Louisiana Law Review

Volume 80
Number 4 *Summer 2020*

Article 13

11-11-2020

Le Deuxième Grand Dérangement: Expelling Louisiana's Taking of Private Property Through Article 450

Michael C. Schimpf

Le Deuxième Grand Dérangement:[1] Expelling Louisiana's Taking of Private Property Through Article 450

Michael C. Schimpf *

TABLE OF CONTENTS

---

* J.D./D.C.L., 2020, Paul M. Hebert Law Center, Louisiana State University. The author would like to specially thank Professor N. Gregory Smith, Professor Heidi Thompson, and Christopher Handy for their excellent guidance, suggestions, and knowledge throughout the writing and editing process. Additional thanks go to Jacques Mestayer for his insightful article and mentorship during summer employment. Final thanks go to the author's family for their continual support and encouragement.

1. "*Deuxième*" is French for "second." To briefly summarize, Le Grand Dérangement was a period in the 18th century when the British expelled the Acadians from their homes in l'Acadie, present-day Nova Scotia. The British claimed their property for the crown. The Acadians ended up in various places; eventually, groups came to Louisiana. Many settled on the Louisiana coast and swamplands, becoming the Cajuns. Some Cajun descendants and all private landowners of coastal property potentially face losing their property to the State as the Louisiana coast changes. *See* Katy Reckdahl, *Mixing Oil and Water: An Inside Look at What Happens When Land Sinks and Oil Money Is on the Line*, WEATHER CHANNEL, http://stories.weather.com/mixingoilandwater [https://perma.cc/45SH-LAPQ] (last visited Sept. 21, 2018).

INTRODUCTION

Over 200 years ago, the Thibodeaux family settled in South Louisiana where they lived, hunted, and fished on the Louisiana coast.[2] Eventually, the Thibodeauxs purchased a piece of land in close proximity to Vermilion Bay.[3] They paid—and continue to pay—property taxes on the coastal tract of land, which the State required.[4] In 2012, the Thibodeauxs authorized an oil company to open an oil well on their property in exchange for royalties.[5] Right before the oil lease officially started, the State notified the Thibodeauxs that 40 acres of their land, including the oil well, now belonged to the State because the land submerged below navigable

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

waters.[6] Thus, the State took ownership of the land and the royalties from the oil well without compensating the Thibodeauxs.[7]

For families like the Thibodeauxs, the State's land grab is eerily similar to the fate of their ancestors in the 18th century when the British crown forcibly took the Acadians' lands and exiled them from l'Acadie.[8] The State's actions seem to violate the fundamental right to own property that the framers of the United States and Louisiana Constitutions expressly protected.[9] Thus, at face value, it seems Louisiana has abandoned one of the fundamental purposes of government: preservation of citizens' property.[10] Instead, Louisiana is struggling to reconcile property ownership with a changing coast.[11]

In Louisiana, private landowners own approximately 80% of coastal land.[12] Natural and human forces, however, are causing the land to submerge beneath water bodies.[13] In the Thibodeauxs' case, the State claimed that the land now sits below navigable water,[14] thus reverting ownership to the State under Louisiana Civil Code article 450.[15] Article 450 defines State-owned property "as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the

---

6. *Id.* The author recognizes that the "Freeze Statute" allows an oil lease to continue even after the State takes the land if the lease opened. *See* LA. REV STAT. § 9:1151. The scenario avoids the Freeze Statute because the lease was not officially open. *See id*. Implications of the Freeze Statute are beyond the scope of this Comment.

7. *See* Reckdahl, *supra* note 1.

8. *Id.*

9. *See generally* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see generally* LA. CONST. art. I, § 4(B).

10. *See generally* U.S. CONST. amend. V; *see generally* LA. CONST. art. I, § 4(B).

11. *See generally* Christopher R. Handy, *Filling the Lacuna with Water: HB 391 and Louisiana's Problem with Public Access to Water*, NEW ORLEANS BAR ASS'N (July 6, 2018), http://www.neworleansbar.org/news/committees/filling-the-lacuna-with-water-hb-391-and-louisiana-s-problem [https://perma.cc/8VAY-JK72].

12. Gena Somra, *Louisiana's Shrinking Marshes Signal the Loss of a Way of Life*, CNN (June 6, 2018, 2:55 PM), https://www.cnn.com/2018/06/06/us/louisiana-land-loss-wxc/index.html [https://perma.cc/B84K-T3GD].

13. *See generally* Handy, *supra* note 11.

14. *See* Reckdahl, *supra* note 1.

15. *See* LA. CIV. CODE art. 450 (2018) ("Public things that belong to the state are . . . the bottoms of natural navigable water bodies.").

seashore."[16] Louisiana's changing coast has caused once private land to arguably be classifiable today as article 450 State-owned property.[17] The text and jurisprudential interpretation of article 450 suggest that the submerged land should revert to the State by operation of law.[18] Further, coastal change has caused newly navigable water bodies to emerge on private land, including a possible change of former non-navigable water bodies into navigable water bodies.[19] Article 450 and existing jurisprudence do not provide concrete answers to the State or landowners about ownership of newly navigable water bodies. Further, the jurisprudence is unclear as to whether the State owes compensation if any of the disputed property becomes State-owned land.[20]

Like the Thibodeauxs, similarly situated families live with a continual fear that the State could reclassify—and assert ownership of—their land.[21] Private landowners have combatted the State's ownership claims by maintaining their claims to the land.[22] Further, neither the State nor private landowners have taken formal action because both fear litigation expenses and an unfavorable court ruling.[23] Consequently, private landowners and outdoorsmen have come into conflict because boaters cannot tell the difference between State property that allows open access to the waterways and private property that subjects boaters to potential trespass liability.[24] Private landowners have forcibly removed boaters, largely for fear of tort liability if an injury were to occur on their land.[25]

This situation is ripe for judicial or legislative action because Louisiana continues to lose land every hour along its coast.[26] A proper

16. *Id.*

17. *See generally* Handy, *supra* note 11.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See generally* Reckdahl, *supra* note 1.

22. Jacques Mestayer, Comment, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 LA. L. REV. 889, 891 (2016). The Louisiana Office of State Lands has posted warnings about the dual claim to ownership of the property. *Id.*

23. *Id.*

24. *See generally* Handy, *supra* note 11.

25. *Id.*; *see, e.g.*, Brown v. Rougon, 552 So. 2d 1052 (La. Ct. App. 1st Cir. 1989); State v. Barras, 602 So. 2d 301 (La. Ct. App. 3d Cir. 1992); Buckskin Hunting Club v. Bayard, 868 So. 2d 266 (La. Ct. App. 3d Cir. 2004); Carpenter v. Webre, 17-808, 2018 WL 1453201 (E.D. La. Mar. 23, 2018).

26. *See generally* Handy, *supra* note 11. Sources often equate the amount of land loss per hour to a football field. *See id.*

solution must consider takings law,[27] which the State tried to avoid when asserting a claim over the Thibodeauxs' property.[28] After analyzing the issue under takings law, the State most likely owns land that submerges, through entirely natural forces,[29] beneath *historically*[30] navigable water bodies or the territorial sea because the State and the neighboring landowner are parties to an aleatory contract,[31] which causes the submerged land to revert by operation of law.[32] Because no taking occurs, the State does not owe compensation to the landowner subject to the aleatory contract.[33] The aleatory contract, however, should not exist as to *newly*[34] created navigable water bodies because the landowner does not lose his or her property right by operation of law.[35] Thus, an impermissible taking would occur if the State interfered with this land absent eminent domain proceedings.[36] Although the State does not have to compensate the landowner whose land abuts historically navigable water bodies or the territorial sea, the State can avoid this inequity if it passes an amendment to the Louisiana Constitution allowing gratuitous compensation for this

27. Takings law derives from the Fifth Amendment of the United States Constitution and Article I, section 4(B) of the Louisiana Constitution. Takings law protects citizens from arbitrary governmental invasion of private property; the government can only take private property for public purposes and after paying just compensation. *See* U.S. CONST. amend. V; LA. CONST. art. I, § 4(B). This Comment largely presupposes a situation where the Louisiana government invades private land and the landowner seeks redress under Louisiana takings law.

28. *See generally* Reckdahl, *supra* note 1. Simply, the State does not owe compensation if there is no taking. *See* discussion *infra* Part II.

29. But in Part IV, this Comment will point out that State action and private action along the coast makes it very difficult for truly natural land loss. *See* discussion *infra* Section IV.B.

30. "Historically" refers to water bodies that were navigable in 1812 or before the State sold the land to private parties. *See* Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So. 2d 408, 411 (La. Ct. App. 4th Cir. 1994).

31. "A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event." LA. CIV. CODE art. 1912 (2018).

32. *See* discussion *infra* Section II.A. This Comment will refer to this operation of law reversion as the "implied reversion."

33. *See* discussion *infra* Section II.B.

34. "Newly" refers to water bodies made navigable after 1812 or after the State sold the land to private parties. *See generally* Handy, *supra* note 11.

35. *See* discussion *infra* Section III.B.

36. *See* discussion *infra* Section III.B. Eminent domain is the "inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking." *Eminent Domain*, BLACK'S LAW DICTIONARY (10th ed. 2014).

land loss[37] or extending Louisiana takings jurisprudence to include inaction.[38]

Part I of this Comment explains Louisiana's classification of things in relation to water bottom ownership and Louisiana's protection of private property. Part II analyzes whether the State owes compensation if it takes title to former private land that submerges beneath historically navigable water bodies or the territorial sea. Further, Part II finds that an implied reversion occurs where the State does not owe compensation if the land submerges beneath historically navigable water bodies or the sea. Part III argues that an implied reversion does not occur for newly formed navigable water bodies because courts only look at historic navigability for water bottom ownership. Part IV argues that the State could propose a constitutional amendment calling for a gratuitous payment for the landowners whose former lands submerge through natural forces beneath historically navigable water bodies or the territorial sea. Further, Part IV argues that the State should expand takings law to include inaction because the State has a duty to protect the coast. This Comment concludes by arguing that expanding takings to cover State inaction is the best solution.

I. LOUISIANA'S HISTORICAL CLASSIFICATION OF THINGS: PUBLIC AND PRIVATE WATER BOTTOMS

In the Louisiana Civil Code, the word "property" largely refers to things and rights deriving from things, such as ownership.[39] In Book II of the Civil Code, a "thing" broadly refers to both objects that are susceptible of ownership and objects insusceptible of ownership.[40] In Louisiana property law, the first major step in determining water bottom ownership requires classifying whether the water body is navigable.[41] To understand the limits of State-owned submerged land, one must examine the limits of

37. *See* discussion *infra* Section IV.A. This Comment does not advocate for the gratuitous compensation method because it would be almost impossible to determine exactly what land the landowner lost and to have an amendment adopted. It serves as illustration of a possible solution. This Comment takes the view that expanding takings to cover inaction is the best option.

38. *See* discussion *infra* Section IV.B.

39. A.N. YIANNOPOULOS, PROPERTY *in* 2 LOUISIANA CIVIL LAW TREATISE § 1:3, 1, 4 (5th ed. 2015). The word "property" largely comes from the French word "*propriété*" but, other times, the French word meaning things: "*biens*." *Id.*

40. *Id.* § 2:4, at 30–33.

41. *See generally* LA. CIV. CODE arts. 450, 453 (2018).

navigability and tidal influence.[42] Moreover, human and natural forces—erosion, subsidence, and sea-level rise[43]—have caused navigable waters and the sea to expand, thus potentially expanding State property at the expense of private property owners.[44] Further, a court could classify the water that has inundated private lands as navigable.[45] The classification of newly navigable water bodies has led to uncertainty because both the State and private landowners claim ownership.[46] Nevertheless, the State and private landowners have refrained from using the courts to clear up property titles because of the uncertainty surrounding the application of Louisiana takings law.

A. Things Out of Commerce: Public Water Bottoms

Louisiana Civil Code article 448 states that things are "common, public, and private; corporeals and incorporeals; and movables and immovables."[47] The first division of things—common, public, and private—determines whether a thing is susceptible of private ownership.[48] In other words, the division determines whether a thing is in commerce or out of commerce.[49] According to article 449, common things, such as the

42. *See id.* art. 451 ("Seashore is the space of land over which the waters of the sea spread in the highest tide during the winter season."); *see also* Handy, *supra* note 11. For navigable streams or rivers, the State owns the land up to the ordinary low-water mark; however, the State owns the land up to the ordinary high-water mark of navigable lakes. State v. Placid Oil Co., 300 So. 2d 154, 172 (La. 1974) (reh'g).

43. Erosion is the "wearing away of something by action of elements; esp., the gradual eating away of soil by operation of wind, currents, or tides." *Erosion*, BLACK'S LAW DICTIONARY (10th ed. 2014). Subsidence is "[a]ny downward movement of the soil from its natural position; esp., a sinking of soil." *Subsidence*, BLACK'S LAW DICTIONARY.

44. *See* Mestayer, *supra* note 22, at 892. This Comment largely deals with natural forces, such as erosion, subsidence, or sea-level rise. *See* Miami Corp. v. State, 173 So. 315, 322 (1936).

45. *See* Handy, *supra* note 11.

46. *Id.*

47. LA. CIV. CODE art. 448 (2018).

48. YIANNOPOULOS, *supra* note 39, § 3:1, at 95–96.

49. Many modern civil codes use the phrases "in commerce" and "out of commerce." *Id.* Louisiana maintains the historical view: susceptibility or insusceptibility of private ownership. *Id.*

air and high seas, are insusceptible of ownership and out of commerce.[50] Thus, nobody, including the State, can own common things.[51]

Similarly, public things are out of commerce and insusceptible of private ownership.[52] The Louisiana Civil Code defines public things as things "owned by the state or its political subdivisions in their capacity as public persons."[53] According to paragraph 2 of article 450, "running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore" are public things that belong to the State.[54] These things are out of commerce and always insusceptible of private ownership as a matter of law for as long as one classifies them as such.[55] Louisiana's changing coast directly affects coastal land that could now fall under the category of bottoms of navigable water bodies, seashore, or the territorial sea.[56] Thus, it is necessary to understand the bases of each classification.

1. Natural Navigable Water Bodies[57]

The importance of navigability dates back to Louisiana's statehood and can be seen through the equal footing doctrine and the public trust doctrine.[58] Creating the equal footing doctrine, the United States Supreme

---

50. LA. CIV. CODE art. 449.

51. *Id.* This Comment is mainly concerned with the public and private division because water bodies—rivers, streams, and lakes—are either public or private depending on navigability. *See* LA. CIV. CODE art. 450.

52. YIANNOPOULOS, *supra* note 39, § 3:1, at 95–96.

53. LA. CIV. CODE art. 450.

54. *Id.*

55. New Orleans v. Carrolton Land Co., 60 So. 695, 696 (1913); *see* LA. CONST. art. IX, § 3; LA. CIV. CODE art. 450 cmt. b; YIANNOPOULOS, *supra* note 39, § 3:8, at 105–08; JOHN RANDALL TRAHAN, LOUISIANA LAW OF PROPERTY: A PRÉCIS 13 (2012) (describing paragraph 2 of article 450 as "public things as a matter of law"). Public things do not run the risk of acquisitive prescription because they cannot be privately owned. *See* LA. CIV. CODE art. 450 cmt. b.

56. *See generally* Handy, *supra* note 11.

57. The term "natural" in article 450 refers to non-manmade water bodies. *See* Dardar v. Lafourche Realty Co., 985 F.2d 824, 833 (5th Cir. 1993). Thus, it refers to water bodies made from nature and not manmade canals. Amigo Enterprises v. Gonzales, 581 So. 2d 1082, 1084 (La. Ct. App. 2d Cir. 1991); *but see* Vaughn v. Vermilion Corp., 444 U.S. 206 (1979) (inferring that if an artificial canal displaces a natural waterway, then there may be a different result).

58. *See, e.g.*, Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 594 (La. 1975) (reh'g) (Summers, J., dissenting) ("When Louisiana was admitted into the Union on April 8, 1812 'on an equal footing with the original states', Louisiana

Court determined that upon entering the Union, all states owned the bottoms of navigable waterways,[59] which put the new states on the same level as the 13 original colonies.[60] The public trust doctrine, on the other hand, dictates that the states each hold navigable water bodies for the benefit of their citizens, and states typically cannot alienate land in the public trust.[61]

Addressing the public trust doctrine, the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi* determined that land subject to the "ebb and flow" of the tide belonged to Mississippi in its public trust by virtue of the equal footing doctrine, which also granted states ownership of lands under tidal influence.[62] The Court made clear that this land belonged in the public trust and the State could not alienate it under state law.[63] The Supreme Court, however, pointed out a caveat: states can define their public trusts.[64] Louisiana, for instance, has a distinguishable public trust from Mississippi.[65] Louisiana defined its public trust to include the "beds and bottoms of all navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes."[66] Thus, navigability is the key to Louisiana ownership of the bottoms of water bodies in paragraph 2 of article 450, which are not territorial sea or seashore.[67]

---

like all other states, acquired title, by virtue of its inherent sovereignty, to the beds of navigable water bodies situated within its boundaries.").

59. *See, e.g.*, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).

60. *See generally* Handy, *supra* note 11.

61. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472–73 (1988). Louisiana does not allow the alienation of public trust land. *See* LA. CONST. art. IX, § 3 ("The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body.").

62. *Phillips Petroleum*, 484 U.S. at 476.

63. *Id.* at 483–85.

64. *Id.* at 475 ("But it has been long established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.").

65. *See id.*; *see also* LA. REV. STAT. § 41:1701 (2018).

66. LA. REV. STAT. § 41:1701:

> The beds and bottoms of all navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes belong to the state of Louisiana, and the policy of this state is hereby declared to be that these lands and water bottoms, hereinafter referred to as "public lands," shall be protected, administered, and conserved to best ensure full public navigation, fishery, recreation, and other interests.

67. LA. CIV. CODE arts. 450, 451 (2018); LA. REV. STAT. § 41:1701.

Navigability is a question of fact.[68] A water body is navigable in fact if one can use it as a highway of commerce in the customary mode of trade and travel in the area.[69] The Louisiana Office of State Lands published unofficial guidelines to aid in determining navigability that suggest that the water body should be at least 66 feet wide, connected to another navigable water body, and feature water that flows through at least part of the year.[70]

Although the Louisiana Office of State Lands defined navigability, Louisiana courts have not applied the same standard.[71] For example, the Louisiana Supreme Court in 1906 determined that "grass choked" land, which was only traversable by pirogues and small skiffs, was not navigable.[72] The Louisiana Supreme Court found that Bayou Castiglione was not navigable because it had no historic commercial activity and that navigability meant that the water body could "float a boat of some size, engaged in carrying trade."[73] In contrast, the Louisiana Supreme Court in 1981 determined that Bogue Falaya River was navigable because it historically supported a logging operation that floated logs down it.[74] Here, the Louisiana Supreme Court focused more on the capability for commerce.[75] The jurisprudence shows that the likelihood of navigability

---

68. Louisiana seems to have adopted the federal navigation definition. *See* The Daniel Ball, 77 U.S. (9 Wall.) 557, 563 (1870):

> Those [water bodies] are public navigable [water bodies] in law which are navigable in fact. [Water bodies] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

69. *See* TRAHAN, *supra* note 55, at 13 (2012).

70. *Guidelines for Determining State Water Bottoms*, Office of State Lands, https://www.wlf.louisiana.gov/assets/Resources/Publications/Oyster_Task_Force/2013/oyster_task_force_2_28_13_guidelines_for_determining_state_water_bottoms.pdf [https://perma.cc/6A83-QLBL] (last visited Jan. 31, 2013).

71. Handy, *supra* note 11.

72. Burns v. Crescent Gun & Rod Club, 41 So. 249, 251 (La. 1906).

73. *Id.*

74. Ramsey River Rd. Prop. Owners Ass'n v. Reeves, 396 So. 2d 873, 876–77 (La. 1981). The dissent viewed the mere capability of floating logs as insufficient for classifying a stream as navigable. *See id.* at 877–78 (Dixon, C.J., dissenting).

75. *Id.* at 876–77 (citing The Montello, 87 U.S. (20 Wall.) 430, 441 (1874)) (referring to "capability of use by the public for . . . transportation and commerce").

increases if the water body is deep, wide, and properly located for commercial activities.[76]

In addressing these navigability factors for water bottom ownership, courts often engage in a historical analysis.[77] This analysis requires Louisiana to determine navigability for ownership at two distinct times: (1) 1812, the year Louisiana joined the Union;[78] and (2) before the State sold the land to a private party.[79] The former derives from the equal footing doctrine,[80] and the latter came as an expansion from the Louisiana Fourth Circuit Court of Appeal in *Vermilion Bay Land Co. v. Phillips Petroleum Co.*, which held that the State can reclassify its own property from private to public.[81] Although the State can reclassify its own property, the jurisprudence remains unclear as to whether the State can use article 450 to reclassify private land as public if it submerges beneath newly navigable water bodies created after 1812 or after the State sold the land to private parties.[82] The second paragraph of article 450 additionally lists the territorial sea and seashore as inalienable things of the State.[83]

2. Territorial Sea and Its Shores

Although the territorial sea is navigable by nature, article 450 lists it separately because tidal influence determines the extent of the territorial sea. Louisiana Revised Statutes § 49:3 declares Louisiana's ownership of the territorial sea and seashore.[84] According to article 451, the "[s]eashore

---

76. *See* State ex rel. Bd. Comm'rs of Atchafalaya Basin Levee Dist. v. Capdeville, 83 So. 421, 425 (La. 1919) (A water body is navigable based on its "depth, width, and location . . . for commerce . . . .").

77. *See, e.g.*, State v. Two O'Clock Bayou Land Co. 365 So. 2d 1174, 1177–78 (La. Ct. App. 3d Cir. 1978); *see generally* Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576 (La. 1975) (reh'g).

78. *Gulf Oil Corp.*, 317 So. 2d at 588–89.

79. Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So. 2d 408, 411 (La. Ct. App. 4th Cir.1994).

80. *Gulf Oil Corp.*, 317 So. 2d at 588–89. The equal footing doctrine refers to the land given to the State to put in the public trust upon entry into the Union. *Id.*

81. *Vermilion Bay Land Co.*, 646 So. 2d at 411.

82. *See* discussion *infra* Section III.B.

83. LA. CIV. CODE art. 450 (2018).

84. LA. REV. STAT. § 49:3 (2018):

> The State of Louisiana owns in full and complete ownership the waters of the Gulf of Mexico and of the arms of the Gulf and the beds and shores of the Gulf and the arms of the Gulf, including all lands that are covered

is the space of land over which the waters of the sea spread in the highest tide during the winter season."[85] The equal footing doctrine gave Louisiana ownership up to the highest tide mark of the sea in 1812.[86] Article 451 makes clear that Louisiana owns land to the highest tide, no matter the date.[87] The Louisiana Legislature, however, expanded the territorial sea inland.[88] Commentators and legislators often use the term "arms of the sea" for these expansions because they are extensions of the sea.[89]

According to article 450, article 451, and jurisprudence, the State owns the bottoms of the territorial sea, the bottoms of the arms of the sea, and their shores up to the highest tide mark during the winter season.[90] Although the territorial sea is not difficult to define, the arms of the sea are not as easily defined.[91] In *Morgan v. Negodich*, the Louisiana Supreme Court determined that an arm of the sea should be in close proximity to the coast and subject to direct tidal overflow.[92] The Louisiana Supreme Court in *Buras v. Salinovich* looked to *Morgan* and determined that the land in question was not seashore because the water that overflowed the land was not from an arm of the sea.[93] The court examined the remoteness of the plaintiff's land from an arm of the sea, which was approximately one mile in this case.[94] The court found that the salt water of the sea did not spread onto the plaintiff's land directly, but that the tides caused bayou water to rise and spread over the land.[95] This indirect overflow did not constitute an arm of the sea or seashore; thus the court properly classified the land as private property.[96]

In 1962, the Louisiana Fourth Circuit Court of Appeal more expansively defined "arm of the sea" in *D'Albora v. Garcia*.[97] In *Garcia*,

---

by the waters of the Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana.

85. LA. CIV. CODE art. 451.

86. *See* Dardar v. Lafourche Realty Co., 985 F.2d 824, 826–27 (5th Cir. 1993) (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479–81 (1988)).

87. *See* LA. CIV. CODE art. 451.

88. *See* LA. REV. STAT. § 49:3; *see, e.g.*, Morgan v. Negodich, 3 So. 636, 639 (La. 1887).

89. *See* LA. REV. STAT. § 49:3; *Morgan*, 3 So. at 639.

90. *See* LA. CIV. CODE arts. 450, 451.

91. *See generally Morgan*, 3 So. 636.

92. *Id.* at 638–39.

93. Buras v. Salinovich, 97 So. 748, 750 (La. 1923).

94. *Id.*

95. *Id.*

96. *Id.*

97. D'Albora v. Garcia, 144 So. 2d 911, 914 (La. Ct. App. 4th Cir. 1962).

the court determined that a State-dug canal was an arm of the sea because "the tides ebb[ed] and flow[ed] regularly."[98] More recently, in *Davis Oil Co. v. Citrus Land Co.*, the Louisiana Supreme Court returned to *Morgan* and *Buras* to define arms of the sea.[99] In *Davis*, a landowner and the State fought over alluvion—an accumulation of earth on the bank of a river.[100] Ultimately, the court found that the body of water in question was an arm of the sea because it was in immediate proximity to the Gulf of Mexico and the Gulf's tides directly overflowed into it.[101] Thus, the landowner had no right to collect alluvion because the water body was an arm of the sea.[102]

Similar to bottoms of navigable water bodies, bottoms of the territorial sea and arms of the sea are State-owned public things held in the public trust for public use.[103] The jurisprudence is likewise unclear as to whether the landowner loses title to private property without compensation when private land submerges beneath the territorial sea or its extensions because of natural forces.[104]

B. Things in Commerce: Private Water Bottoms and the Protection of Private Property

Contrary to common things and public things, private things are in commerce and susceptible of private ownership.[105] Louisiana Civil Code article 453 defines private things as things "owned by individuals, other private persons, and by the state or its political subdivisions in their capacity as private persons."[106] Classifying a thing as private has significant implications, such as attaching property rights.[107] The owner of a private thing has full authority over it if he acquired the thing without any conditions or limitations.[108]

---

98. *Id.*

99. Davis Oil Co. v. Citrus Land Co., 576 So. 2d 495, 500–01 (La. 1991).

100. *Id.* at 496. In Louisiana law, alluvion is the "accumulation of soil, clay, or other material deposited on the bank of a river." *Alluvion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

101. *Davis Oil Co.*, 576 So. 2d at 501.

102. *Id.* Alluvion along the sea cannot belong to a private landowner, but instead belongs to the State. *See id.* at 500; LA. CIV. CODE art. 500 (2018) ("There is no right to alluvion or dereliction on the shore of the sea or lakes.").

103. *See* discussion *supra* Section I.A.1.

104. *See* discussion *supra* Section I.A.1.

105. YIANNOPOULOS, *supra* note 39, § 3:16, at 119.

106. LA. CIV. CODE art. 453.

107. YIANNOPOULOS, *supra* note 39, § 3:16, at 119–20.

108. LA. CIV. CODE art. 477 ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing.").

Louisiana recognizes the Roman rights of *usus*, *fructus*, and *abusus*; these three rights afford the owner full and complete ownership.[109] *Usus* gives the owner the right to use the thing—here, land—for anything lawful,[110] which includes the right to exclude others from entering upon the land.[111] The right to exclude is a fundamental property right that courts go to great lengths to protect.[112] The right of *fructus* gives the owner the ability to enjoy the thing, such as royalties from an open oil well.[113] Lastly, *abusus* gives the owner the right to diminish the value of the land or terminate ownership.[114] Other than completely selling the land, the owner has full authority to encumber the land by granting a servitude.[115]

Once a landowner acquires the bundle of rights—*usus*, *fructus*, and *abusus*—the landowner holds the thing against the world and can exclude all others.[116] Although the State owns running water in its public capacity, the public does not have a right to access non-navigable waters because private owners can exclude public access.[117] In fact, article 3413 states that

---

109. *See* TRAHAN, *supra* note 55, at 117; LA. CIV. CODE art. 477 ("The owner of a thing may use, enjoy, and dispose of it . . . .").

110. TRAHAN, *supra* note 55, at 117; *see* LA. CIV. CODE art. 477.

111. Although article 450 states that running water is a public thing, this does not create a public right of access or state navigational servitude; the private landowner can restrict access to non-navigable water bodies or non-natural navigable water bodies. *See, e.g.*, Brown v. Rougon, 552 So. 2d 1052, 1060 (La. Ct. App. 1st Cir. 1989); Dardar v. Lafourche Realty Co., 985 F.2d 824, 834 (5th Cir. 1993).

112. *See, e.g.*, *Brown*, 552 So. 2d at 1060; *Dardar*, 985 F.2d at 834.

113. *See* TRAHAN, *supra* note 55, at 117. The Louisiana Civil Code defines fruits as "things that are produced by or derived from another thing without diminution of its substance." LA. CIV. CODE art. 551. Natural fruits are "products of the earth or of animals," whereas civil fruits are "revenues derived from a thing . . . such as rentals, interest, and certain corporate distributions." *Id.* Often compared to fruits are products, which are "derived from a thing as a result of diminution of its substance." *Id.* art. 488. In *Crooks v. Department of Natural Resources*, the State extracted minerals from the landowner's land without a valid lease; the Louisiana Third Circuit ordered the State to reimburse the private landowner's lost royalties. The Louisiana Supreme Court, however, reversed in part because of prescription. *See generally* Crooks v. Dep't of Nat. Res., 263 So. 3d 540 (La. Ct. App. 3d Cir. 2018), *aff'd in part, rev'd in part*, 2019-0160, 2020 WL 499233 (La. Jan. 29, 2020) (reversing the lower court on the issue of prescription).

114. *See* TRAHAN, *supra* note 55, at 117–18.

115. *See id.*

116. *See id.*

117. *See, e.g.*, *Dardar*, 985 F.2d at 834. A landowner may use running water that runs through his land; however, the landowner "cannot stop it or give it

a landowner "may forbid entry to anyone for purposes of hunting or fishing, and the like."[118] The law is unclear about whether private non-navigable water bodies revert to State ownership if they become navigable through natural causes.[119] If the land does transfer to State control, the private landowner would look to takings law to seek compensation for the loss.[120]

C. Louisiana Takings Law

Federal jurisprudence has strongly influenced Louisiana's takings jurisprudence.[121] Generally, a taking occurs when governmental action results in the government acquiring a private landowner's title to property or when a regulation goes far enough to effectively amount to a taking.[122] Traditionally, eminent domain is the government's power to intentionally engage in a taking, which is typically through a formal proceeding where the government takes title to the property in exchange for compensation.[123] Courts, however, historically recognized that a taking could occur without expropriation proceedings, so courts allowed property owners to bring inverse condemnation proceedings to allege governmental intrusions.[124] The Founding Fathers expressly limited the government's power of eminent domain through the Fifth Amendment's Takings Clause, which states that "private property [shall not] be taken for public use, without just compensation."[125] The purpose of the Takings Clause is to stop the federal government "from forcing some people alone to bear public burdens

---

another direction and is bound to return it to its ordinary channel where it leaves his estate." LA. CIV. CODE art. 658.

118. LA. CIV. CODE art. 3413.

119. *See* discussion *infra* Section III.B.

120. *See* discussion *infra* Section I.C.

121. *See* John J. Costonis, Avenal v. State*: Takings and Damagings in Louisiana*, 65 LA. L. REV. 1015, 1023 n.29 (2005) ("It is not uncommon for Louisiana courts addressing [Louisiana] takings or damagings issues to cite federal authority.").

122. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see generally* Costonis, *supra* note 121. The United States Supreme Court has recognized partial regulatory takings. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). Additionally, if a regulation takes all economically viable use away from the land, then that can be a taking. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

123. *See* State v. Chambers Inv. Co., 595 So. 2d 598, 601 (La. 1992).

124. Avenal v. State, 886 So. 2d 1085, 1113–14 (La. 2004).

125. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

which, in all fairness and justice, should be borne by the public as a whole."[126] The Fourteenth Amendment makes this restriction operative against the states, so states cannot make legislation that falls short of the Fifth Amendment's Takings Clause.[127]

Many states, including Louisiana, adopted a similar takings provision in their respective state constitutions.[128] Louisiana's Takings Clause provides that "[p]roperty shall not be taken *or damaged* by the state or its political subdivision, except for public purposes and with just compensation paid to the landowner."[129] In Louisiana, a taking occurs when the State acquires the right of ownership or one of its recognized dismemberments—*usus*, *fructus*, or *abusus*.[130] The State damages property when its actions diminish the value of the property.[131] In the context of coastal change, some academics believe that the State can avoid takings liability when private land submerges beneath navigable water bodies and the territorial sea because the State acquires ownership through article 450 without its own action.[132]

II. THE IMPLIED REVERSION: SUBMERGED LAND ABUTTING HISTORICALLY NAVIGABLE WATER BODIES OR THE TERRITORIAL SEA

As more land submerges and non-navigable water bodies become navigable, property owners need to know when the State owes compensation for its land acquisitions. An inverse condemnation analysis is necessary for the landowner to know when the State owes a remedy and so the State can adopt policies that respect private property rights while adjusting to the changing coast.[133] In Louisiana, a plaintiff in an inverse condemnation analysis must prove three things: (1) the landowner had a valid property right; (2) the State's action constitutes a taking or damaging

126. Armstrong v. United States, 364 U.S. 40, 49 (1960).

127. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

128. *See* Costonis, *supra* note 121, at 1024.

129. LA. CONST. art I, § 4(B) (emphasis added).

130. *See* Costonis, *supra* note 121, at 1024.

131. *Id.* at 1025–28.

132. *See generally* Mestayer, *supra* note 22; *see also* Lee Hargrave, *"Statutory" and "Horatory" Provisions of the Louisiana Constitution of 1974*, 43 LA. L. REV. 647, 661 (1983) ("[I]f a nonnavigable stream becomes navigable, it would cease to be susceptible of private ownership and would become property of the state. The argument that such a change in ownership may be a taking without due process (absent compensation) probably falls because such a loss is not caused by the state itself." (footnote omitted)).

133. *See generally* State v. Chambers Inv. Co., 595 So. 2d 598 (La. 1992).

of private property; and (3) the taking or damaging was for a public purpose.[134] After the analysis, Louisiana jurisprudence suggests that the State does not owe compensation for land that naturally submerges under *historically* navigable water bodies or the territorial sea because the private landowner and the State are parties to an aleatory contract where the landowner loses the valid property right if the land naturally submerges.[135]

A. Blending Private Law and Public Law with the Implied Reversion

An aleatory contract is a contract based on an uncertain event.[136] Under aleatory contract theory, article 450 incorporates the concept that the State and private landowner are parties to an implied contract, which requires any land that naturally submerges beneath historically navigable water bodies to revert to the State out of public necessity.[137] For simplicity, this Comment will refer to the above as the "implied reversion."

The implied reversion mixes private law and public law.[138] The private elements—contract and property law—involve the private contract between the State and landowner.[139] The implied contract would vest the property rights in the State through an operation of law the moment the land naturally submerges.[140] The loss of property rights triggers the takings doctrine, which is in the public law sphere—constitutional law.[141] Although private law and public law are discrete areas of law, they affect

134. *Id.* at 603. This Comment is mainly concerned with the first prong.

135. *See* discussion *infra* Section III.A.

136. "A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event." LA. CIV. CODE art. 1912 (2018).

137. *See generally* Miami Corp. v. State, 173 So. 315 (La. 1936).

138. Private law is "[t]he body of law dealing with private persons and their property and relationships." *Private law*, BLACK'S LAW DICTIONARY (10th ed. 2014). Public law is "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law." *Public law*, BLACK'S LAW DICTIONARY.

139. *See Private law*, BLACK'S LAW DICTIONARY.

140. *See* Gaudet v. City of Kenner, 487 So. 2d 446, 448 (La. Ct. App. 5th Cir. 1986) (recognizing "instantaneous prescription" of land that submerges beneath historically navigable water bodies through an "operation of law"). The author warns against using the term "prescription" to describe the implied reversion because a Louisiana court has held that the State cannot acquire land through acquisitive prescription. *See* discussion *infra* Section III.B.3. "Prescription" is more analogous when the State takes land beneath newly navigable water bodies. *See* discussion *infra* Section III.B.

141. *See Public law*, BLACK'S LAW DICTIONARY.

each other because of the first prong of the Louisiana takings analysis: whether a valid property right exists.[142] Thus, under the implied reversion, the private law contract takes away the ability to bring the public law inverse condemnation claim because the landowner loses the property right if the land naturally submerges—therefore not meeting the first prong of the analysis.[143]

B. Tracing the Validity of the Implied Reversion of Naturally Navigable Water Bodies

Article 450 is often the authority cited for the implied reversion.[144] Article 450, however, does not contain an express provision about transferring ownership; it only articulates that the State owns submerged land, such as "natural navigable water bodies, the territorial sea, and seashore."[145] Articles 499 to 505, on the other hand, contain express provisions about transferring ownership. For example, article 504 states: "When a navigable river or stream abandons its bed and opens a new one, the owners of the new land on which the new bed is located shall take . . . the abandoned bed."[146] Article 504 grants the State ownership of the new river bed but affords the previous landowner ownership over the old river bed.[147] Reading articles 450 and 504 *in pari materia*[148] may lead to the conclusion that article 450 does not transfer ownership because the Louisiana Legislature knew how to place an express provision about transferring ownership but intentionally omitted reference to a transfer in ownership.[149] The Louisiana Supreme Court, however, has read an implied transfer of ownership into article 450.[150]

---

142. *See* State v. Chambers Inv. Co., 595 So. 2d 598, 603 (La. 1992).

143. *See* discussion *infra* Section II.B.

144. *See generally* Mestayer, *supra* note 22.

145. LA. CIV. CODE art. 450 (2018).

146. *Id.* art. 504:

> When a navigable river or stream abandons its bed and opens a new one, the owners of the land on which the new bed is located shall take by way of indemnification the abandoned bed, each in proportion to the quantity of land that he lost. If the river returns to the old bed, each shall take his former land.

147. *Id.*

148. *In pari materia* is a civilian method of reasoning that dictates that laws on the same subject matter should be interpreted in light of one another. ALAIN A. LEVASSEUR, DECIPHERING A CIVIL CODE: SOURCES OF LAW AND METHODS OF INTERPRETATION 94 (2015).

149. Miami Corp. v. State, 173 So. 315 (La. 1936) (O'Niell, C.J., dissenting).

150. *See generally id.*

Originally, the implied reversion existed between the riparian[151] landowner and the State over title to alluvion, as recognized in the Louisiana Supreme Court case *Succession of Delachaise v. Maginnis*.[152] Quoting the French scholar Portalis and his "Exposé des Motifs" of the Code Napoléon, the court determined: "There exists, so to speak, an aleatory contract between the riparious owner and nature, whose action may at any moment despoil or increase his estate . . . like chance or fortune."[153] Subsequent courts have inserted the State, as owner of the adjacent water bottom, as the other party to the aleatory contract with the landowner.[154]

In *Miami Corp. v. State*, the Louisiana Supreme Court used the reasoning from *Maginnis* to find an implied reversion for land abutting historically navigable rivers or lakes.[155] In *Miami Corp.*, the landowner fought the State over a piece of submerged land below a navigable lake, which was navigable in 1812.[156] At the time of *Miami Corp.*, the Louisiana Civil Code article on public things—present-day article 450—omitted lakes, but the Louisiana Supreme Court nevertheless implied that the article included lakes.[157] The majority opinion relied only on the article on public things to justify the State's taking of ownership of the land from the landowner without compensation.[158] The court found that "where the forces of nature—subsidence and erosion—have operated on the banks of a navigable body of water . . . the submerged area becomes a portion of the bed and is insusceptible of private ownership."[159] In the implied reversion, the State, through its inherent sovereignty, acquires ownership of any land that submerges beneath historically navigable water bodies.[160] Thus, the reasoning of the majority in *Miami Corp.* incorporated the

151. *Riparian*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake.").

152. Succession of Delachaise v. Maginnis, 11 So. 715, 716 (La. 1892).

153. *Id.*

154. *See Miami Corp.*, 173 So. at 318 ("The articles quoted in reality make the riparian owner a party to an aleatory contract, in which the State as the owner of the bed of the stream is the other party.").

155. *See generally id.*

156. *Id.*

157. *Id.* at 318–19 (French courts included lakes in their interpretation of public things.).

158. *Id.*

159. *Id.* at 322.

160. *Id.* at 322–23. This result seems necessary to protect land currently in the public trust because it would be absurd for landowners to restrict access to an entire lake if private ownership persisted along the rim. *Id.* at 323.

implied reversion into the titles of landowners whose lands abut historically navigable rivers and lakes.[161]

In *Miami Corp.*, the plaintiff did not receive compensation for the lost land.[162] The private landowner loses the land once natural forces cause the land to submerge beneath navigable water because, through the implied reversion, the State gains title as a result of its sovereignty.[163] Similarly, landowners in the future whose lands abut historically navigable water bodies will not receive compensation if land submerges because the property owners will lose their valid property rights.[164] Thus, the inverse condemnation claim would fail because the property owner could not satisfy the first prong of the analysis and show a valid property right.[165]

Reading the relevant concepts contained in article 450—natural navigable water bodies and territorial sea—*in pari materia*[166] and applying *a pari ratione*,[167] the result should be the same for the landowner of land that abuts navigable water bodies and of land that abuts the shores of the territorial sea because laws on similar subject matters should reach similar results.[168] The seashore, however, was a common thing under the Civil Code at the time of *Miami Corp.* and remained one until the 1978 code revision.[169] In addition, the jurisprudential history has not always found the same result for the sea bottom.[170]

C. The Implied Reversion Encompasses the Territorial Sea and the Arms of the Sea

Prior to the Constitution of 1921, Louisiana did not have an expressed constitutional prohibition on granting patents to bottoms of navigable water bodies, including the sea.[171] In *California Co. v. Price*, despite the reasoning of *Miami Corp.*, the Louisiana Supreme Court found these

---

161. *Id.* at 327 ("[T]he rights of the sovereign State to ownership of the beds of navigable waters must be read into the titles of those who own land bordering on such waters.").

162. *Id.*

163. *See generally id.*

164. *See generally id.*

165. *See generally id.*

166. *In pari materia* is a civilian method of reasoning that dictates that laws on the same subject matter should be interpreted in light of one another. LEVASSEUR, *supra* note 148, at 94.

167. *A pari ratione* is reasoning by analogy. *Id* at 105.

168. *Id.* at 94.

169. LA. CIV. CODE art. 449 cmt. c (2018).

170. *See generally* California Co. v. Price, 99 So. 2d 743 (La. 1957).

171. *See* Mestayer, *supra* note 22, at 912.

private patents to the bottoms valid because the State authorized the patents before a constitutional prohibition.[172] In 1975, *Gulf Oil Corp. v. State Mineral Board* overturned *California Co.* because of "erroneous reasoning" and clarified that private ownership of sea bottoms and navigable water bodies is not allowed because they are inalienable things of the State.[173] The Louisiana Supreme Court determined that beds of navigable water bodies and the territorial sea are always insusceptible of private ownership and belong to the State through its inherent sovereignty.[174] Thus, as the law currently stands, private individuals cannot own sea bottoms, including the shores and arms of the sea.[175]

Gulf Oil Corp. implied that the reasoning of *Miami Corp.* should extend to all public things in paragraph 2 of article 450.[176] The Louisiana Supreme Court, therefore, confirmed that private lands abutting navigable water bodies and the territorial sea are subject to the same implied reversion, which courts will read into all private landowners' titles.[177] An inverse condemnation claim would similarly fail because the private landowner does not have a valid property right once the land submerges beneath an article 450 public thing.[178] Thus, under Louisiana law, the landowner whose land abuts a navigable water body or the shores of the territorial sea loses any naturally submerged land to the State without compensation because the State, as sovereign, acquires the property right through the implied reversion.[179] As the law currently stands, the landowner must bear this unfortunate burden.

D. Alternate Theory to the Implied Reversion: The Landowner's Theory

Given the harshness of the situation for private land abutting historically navigable water bodies or the territorial sea, the landowner

---

172. *California Co.*, 99 So. 2d 743.

173. Gulf Oil Corp. v. State, 317 So. 2d 576, 581 (La. 1975) (reh'g).

174. *Id.*

175. *See id.*; *but see* Mestayer, *supra* note 22, at 912 (describing how some patents before 1921 might be valid).

176. *See generally Gulf Oil Corp.*, 317 So. 2d 576.

177. *See generally id.*; Miami Corp. v. State, 173 So. 315, 318 (La. 1936). The French scholar Portalis originally stated that the implied reversion concerned the private property owner and nature, but the courts have inserted the State for nature. *Compare* Succession of Delachaise v. Maginnis, 11 So. 715, 716 (La. 1892) (describing relationship as with nature), *with Miami Corp*., 173 So. at 318 (defining relationship as with the State).

178. *See generally Miami Corp*., 173 So. 315; Gaudet v. City of Kenner, 487 So. 2d 446, 448 (La. Ct. App. 5th Cir. 1986).

179. *See generally Miami Corp*., 173 So. 315; *Gaudet*, 487 So. 2d at 448.

must either accept the situation or try to limit the application of the implied reversion. An alternate theory to the implied reversion is that the naturally submerging land does not vest to State control until after the State brings an eminent domain proceeding to assert ownership and pay compensation.[180] In the "landowner theory," the property owner maintains the valid property right until after the State invokes the implied reversion in a court proceeding.[181] Ultimately, under the landowner theory, the private property owner would survive the first prong and then argue that the government's action—implied reversion—constitutes a taking for a public purpose.[182] Although no appellate opinions address the landowner theory, it would prove unworkable because it would require a change in the *ratio decidendi*[183] of *Miami Corp.* and article 450.[184]

It is unlikely that a Louisiana court would depart from the reasoning in *Miami Corp.* because the majority in *Miami Corp.* based its decision on sound reasoning and public necessity.[185] The court recognized that private landowners could absurdly restrict public access to a navigable lake if allowed to keep ownership of eroded land around the entire rim.[186] The reason for the implied reversion is to protect public access to navigable water bodies and the territorial sea and to protect commerce.[187]

Secondly, the trigger for the performance of an obligation in an aleatory contract is the uncertain event, not a court proceeding.[188] In this context, the uncertain event is the land naturally submerging, which

---

180. The evidence of the landowner theory lies in landowners' arguments that the State violates their rights when asserting ownership. *See generally* Reckdahl, *supra* note 1.

181. *See generally id.*

182. *See generally id.* The author does not advocate for the landowner theory as anything but a last-ditch effort to protect property rights. The landowner theory's reasoning, however, is more applicable to newly created navigable water bodies. *See* discussion *infra* Section III.B.

183. *Ratio decidendi*, BLACK'S LAW DICTIONARY (10th ed. 2014) (meaning "reason for deciding").

184. *See Gaudet*, 487 So. 2d at 448 (recognizing "instantaneous prescription" of land that submerges beneath historically navigable water bodies through an "operation of law").

185. *Id.*

186. Miami Corp. v. State, 173 So. 315, 323 (La. 1936) (stating the absurd result if landowners could restrict access to an entire lake).

187. *Id.*

188. "A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, *depends on an uncertain event*." LA. CIV. CODE art. 1912 (2018) (emphasis added).

triggers the implied reversion.[189] Thus, since the relationship between the landowner and the State is that of an aleatory contract, only the submerging of land will trigger the obligation.

Lastly, even if the landowner proves a valid property right, it is unlikely that a court would find a taking.[190] Under contract and property principles, the enforcement of the implied reversion is an exercise of a pre-existing right in property.[191] Courts would not have to look long to find a comparable burden to compare the aleatory contract against: the levee servitude burdens many landowners abutting navigable water bodies.[192]

The levee servitude dates back to colonial times.[193] France and Spain required riparian landowners to build and maintain levees at their own expense, on threat of forfeiture of property.[194] This practice remained intact until the State took over the burden in 1878.[195] Even with the State taking control of the levee systems, the levee servitude continues to burden private land; thus, the State can appropriate the land when necessary for levee purposes.[196] Unfortunately for the landowner, in *Eldride v. Trezevant*, the United States Supreme Court determined that the State does not owe compensation for the levee appropriation because the State is only exercising a pre-existing right.[197] Thus, according to the Court,

---

189. *See generally Miami Corp*., 173 So. 315. The immediate transfer of title gives the appearance of "instantaneous prescription." *See Gaudet*, 487 So. 2d at 448.

190. *See* S. Lafourche Levee Dist. v. Jarreau, 217 So. 3d 298, 308 (La. 2017).

191. *Cf.* Eldridge v. Trezevant, 160 U.S. 452, 465–66 (1896) (recognizing an existing right in levee servitude).

192. *See* LA. CONST. art. VI, § 42. The levee servitude is found in the Civil Code as well. LA. CIV. CODE art. 665 (2018):

> Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. Such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees. All that relates to this kind of servitude is determined by laws or particular regulations.

193. *See Jarreau*, 217 So. 3d at 308.

194. *Id.*

195. *Id.* at 308–09.

196. See *generally id.*

197. Eldridge v. Trezevant, 160 U.S. 452, 465–66 (1896) (stating how the landowner never acquires full dominion).

appropriating land burdened with the levee servitude does not equate to a taking.[198]

Like the levee servitude, the implied reversion is an exercise of a pre-existing right.[199] Although exercising a servitude right and acquiring ownership over property are different, both are read into titles of landowners whose lands abut navigable water bodies out of public necessity.[200] Thus, it is likely that the State's action—exercising the implied reversion—does not constitute an unlawful taking in the constitutional sense.[201]

Instead of attacking the implied reversion or its application, a better approach for the private landowner is to fight to expand takings liability and limit the implied reversion to private land abutting historically navigable water bodies or the territorial sea.[202] The law is relatively clear in regard to private lands abutting historically navigable water bodies or the territorial sea: the State acquires the property without owing compensation because of the implied reversion in article 450.[203] There is, however, a gap in the law about whether *newly* formed navigable water bodies on private property, including non-navigable water bodies becoming navigable, are subject to the same implied reversion.[204]

III. TAKINGS OR NOT: SUBMERGED LAND AND NEWLY NAVIGABLE WATER BODIES

Although the State does not owe compensation if land naturally submerges beneath *historically* navigable water bodies or the territorial sea because of the implied reversion, the legislation and jurisprudence do not answer whether the implied reversion extends to *newly* formed navigable water bodies—navigable water bodies created after 1812 or after the State sold the land to private parties.[205] Thus, reason and policy

198. *See id.*; *Jarreau,* 217 So. 3d at 308 (stating landowner never acquired complete ownership over the land).

199. *Cf. Jarreau*, 217 So. 3d at 308 (treating levee servitude as pre-existing right).

200. *Id.*

201. The State cannot take its own property. Avenal v. State, 886 So. 2d 1085, 1106 (La. 2004). The implied reversion returns the property to the State, so the landowner loses the property right to assert an inverse condemnation claim. *See id*.

202. *See* discussion *infra* Section III.B; *see* discussion *infra* Section IV.B.

203. *See generally* Miami Corp. v. State, 173 So. 315 (La. 1936).

204. *See* Handy, *supra* note 11.

205. *Id.*

must guide the solution.[206] In his 2016 student Comment, Jacques Mestayer argued that the State acquired newly navigable water bodies without owing compensation, just like historically navigable water bodies.[207] After a similar inverse condemnation analysis, the State owes compensation if it asserts ownership over newly created navigable water bodies on private property, including a non-navigable water body becoming navigable, because courts as a matter of reason and policy look to historic navigability for property ownership.[208] Further, the implied reversion should not apply to the newly created water bottoms because the reasons for the implied reversion do not exist for newly navigable water bodies. A change in the law would produce inequitable results.[209]

A. Argument to Expand the Implied Reversion

In his Comment, Mestayer argued that the test for water bottom ownership should add a third point in time to examine navigability: the present state of the water body.[210] Thus, Mestayer articulated that present navigability could alter land ownership.[211] Although Mestayer never directly called it an expansion of the implied reversion, his proposal would result in just that.[212] Mestayer recognized that there was no legislation nor jurisprudence on point, so he relied on reason, logic, and policy.[213] First, Mestayer determined that a literal reading of article 450 buttresses the reasoning that the land reverts to the State.[214] Mestayer stated that article 450 refers to bottoms of natural navigable water bodies and the territorial sea as public things without distinguishing if or when the land submerged.[215] He used the maxim "when the law does not distinguish, courts should not distinguish" to support a reading of the article that all bottoms of naturally navigable water bodies and territorial sea are public

206. "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usage." LA. CIV. CODE art. 4 (2018).

207. *See generally* Mestayer, *supra* note 22.

208. *See* discussion *infra* Section III.B.

209. *See* discussion *infra* Section III.B.

210. Mestayer, *supra* note 22, at 909.

211. *See generally id.*

212. Ultimately, Mestayer proposed a statute codifying and expanding the implied reversion, which technically sought to turn the implied reversion into the "expressed reversion." *See id.* at 918–19.

213. *Id.*

214. *Id.* at 909; *see also* LA. CIV. CODE art. 450 (2018).

215. Mestayer, *supra* note 22, at 896.

things, no matter when they submerged.[216] Second, Mestayer reasoned, citing the Louisiana Constitution, that the policy of the State is to prevent private ownership of navigable water bottoms.[217] Finally, Mestayer argued that allowing private ownership of bottoms of newly navigable water bodies would disrupt commerce because private landowners could exclude the public from accessing the water bodies for trade and recreation.[218]

In reaching his conclusions about historically navigable water bodies, the territorial sea, and newly navigable water bodies, Mestayer asserted that the State acquired the land without having to compensate the landowner because the State was not the cause of the land submersion and the change happened by an operation of law.[219] Mestayer's position rested on the private property owner losing the property right, similar to the landowner whose land abuts historically navigable water bodies or the territorial sea.[220] Conversely, a noted commentator, A.N. Yiannopoulos, suggested that a private landowner has a strong argument that an unlawful taking occurs if the State takes title to newly navigable water bodies without compensation.[221]

B. The Landowner of a Newly Navigable Water Body Maintains the Property Right until Expropriation

Mestayer's proposal paints an alarming picture for private property owners: when it comes to coastal change, private property rights are in danger.[222] Despite the reasoning of Mestayer, the bottoms of the newly navigable water bottoms must remain private until an expropriation proceeding because courts determine ownership of water bottoms at two distinct times as matter of sound reason and policy.

The application of navigability "must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case."[223] The concept of navigability for, say, maritime tort jurisdiction may differ from property ownership.[224] In

---

216. *Id.* at 909–11.
217. *Id.*
218. *Id.* at 909–12.
219. *Id.* at 916.
220. *Id.*
221. YIANNOPOULOS, *supra* note 39, § 4:2, at 130; *see* Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So. 2d 408, 412 (La. Ct. App. 4th Cir. 1994) (citing Yiannopoulos for this proposition).
222. *See generally* discussion *supra* Section III.A.
223. Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979).
224. *See id.* at 170–72.

Louisiana law, although navigability is a question of fact and a water body may presently be navigable, courts determine *ownership* of the bottoms of the newly navigable water bodies on private property as a matter of law at two distinct times: (1) in 1812; and (2) before the State sold the land to private parties.[225]

In *State v. Two O'Clock Bayou Co.*, the Louisiana Third Circuit Court of Appeal pointed out that a bayou was navigable in fact because of its present physical characteristics: depth, width, and location for commerce.[226] The court noted that this determination did not affect property ownership.[227] The court reiterated that the important date for ownership of the bayou's bottoms was still 1812.[228]

In *Dardar v. Lafourche Realty Co.*, the United States Fifth Circuit Court of Appeals, interpreting Louisiana law, determined that the district court was correct to ignore the subsequent navigability of a waterway and that the district court correctly focused on 1812 as the determinative date for water bottom ownership.[229] The Fifth Circuit cited the Louisiana Supreme Court case *Ramsey River Road Property Owners Association v. Reeves* for support.[230] *Ramsey River* dictated that 1812 was the determinative date for ownership over the water body at issue.[231]

Recently, in 2018, in *Crooks v. Department of Natural Resources*, the Louisiana Third Circuit Court of Appeal determined that Catahoula Lake was not a navigable lake because the "lake" was actually flooding from a navigable river.[232] Despite the area's public status as a lake and a previous court accepting a stipulation that the area was a navigable lake, the court focused on the status of the water body in 1812 for bed ownership.[233] In finding the land in question as only overflow from a nearby river in 1812, the submerged land beneath the water was private property because article

225. State v. Two O'Clock Bayou Co., 365 So. 2d 1174, 1178 (La. Ct. App. 3d Cir. 1978); *Vermilion Bay Land Co.*, 646 So. 2d at 411.

226. *Two O'Clock Bayou Co.*, 365 So. 2d at 1177.

227. *Id.*

228. *Id.*

229. Dardar v. Lafourche Realty Co., 985 F.2d 824, 833 (5th Cir. 1993).

230. *Id.* at 831; *see* Ramsey River Rd. Prop. Owners Ass'n v. Reeves, 396 So. 2d 873, 876–77 (La. 1981).

231. *Ramsey River*, 396 So. 2d at 876–77.

232. Crooks v. Dep't of Nat. Res., 263 So. 3d 540, 556–57 (La. Ct. App. 3d Cir. 2018), *aff'd in part, rev'd in part*, 2019-0160, 2020 WL 499233 (La. Jan. 29, 2020) (reversing the lower court on the issue of prescription).

233. *Id.*

450 and the equal footing doctrine did not take it away.[234] Although the Louisiana Supreme Court reversed the lower court over prescription issues, the Louisiana Supreme Court affirmed the lower court's findings as to the status of the water body.[235]

Looking at the present navigability to alter bed ownership violates the purpose of the equal footing doctrine, which is to grant states ownership to the bottoms of navigable water bodies at the time they entered the Union.[236] Three sound reasons exist for why the two distinct times to test for water bottom ownership must remain the law: (1) a change in navigability should not be used to alter ownership because of reasonable expectations; (2) there is no implied reversion; and (3) equity principles favor this method.

1. Change in Navigability Should Not Be Used to Alter Ownership

The United States Supreme Court has hinted that using the concept of navigability to change ownership without compensation runs afoul of the Fifth Amendment Takings Clause.[237] In *Kaiser Aetna v. United States*, the federal government tried to use the definition of navigability to change private property rights.[238] In *Kaiser Aetna*, an island separated a pond, known as Kuapa Pond, from the Pacific Ocean and Maunalua Bay.[239] Hawaiian law dictated that this pond was private property.[240] Through private funds, but with the approval of the United States Army Corps of Engineers, the owners developed a marina.[241] The petitioners dredged and filled Kuapa Pond, connecting it to the Bay.[242] The petitioners' development increased the depth of the pond, which resulted in

234. *Id.* Likely, the court would have reached the same result even if the State did not contribute to the flooding through a project because the court looked to 1812 without regard to the change the project caused. *See id.*

235. *See* Crooks v. Dep't of Nat. Res., 2019-0160, 2020 WL 499233 (La. Jan. 29, 2020).

236. *See* Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 594 (La. 1975) (reh'g) ("Louisiana like all other states, acquired title, by virtue of its inherent sovereignty, to the beds of navigable water bodies situated within its boundaries.").

237. *See generally* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

238. *See generally id.*

239. *Id.* at 166.

240. *Id.* at 179.

241. *Id.* at 179.

242. *Id.* at 180.

navigability.[243] The United States government brought a suit that challenged the ability of the private owners to exclude people from the waters.[244] The government argued that the pond was now in the regulatory power of the United States and a navigational servitude existed, so the public should have free access.[245] The Court found the water navigable but held that such finding did not lead to an automatic right of public access.[246] In its holding, the Court stated that navigational servitudes do not "create[] a blanket exception to the Takings Clause of the Fifth Amendment whenever Congress exercises its Commerce Clause authority to promote navigation."[247] Thus, the Court determined that the government could regulate the property, but the government must pay compensation to the private owners.[248]

Louisiana courts have followed a similar reasoning to *Kaiser Aetna*.[249] In *Brown v. Rougon*, the Louisiana First Circuit Court of Appeal rejected the idea that a person had the right to access a navigable canal built with public funds because the canal stayed private property.[250] Over time, the Rougons prevented people from accessing the canal for transportation or fishing without their permission.[251] The Browns fought for a public right of access because the canal was arguably navigable.[252] The First Circuit held that forcing the Rougons to allow for public access would be a taking without compensation regardless of where the funds came from or whether the canal was navigable.[253]

Kaiser Aetna and *Brown* broadly illustrate that the state or federal government should not be able to take property or a right in the property without compensation just because a once non-navigable water body becomes navigable.[254] Although *Kaiser Aetna* and *Brown* involved artificially created water bodies, Louisiana courts should extend this logic

243. *Id.* at 167 (increasing depth from two to six feet and dredging an eight-foot channel to connect the pond to the Pacific Ocean).

244. *Id.* at 169.

245. *Id.* at 169–70.

246. *Id.* at 170–72.

247. *Id.* at 172.

248. *See generally id.*

249. *See, e.g.*, Brown v. Rougon, 552 So. 2d 1052 (La. Ct. App. 1st Cir. 1989).

250. *Id.* at 1059–61.

251. *Id.* at 1055.

252. The Sheriff's office arrested the Browns for refusing to leave the canal upon request. *Id.*

253. *Id.* at 1059–61.

254. *See generally id.*; Kaiser Aetna v. United States, 444 U.S. 164 (1979) (describing how navigation places the water in the regulatory power of Congress but does not per se create a public right of access).

to newly naturally forming water bodies because private landowners have a reasonable expectation to keep their land, on which they have paid taxes for generations, similar to the landowners in *Kaiser Aetna* and *Brown*.[255] Worded differently, the landowners never reasonably expected to lose ownership of their land from a change in navigability, whether natural or artificial, because their lands were not abutting a historically navigable water body.

Addressing *Kaiser Aetna*, a major factor in the decision was that the pond was always private and the public never had access, but the landowners always had the fundamental right to exclude others.[256] The United States Supreme Court determined that the landowners in *Kaiser Aetna* had a reasonable expectation in the land.[257] The situation is similar to Louisiana where land becomes submerged under newly navigable water bodies because the land has long been private with no public access and landowners have long paid property taxes on the land. In Louisiana, declaring the land public will result in more than a physical invasion like in *Kaiser Aetna*—it will result in a complete loss in title.[258]

Although *Kaiser Aetna* suggests that a change from a non-navigable water body to navigable should not alter ownership until after the State pays compensation, a narrow reading of *Kaiser Aetna* would restrict its application to the navigational servitude and artificially created navigable water bodies. The federal navigational servitude still might appear in situations where the public interests outweigh the private interests.[259] Louisiana does not have a navigational servitude because running water, although a public thing, does not create a right of public access to private water bodies.[260] At the 2018 House Regular Session, Louisiana legislators

---

255. The United States Supreme Court has "recognized the importance of honoring reasonable expectations in property interests." Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 481–82 (1988) (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

256. *See Kaiser Aetna*, 444 U.S. at 179–80 (stating that the right to exclude is such a fundamental right that the government cannot take it without compensation).

257. *Phillips Petroleum Co.*, 484 U.S. at 482 (citing *Kaiser Aetna* as adhering to reasonable expectations).

258. *See Kaiser Aetna*, 444 U.S. at 179–80 (describing government as going beyond mere regulation and committing a physical invasion by taking away the right to exclude).

259. Dardar v. Lafourche Realty Co., 985 F.2d 824, 834 (5th Cir. 1993).

260. *Id.* Louisiana courts have rejected the proposition that running water, being a public thing, creates a public right to access private non-navigable water bodies. *See, e.g.*, Brown v. Rougon, 552 So. 2d 1052, 1060 (La. Ct. App. 1st Cir. 1989).

proposed House Bill 391 to create a navigational servitude and ensure that "[n]o person may restrict or prohibit, pursuant to the authority of Civil Code Article 3413 or otherwise, the public navigation of running waters . . . ."[261] Ultimately, the bill failed because it lacked support, and people feared expanded takings liability from the reasoning in *Kaiser Aetna* and *Brown*.[262] Since a navigational servitude was not at issue, *Kaiser Aetna* arguably might be inapplicable to newly formed navigable water bodies. Even with a narrow interpretation, if the State cannot acquire a servitude right or public access without compensation, then, *a fortiori*,[263] the State should not be able to acquire complete ownership—*usus*, *fructus*, and *abusus*—of the submerged land without compensation or the implied reversion.

2. No Implied Reversion

The implied reversion that exists with historically navigable water bodies and the territorial sea does not extend to newly formed navigable water bodies because the purpose for extending the implied reversion differs from the purpose propounded in *Miami Corp.*: to protect existing public access.[264] The reasoning in *Miami Corp.*, however, is not applicable to newly created navigable water bodies because the public never had a right to access the land or prior non-navigable water bodies.[265] The private landowner always had the right to exclude the public from this disputed land and paid taxes on the land.[266] Thus, private landowners would not disrupt commerce because public commerce never existed in this area before.[267] Simply, the implied reversion is a shield to protect existing public access, not a sword to expand State-owned land at the expense of private property owners. The court did not intend to extend the *Miami Corp.* purpose to include expanding public access to areas that the public could never access.[268] Accordingly, newly navigable water bodies do not revert to the State through an implied reversion because the purpose of the

261. *See generally* H.B. 391, 2018 Leg., Reg. Sess. (La. 2018); *see also* LA. CIV. CODE art. 450 (2018) ("Public things that belong to the state are such as running waters . . . .").

262. *See generally* Handy, *supra* note 11.

263. *A fortiori* means "[b]y even greater force or logic." LEVASSEUR, *supra* note 148, at 111.

264. *See generally* Miami Corp. v. State, 173 So. 315 (La. 1936).

265. *See generally id.*

266. *See generally id.*

267. *See generally id.*

268. *See generally id.*

implied reversion is to protect existing public access and commerce, not to expand public access to places where the public never before had access.[269] Expanding the scope of navigability for ownership would violate the spirit of its purpose and basic equity.

3. Inequities of "Instantaneous Prescription"[270]

When enacting article 450, Louisiana legislators left interpreting the definition of navigability to the courts.[271] So far, Louisiana courts have only identified two points in time to test for navigability for water bottom ownership: 1812[272] and before selling the land to a private party.[273] Adopting a third point in time, as Mestayer suggested, would unfairly take property away from landowners who had valid titles without compensation. The design of article 450 was to protect land in the public trust, not to expand the land in the public trust at the cost to private landowners.[274]

The implied reversion removes the unfairness that comes with a sudden change in ownership by placing the landowner on prior notice of the State's existing rights in submerged lands under historically navigable water bodies.[275] Because the implied reversion should not extend to newly navigable water bodies, the owner is not on notice that land abutting or under newly navigable water bodies is susceptible to a sudden change in ownership.[276] Without the implied reversion, the State is simply taking submerged land through "instantaneous prescription" because the State asserts to transfer land from a landowner with a valid title to itself—analogous to acquisitive prescription.[277] A Louisiana court, however, has

269. *See generally id.*

270. *See* Gaudet v. City of Kenner, 487 So. 2d 446, 448 (La. Ct. App. 5th Cir. 1986) (recognizing "instantaneous prescription" of land that submerges beneath navigable water bodies through an "operation of law").

271. There is no definition of "navigable" in the Civil Code. *See generally* LA. CIV. CODE art. 450 (2018).

272. Handy, *supra* note 11.

273. *Id.*

274. *See generally* Miami Corp. v. State, 173 So. 315 (La. 1936).

275. *See* discussion *supra* Part II.

276. *See* discussion *supra* Section III.B.2.

277. Instantaneous prescription is not a codified concept like acquisitive prescription. Instead, the term is descriptive of the sudden change in ownership of submerged land and how it appears like a form of acquisitive prescription without any delay period. *See* Gaudet v. City of Kenner, 487 So. 2d 446, 448 (La. Ct. App. 5th Cir. 1986) (using term "instantaneous prescription," describing implied reversion appearance). The author uses the term to illustrate how allowing the

held that the State acquiring property through prescription is an unconstitutional taking.[278]

In *Crooks v. Department of Natural Resources*, the Louisiana Third Circuit Court of Appeal found that the State cannot acquire property through acquisitive prescription because it would be a taking without compensation.[279] Reasoning *a fortiori*,[280] allowing the concept of instantaneous prescription of submerged land would be a taking because it is merely a heightened version of acquisitive prescription—instantaneous prescription transfers title without a possessory delay period.[281] Although it is debatable whether the State can benefit from acquisitive prescription,[282] the concept of instantaneous prescription has the element of surprise and unfairness that takings law should protect against because the State would instantly acquire ownership of private

---

instantaneous transfer of submerged lands is likely an unconstitutional taking without the implied reversion. "Acquisitive prescription is a mode of acquiring ownership or other real rights by possession for a period of time." LA. CIV. CODE art. 3446 (2018). The delay period for acquisitive prescription of an immovable without just title or good faith is 30 years of possession. *See id.* art. 3486; *id.* art. 462 ("Tracts of land, with their component parts, are immovables.").

278. Crooks v. Dep't of Nat. Res., 263 So. 3d 540, 556 (La. Ct. App. 3d Cir. 2018), *aff'd in part, rev'd in part*, 2019-0160, 2020 WL 499233 (La. Jan. 29, 2020) (reversing the lower court on issue unrelated to acquisitive prescription).

279. *Id.*

280. *A fortiori* means "[b]y even greater force or logic." LEVASSEUR, *supra* note 148, at 111.

281. *Compare Crooks*, 263 So. 3d 540 (determining that the State commits a taking using acquisitive prescription), *with Gaudet*, 487 So. 2d at 448 (analogizing implied reversion to instantaneous prescription), *and* Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So. 2d 408, 412 (La. Ct. App. 4th Cir. 1994) (citing Yiannopoulos, warning of takings liability if State claims newly navigable water bottoms without compensating landowner).

282. *See Crooks*, 263 So. 3d at 570–74 (Amy, J., dissenting). Regardless, the concept of instantaneous prescription differs because it is acquisitive prescription without the social benefits and codified protections. Acquisitive prescription only takes land from an inattentive landowner and gives the land to someone who values it more after a long period of possession; however, instantaneous prescription takes land even from an attentive landowner still in possession of the land. *See* Boudreaux v. Cummings, 167 So. 3d 559, 570–72 (La. 2015) (Weimer, J., concurring). Further, acquisitive prescription has protections such as requiring 30 years of possession; contrarily, instantly transferring ownership of submerged lands does not require possession or a delay period. *See generally* LA. CIV. CODE art. 3486 (2018). Instead, instantaneous prescription creates rights in property that were not previously present. *See generally Phillips Petroleum Co.*, 646 So. 2d at 412 (citing Yiannopoulos, warning of takings liability).

property without compensation or prior notice of existing property rights.[283] Instead, the State's sudden taking of this private property and subsequent reclassification into public property is the exact type of injustice takings law prevents.[284]

On its face, it seems like instantly reverting private property to public property without compensation is patently inequitable and constitutes a direct expropriation of property because the government takes the title to private property and asserts dominion over it without the implied reversion.[285] In *Webb's Fabulous Pharmacies v. Beckwith*, a Florida statute required the clerk of court to take interest from a deposited interpleader fund as a charge for the service of the court.[286] The statute required the parties to deposit the money into the account.[287] The government argued that the funds became public funds when the parties deposited them because the state was holding the funds in its public capacity.[288] The United States Supreme Court found that the deposited funds were private property under Florida law and were not put in the fund for the public benefit.[289] The Court held that this forced deposit plus taking of interest equaled a taking of private property, which required compensation, because the funds are a valid property interest and the State took the interest without a justifiable reason.[290] The Court analogized the case to *United States v. Causby* because Florida used the funds similar to how the government used private airspace above land for constant low-level flights.[291] The Court stated that the government shall not turn a

283. A. Dan Tarlock, *United States Flood Control Policy: The Incomplete Transition from the Illusion of Total Protection to Risk Management*, 23 DUKE ENVTL. L. & POL'Y F. 151, 177 (2012) ("Fairness has two dimensions: protecting landowners who are the victims of discrimination and avoiding surprise.").

284. *See* Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 164 (1980) (stating how the transformation of private property into public property without compensation "is the very kind of thing that the Taking[s] Clause . . . was meant to prevent").

285. *See generally id.*

286. *Id.* at 161.

287. *Id.*

288. *Id.* at 162.

289. *Id.*

290. *Id.*

291. *Id.* at 163–64. In *United States v. Causby*, the United States Supreme Court found the government liable for a taking for constant low-level flights over private land. *See generally* United States v. Causby, 328 U.S. 256 (1946).

private thing into a public thing without compensation because it would be an unjust and arbitrary abuse of the State's power.[292]

Although taking interest from an interpleader fund and taking land are separate issues, *Webb's* is illustrative on the macro level of how converting a public thing to a private thing produces injustice.[293] Similarly, Louisiana would take control of the land through an operation of law reversion and try to call it public property.[294] The government, however, sold the land to a private party at some point, which gave the private owner a clear property interest recognized under Louisiana law.[295] The State did not sell the land with any conditions or an implied reversion stating that the land reverts if a new navigable body of water appears on the land.[296] Article 450 would then turn private property into public property without compensation.[297] As one should only use paragraph 2 of article 450 to protect access to historically navigable water bodies, the use of article 450 to expand State property would be an arbitrary exercise of State power like in *Webb's*. Placing an arbitrary implied reversion on private property would likely be a taking under the United States Constitution because private property cannot become public absent a valid reason;[298] thus, reasoning symmetrically, it should be considered a taking under the Louisiana Constitution.[299]

Allowing the State to redefine property rights through the concept of navigability is incongruent with the equitable concept of takings law.[300] Although the landowner whose land abuts historically navigable water bodies or the territorial sea loses land without compensation because of an implied reversion, no such implied reversion exists between the State and the landowner whose land abuts a newly navigable water body.[301] Thus, the latter landowner maintains a valid property right to proceed in an

---

292. *Webb's*, 449 U.S. at 164 ("[A] State . . . may not transform private property into public property without compensation.") (The Takings Clause "shields against the arbitrary use of governmental power.").

293. *See id.* Analogizing the situation to *Webb's* is not a stretch because of the United States Supreme Court's analogy to *United States v. Causby*. *Id.* at 163–64.

294. *See* LA. CIV. CODE art. 450 (2018).

295. *See generally* State v. Chambers Inv. Co., 595 So. 2d 598 (La. 1992).

296. *See* Miami Corp. v. State, 173 So. 315 (La. 1936).

297. *See Webb's*, 449 U.S. at 164.

298. *Id*. at 164.

299. *See* Avenal v. State, 886 So. 2d 1085, 1113–14 (La. 2004) (Weimer, J., concurring).

300. *See generally* Miami Corp. v. State, 173 So. 315 (La. 1936).

301. *See* discussion *supra* Part III.

inverse condemnation suit if the State takes any of the landowner's bundle of ownership rights—*usus*, *fructus*, or *abusus*.[302]

IV. THE FAIR SOLUTION OR AN EXPANSION TO INACTION TAKINGS

Louisiana landowners whose lands abut newly navigable water bodies should have their property rights protected, but landowners whose lands abut historically navigable water bodies are not as fortunate.[303] The latter lose their property without compensation.[304] Although not a taking, the loss without compensation violates the spirit of takings law.[305] A remedy to the situation may present itself through a gratuitous compensation similar to the levee servitude or by expanding takings law to include inaction because fewer landowners would "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[306] After consideration of both options, expanding takings to inaction is the better solution because it does not require any constitutional amendments or legislative solutions. Instead, it adheres to the spirit of the current Louisiana Constitution.

A. The Gratuitous Amendment

In Louisiana law, a gratuitous compensation affords a landowner compensation for land lost to the State even though no takings took place.[307] The Louisiana Constitution and Civil Code expressly provide for a situation in which a gratuitous compensation is appropriate: the levee servitude.[308] Although the State does not owe compensation for appropriating land for the levee servitude, Louisiana citizens approved a constitutional provision that provides a gratuitous compensation to the landowner who loses land when the State exercises the levee servitude.[309] The similarities between the levee servitude and land loss due to coastal change are apparent. First, the levee servitude and implied reversion both

302. *See* discussion *supra* Section III.B.
303. *See* discussion *supra* Part III.
304. *See* discussion *supra* Part III.
305. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).
306. *Id.*
307. *See* S. Lafourche Levee Dist. v. Jarreau, 217 So. 3d 298 (La. 2017).
308. *Id.*; *see* LA. CIV. CODE art. 665 (2018).
309. *See* LA. CONST. art. VI, § 42; *Jarreau*, 217 So. 3d 298.

serve public purposes.[310] The levee servitude appropriation protects land from flooding,[311] and the implied reversion promotes continuing public access for commerce and recreation.[312] Second, the State placed both burdens on lands without the landowner's expressed consent.[313] Following the spirit of the Louisiana Constitution, a constitutional amendment could be proposed—like the payment for the levee servitude—that provides a gratuitous payment to landowners whose lands naturally submerge beneath historically navigable water bodies or the territorial sea.[314]

The gratuitous payment would help alleviate some of the burden that the private landowner should not shoulder alone when private land naturally submerges beneath historically navigable water bodies and the territorial sea.[315] The gratuitous compensation, however, would require legislative action, which can be a very slow process. In addition, coastal land loss is not strictly caused by natural factors, such as erosion,

---

310. *Compare Jarreau*, 217 So. 3d 298 (describing need to protect public from flooding), *with* Miami Corp. v. State, 173 So. 315 (La. 1936) (providing reason for protecting public access to navigable water bodies).

311. *See Jarreau*, 217 So. 3d 298.

312. *See generally Miami Corp.*, 173 So. 315.

313. *Id.*; *see generally Jarreau*, 217 So. 3d 298.

314. LA. CONST. art. VI, § 42(A):

> Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law. With respect to lands and improvements actually used or destroyed in the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, such payment shall not exceed the amount of compensation authorized under Article I, Section 4(G) of this constitution. However, nothing contained in this Paragraph with respect to compensation for lands and improvements shall apply to batture or to property the control of which is vested in the state or any political subdivision for the purpose of commerce. If the district has no other funds or resources from which the payment can be made, it shall levy on all taxable property within the district a tax sufficient to pay for property used or destroyed to be used solely in the district where collected.

See LA. CONST. art. I, § 4(G) (limiting compensation to Fifth Amendment requirement instead of full extent of loss). The Fifth Amendment does not require compensation for the levee servitude, but the Louisiana Supreme Court decided that the legislature intended to reduce compensation from full extent of the loss to just compensation. *See generally Jarreau*, 217 So. 3d 298.

315. *See generally Jarreau*, 217 So. 3d 298 (describing the reason for paying the levee servitude).

subsidence, and a rising sea level.[316] In practice, State, private, and natural factors work in tandem to destroy the coast.[317] Thus, the better solution would be to adopt inaction takings because this approach would help bridge the gap between natural submersion and State-caused submersion to promote "fairness and justice" and ensure that the State fulfills its duty to protect the coast.[318]

B. Expansion to Inaction

A taking through inaction is the "failure to act, in the face of an affirmative duty to act."[319] Many states recognize the concept of inaction leading to takings.[320] In *Litz v. Maryland Department of the Environment*, the Maryland Court of Appeals held the government responsible for a sewage overflow that the government knew about but did not act to stop.[321] Also, as considered in *Arreola v. County of Monterey*, in California, the government failed to maintain the levees, which resulted in the flooding of private property.[322] The California Court of Appeals supported an inverse condemnation claim when "the entity was aware of the risk posed by its public improvement and deliberately chose a course of action—or inaction—in the face of that known risk."[323] Additionally, a Florida court allowed an inverse condemnation claim to proceed when the government failed to maintain a road, which caused the road to deteriorate to the point that a property owner could no longer access the private property.[324]

Currently, a blanket exclusion precludes inaction claims in federal courts.[325] In *St. Bernard Parish v. United States*, the United States Court of Federal Claims found that the United States Army Corps failed to maintain a navigational canal that foreseeably caused flooding to private property.[326] The Court of Federal Claims held the government responsible

316. *See* Reckdahl, *supra* note 1.
317. *See id.*
318. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).
319. Litz v. Maryland Dep't of the Env't, 131 A.3d 923, 931 (Md. 2016).
320. *Id.*
321. *Id.* at 931.
322. Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002).
323. *Id.* at 55.
324. Jordan v. St. Johns County, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).
325. *See* St. Bernard Par. v. United States, 887 F.3d 1354, 1357 (Fed. Cir. 2018) ("We conclude that the government cannot be liable on a takings theory for inaction . . . .").
326. *Id.* at 1358.

for its inaction in the face of Hurricane Katrina.[327] The United States Court of Appeals for the Federal Circuit overturned the decision and created a blanket exclusion to inaction liability.[328] The Federal Circuit determined that the government should only be liable for its actions.[329] Nevertheless, the Federal Circuit's decision is only persuasive authority in Louisiana.[330] Louisiana courts have not accepted or rejected the concept of inaction takings. Thus, Louisiana courts should ignore the Federal Circuit's decision and follow the states that have adopted inaction takings because inaction takings better address the issues of a changing coast.[331]

Several reasons exist for Louisiana to adopt inaction takings because of coastal change. First, Louisiana has an affirmative duty to protect its coast.[332] The Louisiana Constitution states: "The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."[333] Because the State cannot be held responsible for every natural disaster, it should be held responsible in situations where it has failed to maintain public projects that cause coastal loss and where the State chooses inaction in the face of a foreseeable risk.[334]

Second, inaction takings would prevent the State's bad faith.[335] Inaction takings guard against the possibility of the State picking and choosing places to protect and allowing more profitable lands to submerge beneath navigable water bodies and the territorial sea.[336] It has become a common practice of the State to take land from private citizens before oil leases start operating because if the oil leases commence operations, then the landowner maintains the mineral rights, even though the landowner loses surface rights.[337] Inaction would guard against the perverse incentive

---

327. *Id.*

328. *Id.* at 1357.

329. *Id.*

330. Parish Nat'l Bank v. Lane, 397 So. 2d 1282, 1285 (La. 1981) (stating "federal courts' interpretations . . . would be . . . persuasive, though not controlling").

331. Maryland serves as a good example: "failure to act, in the face of an affirmative duty to act." Litz v. Maryland Dep't of the Env't, 131 A.3d 923, 931 (Md. 2016).

332. LA. CONST. art. IX, § 1.

333. *Id.*

334. *See* Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002).

335. *See* Reckdahl, *supra* note 1.

336. *See id.*

337. *See generally id.*; *see also* LA. REV STAT. § 9:1151 (2018) (the Freeze Statute):

to allow certain lands to flood so the landowner loses the surface and mineral rights.[338]

Third, the Louisiana Constitution supports a broader reading than the federal Takings Clause.[339] The Louisiana Constitution provides that "property shall not be taken *or damaged*."[340] The Fifth Amendment's Takings Clause contains no such reference to the term "damaged."[341] The addition of the word "damaged" in the Louisiana Constitution provides evidence that takings liability in Louisiana reaches further than the federal Takings Clause because the Louisiana Legislature could not have intended to include "damaged" as superfluous language.[342] Further, the addition of the word "damaged" ensures that "the right to compensation is broad" in Louisiana.[343] Thus, the current Louisiana Constitution supports a broad application of takings liability to include inaction.[344]

Lastly, inaction takings can bridge the gap between State-caused submersion and natural submersion.[345] The landowner whose land abuts

---

> In all cases where a change occurs in the ownership of land or water bottoms as a result of the action of a navigable stream, bay, lake, sea, or arm of the sea, in the change of its course, bed, or bottom, or as a result of accretion, dereliction, erosion, subsidence, or other condition resulting from the action of a navigable stream, bay, lake, sea, or arm of the sea, the new owner of such lands or water bottoms, including the state of Louisiana, shall take the same subject to and encumbered with any oil, gas, or mineral lease covering and affecting such lands or water bottoms, and subject to the mineral and royalty rights of the lessors in such lease, their heirs, successors, and assigns; the right of the lessee or owners of such lease and the right of the mineral and royalty owners thereunder shall be in no manner abrogated or affected by such change in ownership.

338. *See* LA. REV STAT. § 9:1151; *see also* Reckdahl, *supra* note 1 (taking the landowners' land right before it produced oil).

339. *See* LA. CONST. art. I, § 4(B).

340. *Id.* (emphasis added).

341. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.")

342. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (citing Duncan v. Walker, 533 U.S. 167 (2001)).

343. Avenal v. State, 886 So. 2d 1085, 1113 (La. 2004) (Weimer, J., concurring). Federal takings encompass all of Louisiana takings and go beyond to cover some of what Louisiana calls damages. *Id.* at 1113–14 (Weimer, J., concurring). Louisiana damages go beyond some of the scope of the Fifth Amendment. *Id.* at 1113–14 (Weimer, J., concurring).

344. *Id.* at 1113–14 (Weimer, J., concurring).

345. *See* discussion *supra* Part IV.

historically natural navigable water bodies and the territorial sea has an implied reversion read into the title, through which the landowner loses submerged land without compensation when natural forces cause the submersion.[346] When a State project causes land to submerge under water, Louisiana courts are more likely to find a temporary flooding and compensate the landowner for the action of the State.[347] Inaction takings would compensate the landowner whose land primarily submerged due to natural causes when the State had the ability to prevent and chose not to act or did not maintain current protection structures.[348] Inaction takings would suspend the implied reversion of the land abutting historically navigable water bodies or the territorial sea until the State compensated the landowner because the State contributed to the submersion through inaction.[349] In other words, the submersion is no longer completely natural, so the State breached the aleatory contract and now has an implied contract to compensate the landowner when the State takes title to the submerged land.[350]

CONCLUSION

The Thibodeauxs chose to negotiate instead of going to court to fight the State over the submerged land.[351] Uncertainty around the law because of coastal change may have contributed to their decision.[352] Clearing up the uncertainty will save similarly situated families from potentially making a mistake, whether that is negotiating when needing to sue or suing when needing to negotiate. As the law currently stands, landowners whose lands abut *historically* navigable water bodies or the territorial sea lose land that naturally submerges.[353] The bottoms of *newly* navigable water bodies, including non-navigable ones that could be reclassified as

346. *See generally* Miami Corp. v. State, 173 So. 315 (La. 1936).

347. Crooks v. Dep't of Nat. Res., 263 So. 3d 540 (La. Ct. App. 3d Cir. 2018), *aff'd in part, rev'd in part*, 2019-0160, 2020 WL 499233 (La. Jan. 29, 2020) (reversing the lower court on the issue of prescription) (finding temporary flooding after flood project kept private land flooded so long that people thought it was a lake).

348. *See* Litz v. Maryland Dep't of the Env't, 131 A.3d 923, 931 (Md. 2016).

349. United States v. Lynah, 188 U.S. 445, 459 (1903) (citing United States v. Great Falls Mfg. Co., 112 U.S. 645 (1884)).

350. *Id.* (reading in an implied contract to compensate when the government takes the land).

351. *See* Reckdahl, *supra* note 1.

352. *See* generally *id.*

353. *See* discussion *supra* Part II.

navigable, should stay as private property until the State formally expropriates the land because the landowner should maintain the valid property right.[354] To remedy the harsh situation of the landowner whose land abuts historically navigable water bodies or the territorial sea, Louisiana could adopt a gratuitous compensation for landowners subject to the implied reversion.[355] Alternatively, expanding takings jurisprudence would compensate the landowner who deserves compensation because of the State allowing certain lands to submerge.[356] Expanding takings jurisprudence is the best option because it incorporates the spirit of the current Louisiana Constitution and bridges the gap between natural submersion and State-caused submersion.

354. *See* discussion *supra* Part III.

355. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960); S. Lafourche Levee Dist. v. Jarreau, 217 So. 3d 298 (La. 2017).

356. *See* discussion *supra* Section IV.B.