of Things" *supra* note 114.

122. La. Act No. 258 (1910), *codified* in LA. REV. STAT. ANN. § 9:1101.

ownership; however, over time, the Louisiana legislature modified this classification in order to have the power to regulate running waters. While the classification of common versus public does not carry huge differences, one major difference between the two is that common things are insusceptible of any ownership and freely used by all. The use of common things cannot be limited by the legislature or the state. If running waters were still classified as a common thing today, this author believes that the argument for the use of running waters by the public would have an even stronger case.

However, this author also recognizes that the reclassification of running waters from common to public brings Louisiana on par with other Continental civil law jurisdictions, and that it would be highly unlikely for the Louisiana legislature to revert the classification back to a common thing. Nevertheless, the prior classification of running waters as a common thing highlights the historical legislative intent for running waters to be used and enjoyed by the public.

V. CONTINENTAL GUIDANCE: INTERPRETING THE EUROPEAN AND ROMAN SOURCES OF LOUISIANA LAW

A. Louisiana's Legal Tradition

Despite Louisiana's geographical location firmly entrenched within a nation governed by common law, Louisiana follows more closely the civil law tradition.[123] Indeed, the drafters of the first bodies of Louisiana law wholesale adopted various provisions of French and Spanish—and by extension Roman—law.[124]

The basis for Louisiana's legal divergence stems from its colonial history. The European discovery of Louisiana by Robert de la Salle in 1682 placed the territory under the French flag. As the

123. Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1162 (2009) ("Louisiana is striving to survive as a civil law island in a common law ocean").

124. *See generally* Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1 (2010).

region developed, the Louisiana territory was thus governed by French law.[125]

In 1769, France sold the territory to Spain, and after Spanish governor Don Alejandro O'Reilly took possession of Louisiana, he promulgated an ordinance declaring that:

> This publication, followed from that moment by an uninterrupted observance of the Spanish law, has been received as an introduction of the Spanish Code in all its parts, and must be considered as having repealed the laws formerly prevailing in Louisiana, whether continued in force by the tacit or express consent of the government.[126]

O'Reilly's ordinance supplanted French law with Spanish law as the legal authority over the Louisiana colony. At the time, both French and Spanish law were similarly rooted in Roman law dating back to Emperor Justinian, therefore the change in legal regimes brought little practical modification to the local laws.[127] Louisiana remained under Spanish law until becoming a United States territory in 1803, and it was not until 1808 following the completion of the Digest of 1808 by Brown and Moreau-Lislet that Louisiana was governed by its own system of laws, albeit with heavy influence from the prior French and Spanish regimes.[128] Civilian legal scholars still dispute which legal tradition was the most prominent

125. Sources of French law which governed the Louisiana territory included royal proclamations of France, the Customs of Paris, and ordinances by French governors in control of the territory. Shael Herman, *Louisiana's Contribution to the 1852 Project of the Spanish Civil Code*, 42 LA. L. REV. 1509 (1982).

126. Tucker, *supra* note 111, at 36.

127. As an aside and to correct a mistaken notion that permeates the history of Louisiana, when Louisiana became a territory of the United States, Louisianians rejected common law and petitioned the federal government to keep their civil law system. The federal government allowed "the laws in force in the said territory . . . shall continue in force, until altered, modified, or repealed by the legislature." U.S. Congress, "An Act erecting Louisiana into two territories, and providing for the temporary government thereof" (March 26, 1804). The law in force at the time was based exclusively on Spanish law because the French, though again in possession of the Louisiana territory, had never reimposed French law upon the Louisiana territory. Thus, "The Digest of the Civil Laws now in force in the Territory of Orleans" (1808) was based solely upon Roman and Spanish law, not French law.

128. Herman, *supra* note 125.

influence upon the first promulgation of American Louisiana law.[129] An examination of the history and substance of both French and Spanish law as well as Roman law is thus relevant to determine the original intent and historical scope of the public's right to access running waters.[130] Examination of these historical legal sources from France, Spain, and Rome indicate that running waters have been intended for free public use for the past 1500 years—and perhaps longer—rendering the restrictions upon running waters imposed by the Louisiana judiciary in recent decades simply baffling.

B. Roman law: The Corpus Juris Civilis

1. Historical Background: Why Rome is Still Relevant in Modern Legal Practice

Like every great human institution, legal systems have a long and comprehensive history depicting their progression through time, showcasing how we arrived at the modern establishments of law we are familiar with today. To understand the contemporary legal traditions of Louisiana, one must go back in time, namely to the era of the Roman Empire, where the civil law tradition was born. While legal progress prior to the Roman Empire existed—for example, with the Code of Hammurabi—Roman innovation serves as the foundation of the world's legal systems, in particular regarding the civil law tradition and written legal scholarship.[131]

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129. *See generally*, Cairns*, supra* note 110, at 79, 92; *but also* Parise, *supra* note 124.

130. A study was done examining the breakdown of authorities cited in judicial decisions between 1809 and 1828, which totaled 2,247 reported decisions and 6,585 citations to authorities within those cases. The study found that Louisiana legal sources were cited with overwhelming majority, but Spanish codes and statutes were cited with substantially more frequency than French legal sources, at 4 times and 12 times as often as French sources, respectively. Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485,1499,1504 (1982).

131. ALAIN LEVASSEUR, DECIPHERING A CIVIL CODE: SOURCES OF LAW AND METHODS OF INTERPRETATION 24 (Carolina Academic Press 2015).

In 527 CE, Emperor Justinian rose to power with a great desire to restore Rome to its former glory. One of the ways he strove to accomplish this goal was through the creation of the *Corpus Iuris Civilis*, a compilation of written laws and doctrinal writings, preserved in four major bodies: the *Codex*,[132] the *Digest*,[133] the *Institutes*,[134] and the *Novellae*.[135] The *Corpus Iuris Civilis* remained prominent as the centuries passed, forming the body of legal study in universities across Europe and influencing Enlightenment thinkers.

When European nations—such as France, Spain, and Germany––attempted to codify their laws, the legal scholars turned to ancient Roman laws for both substantive and structural guidance. Codification in Louisiana was no different. Indeed, the Louisiana Civil Code has been praised as being "of all republications of Roman Law . . . the clearest, fullest, the most philosophical, and the best adapted to the exigencies of modern society."[136] The remainder of

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132. The *Codex Justinianus*, created in 529 CE, was a compilation of all relevant constitutions of prior Roman emperors. Levasseur, *supra* note 131.

133. Justinian's Digest was a compilation of the writings of all classical Roman jurists, namely "the books dealing with Roman law, written by those learned men of old to whom the most revered emperors gave authority to compose and interpret the laws so that the whole substance may be extracted from them." Levasseur, *supra* note 131, at 25, *citing* 1 THE DIGEST OF JUSTINIAN xlvii-xlix (Mommsen, Krueger Watson eds., University of Pennsylvania Press 1985).

134. Because of the complexity of the *Digest* and its lack of easy comprehension, Justinian commissioned the Institutes as a simplified version of the *Digest*. Opening the *Institutes* by addressing "the youth desirous of studying the law," Justinian explains that the purpose of the *Institutes* is one of the pursuits of justice and accurate imperial learning. Levasseur, *supra* note 131, at 26; J.B. MOYLE, THE INSTITUTES OF JUSTINIAN, 1-2 (4th ed., Clarendon Press 1905).

135. Throughout Justinian's reign, he continued to create additional laws and new constitutions—*Novellae constitutiones*—which consisted of edicts, decrees, mandates, and rescripts promulgated by the emperor and directed to the public, judges, provincial governors, and public officials, respectively. Timothy Kearley, *Introduction to Justinian's Novels*, University of Wyoming, George W. Hopper Law Library (2014), available at: https://perma.cc/8MH9-NB95; Timothy Kearley, *The Creation and Transmission of Justinian's Novels*, 102:3 LAW LIBR. J. 377-80 (2010).

136. Tucker, *supra* note 111, at 11. Furthermore, on numerous occasions, the Louisiana Supreme Court has cited Justinian's *Corpus Iuris Civilis* to support their holdings. A. Copeland Enterprises, Inc. v. Slidell Mem'l Hosp., 657 So. 2d 1292, 1296 (La. 1995); Todd v. State Through Dep't of Nat. Res., 456 So. 2d 1340, 1353 (La. 1983), amended on reargument, 474 So. 2d 430 (La. 1985); Plaquemines Par.

this Section will examine Roman, French, and Spanish legal sources as well as codifications to highlight the manner in which these bodies of law impacted Louisiana's law regarding water access rights and running waters.

2. Roman Legal Provisions Relevant to the Running Waters Inquiry

The *Corpus Iuris Civilis* contained numerous provisions related to the use and maintenance of water and water bodies in the Roman empire, many of which can be directly linked to provisions contained in the current Louisiana Civil Code. Included within this body of Roman law were three important topics: (1) the Roman structure for classification of things, (2) the scope of the public's use of water, and (3) the manner in which water usage intersected with property ownership.

Like in modern times, Justinian's Rome classified things into groups. According to Roman jurist Marcianus, "Some things belong in common to all men by *jus naturale*, some to a community corporately, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds."[137] Essentially, these classifications were the precursors to the classifications of things seen in Louisiana today.

In particular, some things included in the category as being "common to all men" were the air, running water, the sea, and the shores of the sea.[138] Book II of the Institutes, entitled "Of the Different Kinds of Things," provides details as to what privileges and

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Comm'n Council v. Perez, 379 So. 2d 1373, 1376 (La. 1980); Ducuy v. Falgoust, 83 So. 2d 118, 121 (La. 1955); Succession of Onorato, 51 So. 2d 804, 811 (La 1951); Malone v. Cannon, 41 So. 2d 837, 843 (1949); Successions of Lissa, 3 So. 2d 534, 536 (La. 1941); Smith v. Cook, 180 So. 469, 472 (La. 1937); Adams v. Golson, 174 So. 876, 879 (La. 1937); Succession of Lannes, 174 So. 94, 96 (La. 1936); Succession of Schonekas, 99 So. 345, 347 (La. 1924); Succession of Carbajal, 98 So. 666, 668 (La. 1923).

137. 1 Digest of Justinian, Book 8 (Alan Watson trans., University of Pennsylvania Press 1998).

138. *Id*.

rights of use the classification of common things affords. The original (translated) text reads:

> No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations.[139] On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein . . . again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequentially every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself . . . again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.[140]

While the text does not elaborate on the public uses of running water, the article elaborates on the public uses of other common things—namely the seashore, river banks, and harbor—which *a pari ratione*, arguably would also apply to running water. No one was forbidden access to the seashore, river banks, and harbors, and public use of these resources by all was part of the law of nations. From a plain reading of the texts, navigable waters—and indeed all running waters—were common things available for free use by all

139. The meaning of the phrase "law of nations" has had multiple interpretations, both in Roman times and by later scholars. In the second century, prominent Roman jurist, Gaius, associated the law of nations—or *ius gentium*—with natural law, defining it as "the law which natural reason appoints for all mankind . . . is called the law of nations." Similarly, the authors of the *Institutes*, from whence this quotation originates, stipulated that the law of nations was identical to natural law, but they associated the source of natural law to God, stating "The law of nature . . . being established by a divine providence, remain ever fixed and immutable." On the other hand, a Roman jurist from the third century, Ulpian, distinguished natural law from the law of nations, stating that natural law is that which "nature teaches to all animals" whereas the law of nations "was common only to human beings and established by their customs and usages." Genc Trnacvi, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26.2 U. PA. J. INT'L ECON. L. 193, 201-02 (2005).

140. MOYLE, *supra* note 134, at 35.

and insusceptible of private ownership.

Turning more fully to the scope of the public's rights to use water under Roman law, in general, the water supply in Roman cities was public, especially when water came from aqueducts constructed at the expense of the public.[141] Water from public water bodies could be used by citizens for their own private purposes, such as watering fields. However, this personal right had to be balanced with the rights of other fellow citizens, meaning "[a] party should only be permitted to conduct water [from a public river] where this can be done without injury to another."[142]

If water was "unlawfully conducted to another place," a Roman citizen could obtain an order from a judge holding that the water should be restored to its former condition.[143] Additionally, the waters of rivers were of great importance and were not allowed to be disturbed or diverted from their customary use; indeed, if the waters of the Nile were diverted by any man,

> he shall be committed to the flames at the place where he disregarded the reverence due to antiquity and nearly the safety of the empire itself; his accomplices and confederates shall be punished by deportation, and they shall have no permission to supplicate for restoration of citizenship, dignity, or property.[144]

The proper utilization of water held a very high place in Roman society, as evidenced by the harsh punishment for the misappropriation of river water in the previous textual excerpt. Water was a valuable resource to be used by all. If one person destroyed the character of a water body in a manner that rendered it unable to fulfill its customary usage, that misdeed harmed all others

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141. FRED H. BLUME, ANNOTATED JUSTINIAN CODE, Book III, Title XXXIV (Timothy Kearley ed., College of Law George W. Hopper Law Library 1920-1952), available at: https://perma.cc/M77Q-SNWW.

142. S.P. SCOTT, THE ENACTMENTS OF JUSTINIAN: THE DIGEST OR PANDECTS, Book VIII, (*The Civil Law* III, Cincinnati 1932), available at: https://perma.cc/JPL2-FB9Y; MOYLE, THE INSTITUTES OF JUSTINIAN, *supra* note 134, at 35.

143. BLUME, *supra* note 141.

144. *Id*.

and infringed upon the public's rights of use.

Justinian's *Digest* also addressed—albeit implicitly—the manner in which water impacted property rights. Particularly relevant to a state with coastal land loss such as Louisiana,

> [w]here a field whose usufruct is ours is flooded by a river or by the sea, the usufruct is extinguished, since even the ownership itself is lost in this instance; nor can we retain the usufruct even by fishing. But as the ownership is restored if the water recedes with the same rapidity with which it came, so also, it must be said that the usufruct is restored.[145]

In Rome, the law recognized that a person could not privately own water, even if the property under said water originally had been privately owned dry land. When a river or the sea—or indeed by comparison, any public waters—flooded private land, the lands ceased being private and reverted to the public domain to be used freely by the public. However, if the land regained its dry characteristic with "rapidity," the land could revert back to being private property. This excerpt from the *Digest* raises a few questions, namely how long does a piece of land need to be flooded by public waters for private ownership to be extinguished, but overall, the text is clear: inundation of waters over privately owned land extinguishes private ownership.

To summarize, Roman legal sources from the *Corpus Iuris Civilis* were very clear in designating a public policy of allowing public access, use, and enjoyment of many of the things enumerated in modern day Article 450 of the Louisiana Civil Code, including running water. Reading the text of these legal sources, some of which were written over 1,500 years ago, one notices the remarkably similar language to modern civilian legal sources, including the Louisiana Civil Code. With such strong ties readily apparent, a study of Roman law presents an interesting perspective that showcases the historical preference for expansive public access rights to water bodies, including running waters.

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145. SCOTT, *supra* note 142.

C. France: The Code Napoleon[146]

The French Civil Code, or Code Napoleon, was first promulgated in 1804 after decades of codification attempts by various French legal intellectuals and the radical reformation effects of the French Revolution.[147] Emperor Napoleon Bonaparte and Jean Etienne Portalis were the masterminds behind the French Civil Code, the first truly successful, modern codification attempt in Europe.[148] The Code Napoleon, drafted only a handful of years before the drafting of the Louisiana Digest of 1808, played a highly influential role upon the fledgling legal system in Louisiana as a model and guide for the Louisiana drafters.[149]

The Code Napoleon and the Louisiana Civil Code do not align; after all—and contrary to the misconception that Louisiana's legal system uses the Napoleonic Code—they are two separate legal regimes.[150] Nevertheless, both codes have comparable articles in relation to the classification of things. For example, Article 537 of the

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146. After the fall of the Roman Empire in the West in 476 CE, the territory of present-day France fell under the control of barbarian tribes who implemented a modified version of Roman law to control their subjects. Once the barbarian reign ceased and French kings replaced them, the remnants of Roman influence remained strong in the southern part of France and as a supplement to customary law in the northern portion of France. All of these materials were the chief sources used when French law was first codified as the Code Napoleon. Levasseur, *supra* note 131, at 37-9.

147. Olivier Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C.J. INT'L & COM. REG. 273 (1995).

148. Pierre Crabites, *Napoleon Bonaparte and the Code Napoleon*, 8 AM. BAR ASS'N J. 439 (1927):

> My greatest title to glory is not the forty battles which I have won. Waterloo alone will wipe out the memory of so many victories. I have, however, one accomplishment to my credit which nothing can efface and which will live until time will be no more. It is my Civil Code.

149. See Moréteau, *supra* note 147, at 279 (asserting that Louisiana imitated the French Civil Code).

150. Civilian legal scholar and Louisiana State University professor John Randall Trahan aptly analogized the relationship between French and Louisiana law, stating,

> [i]f one were to conceive of Louisiana's private law as a 'natural person,' then it would not be unfair to say that the 'parents' of that person are le droit civil of France and el derecho civil of Spain. It was, after all, from those two 'civil laws' that Louisiana's private law was first born. As this 'child' has grown up, it has, like any other child, differentiated itself from

Code Napoleon states that "[t]hings which do not belong to individuals are administered and may be alienated only in the forms and according to the rules which particularly pertain to them."[151] The text of this article is fairly vague, but hints at the premise that there are at least two groups of things: things belonging to individuals which may be freely disposed of, and things not belonging to individuals which may not be freely alienated.[152]

To expound on article 537, article 538 of the Code Napoleon, which articulates a similar premise as article 450 of the Louisiana Civil Code, states that:

> Highways, roads, and streets maintained by the nation, *navigable or floatable* rivers and streams, the shores, accretions and derelictions of the sea, sea ports, harbors, roadsteads, and in general all portions of the national territory which are

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> its parents, both physically and psychologically. Indeed, in the case of this particular child, one could say that, as it has grown up, it has, at the physical level, undergone a good bit of 'cosmetic surgery,' more than a few 'organ transplants,' and even some wholesale 'amputations' and it has, at the psychological level, adopted a mindset that, at least in part, is at odds with that of its parents. But through it all and despite all these many changes, it remains the case that Louisiana's private law, in both its body and its mind, still bears a striking resemblance to its parents.

John R. Trahan, *The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. (2003).

151. Louisiana, "Title I. Of Things", *supra* note 114. Another translation of the same article of the Code Napoleon states that "Private persons have the free disposition of the property belonging to them, subject to the modifications established by the laws. Property not belonging to private persons is administered and cannot be alienated except in the forms and in pursuance of the regulations peculiar to it." THE CODE NAPOLEON, OR, THE FRENCH CIVIL CODE. LITERALLY TRANSLATED FROM THE ORIGINAL AND OFFICIAL EDITION, PUBLISHED AT PARIS, IN 1804. BY A BARRISTER OF THE INNER TEMPLE (William Benning, 1827).

152. The source of the premise of this concept stems from the Projet du Gouvernement (1800) Book II, Title I, Art. 23, which preceded the Code Napoleon. The text from the *Projet* reads:

> Individuals have the free disposal of the things which belong to them, saving the exceptions contained in the laws. But the estates, the property of the nation, of public institutions and communes, are administered according to the laws and regulations which are peculiar to them. It is, moreover, only according to the forms prescribed by these laws and regulations that the nation, public institutions, and communes may sell their estates, or acquire new ones.

Louisiana, "Title I. Of Things (Art. 448 - 487)" *supra* note 114.

> not susceptible of private ownership, are considered as pertaining to the public domain.[153]

Inferring from the text of this article and the previous article, things may be susceptible of private ownership, or belong to individuals. If they are not susceptible of private ownership and do not belong to individuals, they are thus part of the public domain. The French concept of "public domain" is arguably comparable to Louisiana's classification of "things" as public things; indeed, many of the things in the above article classified as public domain—such as highways, roads, streets maintained by the nation, navigable streams, and the shores—are also public things in the Louisiana Civil Code.[154]

Beyond the classification of things as part of the public or private domain, article 714 of the Code Napoleon portrays a third category of things: things belonging to no one—common things—or things insusceptible of ownership. The text of Article 714 states that "[t]here are things which belong to no one, and the use whereof is common to all. The laws of police regulate the manner of enjoying such."[155] The Code Napoleon does not provide any examples of things which would fall under this characterization.[156]

No article of the Code Napoleon explicitly mentions running waters; however, this absence still provides important information. As mentioned above, the Code Napoleon was highly influential on the drafters of the first Louisiana laws. When the drafters of the Digest of 1808 made use of the Code Napoleon as a resource, the Louisiana drafters actively chose to include running waters as a common thing in the Digest, even though running waters were not mentioned in the Code Napoleon.

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153. *Id.*

154. DIAN TOOLEY-KNOBLETT ET AL., YIANNOPOULOS' CIVIL LAW PROPERTY COURSEBOOK, 11 (10th ed., Claitor's Pub. Division 2014).

155. THE CODE NAPOLEON, *supra* note 151.

156. According to Professor Yiannopoulos' analysis of the French legal system, running waters—along with the sea shore—are examples of common things in the French legal system. YIANNOPOULOS, PROPERTY, *supra* note 8, at 84 (2nd ed. 1980).

D. Spain: The Siete Partidas

While the Code Napoleon was highly influential on the early development of Louisiana law, the Spanish Civil Code, known as *Código Civil*,[157] was not promulgated until 1889, nearly 81 years after the Louisiana Digest of 1808.[158] Instead, the *Siete Partidas,* a precursor to the *Código Civil*, was of huge influence on the drafters, especially regarding Louisiana's classification of things.

To provide some background, the *Siete Partidas* of 1348,[159] or the Code of Seven Parts, was a complete compilation of Spanish laws, with source materials including the *Fuero Juzgo*, the *Fuero Real*, Canonical law, Roman law, and works of Roman jurisconsults.[160] Due in part to its compilation in imitation of the Roman *Pandects*, the *Siete Partidas* was the subject of praise and admiration by civilian jurists across the world as a great source of civil law that brought uniformity to Spanish law for centuries.[161] As a consequence of Spain's occupation of the Louisiana territory in the 1700s, the Louisiana territory was subject to the laws contained in the *Siete Partidas* immediately prior to becoming an American state.

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157. Different from the Louisiana Civil Code, the Spanish Civil Code provides much more detail regarding water and ownership of water, granting an entire chapter of the code to the subject under the title of "Special Properties." The code includes continuous or intermittent waters over beds or lands as part of the public domain. SPAIN, THE SPANISH CIVIL CODE IN FORCE IN SPAIN, CUBA, PUERTO RICO, AND THE PHILIPPINES, art. 407 (Clifford S. Walton & Nestor Ponce de Leon trans., La Propaganda literaria Printing House 1899), available at: https://perma.cc/DA25-46NS.

158. Moréteau & Parise, *supra* note 123.

159. After the fall of Rome, Spain was dominated by gothic tribes—namely the Visigoths—who enacted vulgar Roman law to govern their territory. The Visigothic rule was short lived and was ended by the Arab conquest of the Iberian Peninsula in 711. The Moorish occupation caused conflict with the remaining pockets of Christian Spaniards, dividing Spain into a multiplicity of kingdoms and principalities with no uniform law. As the Christians slowly forced the Moors out of Spain – which culminated in 1492 with the ousting of the last Arab stronghold in Granada – the Catholic monarchs enacted laws to govern their territories, creating a prolific compilation of legal sources, the most important of which being the *Siete Partidas*.

160. Tucker, *supra* note 111, at 38.

161. LOUIS MOREAU-LISLET & HENRY CARLETON, THE LAW OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (1820).

The particular English translation of the *Siete Partidas* examined herein is especially relevant because the co-author of the translation was Louis Moreau-Lislet. Drafter of both the Digest of 1808 and the Louisiana Civil Code of 1825, Moreau-Lislet and Henry Carlton translated only those portions of the *Siete Partidas* considered as having the force of law in Louisiana.[162] Thus, each provision of the *Siete Partidas* examined below functioned as controlling law in the Louisiana territory during the Spanish occupation, and many of these provisions were adopted wholesale into the Digest of 1808.

The Third *Partida* details the laws of property—namely the domain of things—in a manner reminiscent of the modern edition of the Louisiana Civil Code. Similar to the Louisiana Civil Code, in regard to "common things," the *Siete Partidas* states that:

> The things which belong in common, to all the living creatures of this world, are, the air, rain, water, the sea and its shores; for every living creature may use them, according to their wants. And therefore every man may enjoy the use of the sea and its shores, either for the purpose of fishing, or navigation; or doing there whatever else he may conceive advantageous to him.[163]

Although the *Siete Partidas* does not explicitly mention "running water," it is reasonable to assume that "running water" could be classified as a subsection of the broader term of "water," which is designated in the article above. According to this Spanish law, water was a common thing available to all men for use, including fishing, navigation, and any other beneficial purpose.

Similar to modern Louisiana jurisprudence, the *Siete Partidas* recognized that water's classification as a common thing to be enjoyed freely by the public was not intended to hinder the rights of landowners. According to Law 32 of the Third *Partida*,

> Lands are sometimes covered with water, by the inundation of rivers, and remain so covered for many days; and though the owner, during that time, loses the possession of them, he

162. *Id.* at iii.
163. *Id.* at 335.

> nevertheless preserves his right to the property: for as soon as the waters retire to their former channel and leave the lands uncovered, he will enjoy them as before.[164]

In cases of seasonal fluctuations of water levels or extreme cases of flooding and water rise that did not result in permanent cover of lands by water, the landowner did not lose the right to his lands. However, reading this provision *a contrario sensu*, if a private tract of land became permanently covered by water and the waters did not "retire," the landowner could lose his rights to privately own the property.

Another relevant provision from the *Partidas* comes from Law 8 of the Third *Partida*, which states:

> No man has a right to dig a new canal, construct a new mill, house, tower, cabin or any other building whatever, in rivers which are navigated by vessels; nor upon their banks, by which the common use of them may be obstructed. And if he does, whether the canal or edifice be newly or anciently made; if it interferes with such common use, it ought to be destroyed. For it is not just the common good of all men generally, should be sacrificed to the interest of some persons only.[165]

This provision from the *Partidas* portrays the importance of preserving navigation for the public. If the "works of a man," such as a canal, infringe on the navigable character of a river— and read more broadly, of any body of water used for navigation—that canal should be destroyed. Law 8 articulates a public policy of protecting the common good of all men to access waters used for navigation purposes, at the expense of the rights of the individual claiming private ownership.

Examination of these historical legal sources from France, Spain, and Rome presents a relevant historical perspective, highlighting the original intent of the civil law tradition—which Louisiana proudly follows—to grant expansive water access rights to the

164. *Id.* at 349.
165. *Id.* at 338.

public for recreational and navigational pursuits. These historical sources, while certainly nonbinding, provide compelling legal source material which could provide persuasive support to the modern-day Louisiana legal system for protection of the public's right to use running waters.

VI. ADDRESSING THE WATER ACCESS DISPUTE MOVING FORWARD

Historical sources, prior iterations of the Louisiana Civil Code, the Public Trust Doctrine, and even the plain text of the current legislation, all indicate that the public should have expansive access and use rights to public things, like running waters. However, because Louisiana courts have interpreted legislative provisions restrictively, historical origins research or common law comparison may not be sufficient to force the courts to reconsider the public's rights to access running waters. Logical options to address the water access dispute, in the opinion of this author, rests either in the hands of creative lawyering or in revisions by the Louisiana legislature.

A. Acquisitive Prescription

Acquisitive prescription has long been recognized as a mode of creating servitudes, but until the 1977 revision of the Louisiana Civil Code, only servitudes which were apparent and continuous could be acquired through acquisitive prescription.[166]

Since the revision, however, a servitude must only be apparent, not continuous, to be acquired through prescription, making it possible for a person to acquire a right-of-passage servitude through acquisitive prescription.[167] The 1977 revisions were not retroactive, and therefore the ability to acquire apparent servitudes of passage through acquisitive prescription could only be obtained after 10

166. Christopher M. Hannan, *Prescription Lenses: How Louisiana Courts Should Apply the Revised Articles Governing Thirty-Year Acquisitive Prescription of Apparent Servitudes*, 53 LOY. L. REV. 937, 945 (2007).

167. For a more detailed history and discussion of the acquisition of servitudes through acquisitive prescription, *see* Hannan, *supra* note 166.

years of use with just title, or 30 years of use without just title; this meant that a passage servitude without just title could not be acquired until 2007.[168] Proponents of water access rights have made the argument that use of a private waterway for thirty years provides the public with a servitude of passage over the water body. In *People for Open Waters*, argued in 1994, plaintiffs made an identical argument, asserting that the public had acquired a servitude of passage for a private canal through 30 year acquisitive prescription.[169] However, the court held that the 1977 revisions were not retroactive, and that since "30 years [had] not passed since the 1977 revision, the plaintiffs [had] not acquired a servitude of passage through Gray Canal."[170]

While the *People* case did not rule in favor of the plaintiffs, the court left open the possibility that a servitude of passage could be acquired by the public over private waterways, such as private canals, once the requisite amount of time had passed. Assuming certain canals and waterways have been in use by the public for thirty years or more, the public arguably could have acquired servitudes of passage over such private waterways, if the public had used the waterways in a manner sufficient to satisfy the requisite elements of acquisitive prescription.

The acquisition of a servitude of passage would be a highly fact intensive inquiry determined on a case-by-case basis, likely requiring litigation and judicial determination. Thus, while being a possible argument to combat the water access crisis, this solution is impracticable to resolve these issues on a large scale.

168. A.N. Yiannopoulos, *Canals, 2* LA. CIV. L. TREATISE, PROPERTY § 4:18 (5th ed.).
169. People For Open Waters, Inc. v. Estate of Gray, 643 So. 2d 415 (La. Ct. App. 3d Cir. 1994), *writ not considered* 646 So. 2d 370 (La. 1994).
170. *Id.* at 418.

B. Legislative Amendment of Navigability under Louisiana Law: A Recreational Navigation Servitude?

As discussed previously, Louisiana's definition of navigability requires that a water body be capable of supporting commerce. This definition of navigability ignores the fact that our definition of commerce has broadened in modern times to include business ventures, such as charter fishing and hunting and other such activities which can be achieved with shallow waters and narrow water bodies.

Furthermore, waterways can have more uses than commercial uses, such as recreation purposes. The current, restrictive definition of navigability has been supported by Louisiana courts, such as the Fourth Circuit, which has stated "[w]e cannot accept the State's premise that any body of water deep enough to float a pirogue is navigable under Louisiana law."[171] The Fourth Circuit's opinion begs the question: why not?

Numerous sister jurisdictions in the United States have expanded their definition of navigability to encompass more than just commerce, the recognition of which is called the recreational navigation doctrine. In Mississippi, for example, the state has expanded its definition of navigable-in-fact to include water bodies that support activities such as fishing, logging, and recreational pleasure boating.[172] Tennessee, thanks to a definition that requires the water to be "capable of and suited to the usual purposes of navigation," recognizes duck hunting as an activity included in the scheme of defining navigability.[173] In Oregon, the supreme court held that pleasure boating is a part of commerce just the same as a commercial vessel transporting lumber.[174] California, Idaho, and Arkansas recognize a form of the recreational navigation doctrine as

171. *See* Sinclair Oil & Gas Co. v. Delacroix Corp., 285 So. 2d 845, 852 (La. Ct. App. 4th 1973).
172. Lancaster, *supra* note 43, at 161, 164-165.
173. *Id*. at 161, 165.
174. *Id*. at 161, 166.

well.[175] Although other states have a more encompassing definition of navigability, precautions are put into place to safeguard against infringement upon the rights of private landowners. The mere fact that a water body can support activities such as duck hunting, rowing, or bathing does not alone constitute navigability; rather, a water body is navigable for recreational purposes only if the water body may be reached without trespass over private dry land.[176]

In a state renowned for its recreational sportsman pleasures and pursuits, why isn't recreational use sufficient to enable public access to running waters, when such waters are navigable based on a layman's definition of the word, especially in light of the text of article 450? What statutory authorization allows private landowners to strip the public of the right to use what it owns? There is none. Regretfully, Louisiana courts have failed to recognize any distinction between public access rights to running waters of this state, instead improperly giving landowners the right to exclude the public from exercising a public property right on the basis of an improper line of jurisprudence beginning with *National Audubon*. The public right to access and utilize running waters has been recognized since the Roman Empire. This is nothing new. Since before Louisiana's admission into the Union, private property rights in Louisiana have been subject to and burdened with the public right of access to running waters.

A curious student of Louisiana Civil Law may ask how or why the courts have adopted an approach that runs contrary to the historical intent and plain language of the Louisiana Civil Code. Perhaps the historic role of Louisiana's oil and gas industry and the substantial monetary stakes involved in mineral ownership have led courts to take an approach that favors private landowners. Perhaps the courts in *National Audubon* and its progeny did not adequately familiarize themselves with the origins of article 450—its history and

175. *Id*.
176. *Id*. at 161, 165.

purpose—failing to recognize the public right of access and focusing instead on property ownership. Regardless, the current contrary jurisprudence requires the legislature to revisit the scope of "navigability" in Louisiana to recognize the rights of public access to the running waters of this state guaranteed by article 450.

One possible solution to balance the inequity of this improper application of the law would be the legislative establishment of a public recreational navigation servitude: the regulation would operate to grant the public access for recreation to any water body that is accessible by boat without the boater first crossing dry, private land to reach the waters. The water body must contain running waters to be subject to the servitude. The landowner would retain ownership to the water bottoms they claim to own, including any mineral rights or any other ownership privileges. Further, the private landowner would continue to enjoy immunity from liability—in tort or otherwise—for injuries that may occur to public persons using the waters above the property owner's lands. The recreational sportsmen, on the other hand, would be prohibited from engaging in any sort of activity that disturb or infringe upon the use of the private landowner's adjoining dry land, facing liability for damages resulting from such disturbance or infringement.

Legislative action is imperative in the face of this crisis, and a vehicle for action already exists: Senate Resolution 171.[177] In 2014, the Louisiana legislature requested that the Law Institute establish a Water Code Committee to "study the legal issues surrounding groundwater and surface water law and any needs for revision to current law" and subsequently enact a comprehensive Water Code to "integrate all of its water resources ... and enable Louisiana to successfully manage and conserve its water resources as it prepares to face the inevitable challenges that lie ahead."[178]According to

177. *See* Sen. Res. 171, 2014 Leg., Reg. Sess. (La. 2014).

178. Louisiana State Law Institute, *Report in Response to SCR 53 of the 2012 Regular Session: The Use of Surface Water Versus Groundwater*, at 3, 87 (2014), available at: https://perma.cc/W5PW-R5YN.

committee member and LSU Law Professor Keith Hall, the main focus of the committee is regulation of mass subsurface water usage to prevent indiscriminate takings of subsurface water without limit, which does not overlap with the concepts of water law discussed in this essay.[179] Nevertheless, if the focus of the Water Committee broadens to also revise issues such as navigability or address the possibility of a recreational navigation servitude, the Water Committee and a subsequent Water Code could become a valuable resource in the pursuit of legal change regarding water access.

C. Reinstatement of the Affirmative Defense to Trespass for Improperly Posted Land

Prior to 2003, the charge of criminal trespass on waterways could be countered by proving an affirmative defense to the crime. According to the pre-2003 version of R.S. 14:63, "It shall be an affirmative defense to a prosecution [of trespass] to show that property was not adequately posted in accordance with Subsections D or E, and F of this Section." The posting requirement mandated that owners place some identifying markers—such as paint marks on trees, posts, signs stipulating "No Trespassing," or fences—to put the public on notice that the land, or water, was private.[180] In the absence of such markers, a trespasser could not face liability for his trespass. However, in 2003, the legislature removed the posting defense to trespass for reasons unknown.[181]

The legislature could consider reinstating this affirmative defense. While a mere affirmative defense to trespassing does not constitute a complete solution to the water access problem, it at least offers an alternative. This affirmative defense to trespass would allow fishermen to travel more freely through Louisiana wetlands and

179. LSU Law Center Professor, Director of the Mineral Law Institute, and Committee Member of the Water Committee (July 9, 2021).
180. LA. REV. STAT. ANN. § 14:63 (2002).
181. *See* SB 98, 2003 Leg., Reg. Sess. (La. 2003).

waterways without fear of accidentally stumbling upon "private" waters.

Should the affirmative defense be reinstated, fishermen would only be prosecuted for trespass if they willfully ignored posted signs on private waterways and entered the waterways in spite of the posting. This solution, while still favoring the private landowners and wholly insufficient to address the core of the issue, affords some protections to the public seeking to legally enjoy Louisiana's waterways.

VII. CONCLUSION

Over the course of roughly 2,000 years of written legal history and scholarship, waters—namely running waters—have been classified as a common thing and subjected to the free use and access of the public. Rome elucidated this sentiment in the *Corpus Iuris Civilis*. Spain expressed this principle in the various bodies of legal scholarship. Only Louisiana, within the past century, has altered the traditional legal classification of running waters by steadily placing limitations on the public's use of waters which traditionally would have been available for enjoyment by the public for any purpose, especially for the purpose of recreation. Only Louisiana has allowed lands inundated by river waters and waters from the seashore—running waters—to remain privately owned at the exclusion of the public, even though the waters can be easily accessed by boat and connect to other navigable waterways.

The legal scholarship that comprises the Louisiana legal tradition portrays very clearly how and to what extent the public may access running waters. Even with the present classification of running waters as a public thing instead of a common thing by the Louisiana legislature, the public should still receive broad rights of access and use.

However, the Louisiana jurisprudence has adopted a different interpretation, one that favors private landowners at the expense of

public rights of access without clear legal support or logic for these policies. This divergence from the historical civilian interpretation of broad public access rights to water bodies can be traced back to an improperly interpreted case from the Third Circuit Court of Appeals, which wrongly applied a doctrinal analogy and has been poorly referenced in the Louisiana jurisprudence. Louisiana courts have used this improperly interpreted case as the cornerstone for subsequent decisions in a manner dangerously analogous to the common law doctrine of *stare decisis*, a legal methodology that has no applicability in a civilian legal system.

As always, the citizens of Louisiana are bound by the decisions of their courts, because civilian judges interpret and apply the primary source of law: legislation. However, in light of the water access crisis that presently plagues the state of Louisiana—a crisis that could have steep economic ramifications for a state dependent on tourism and recreational sportsmanship—perhaps it is time to confront this issue directly.

Lawyers may be called upon to make novel and creative arguments in court, such as arguing for servitudes of passage over "private" waterways acquired through acquisitive prescription. However, the most effective way to address this crisis rests solely in the hands of the Louisiana legislature, namely, to revise the law regarding water access rights.

Revisions to the concept of navigability or allowing recreational access to areas accessible by boat via a navigational servitude, would be an ideal solution to this problem. In the alternative, reinstating the posting requirement in the criminal trespass statute would be another way to balance the rights of the public with private rights, although this solution still favors private landowner rights over the public's rights of access.

The beauty of the civilian legal system is its responsiveness to change as well as foundation in principles of equity and fairness. The water access crisis in Louisiana presents a situation that is inequitable and unfair. Thus, in the words of a great French civilian

scholar, we should look to the spirit of the law when the letter, or in this case the jurisprudence, kills.[182]

182. Alain Levasseur, *Code Napoleon or Code Portalis*?, 63 TUL. L. REV. 762, 772 (1969).