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A Binding and Perpetual Obligation: Protecting Louisiana's Sixteenth Section Land as a Natural Resource

I. INTRODUCTION

Thomas Jefferson believed that if the United States was to remain a free nation, it needed to become an educated nation.¹ In a 1787 letter to James Madison, Jefferson remarked, "Above all things I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty."² Jefferson also believed that government could help promote education in the general populace by reserving land in newly formed towns for the building of local schools.³

As the young United States gained more territory, and new states entered the Union, Congress put Jefferson's ideas into practice. In exchange for statehood, Congress formed agreements⁴ with new state governments in which discrete portions of land, "Sixteenth Section"⁵ land, were permanently set aside for public schools.⁶ These compacts imposed a "binding and perpetual obligation" on the states to use that land for the benefit of public education.⁷ Thomas Jefferson's musings became the United States' first national education policy.

Sixteenth Section lands have recently been the source of legal controversy between Louisiana school boards and the Louisiana oil and gas industry.⁸ This conflict is aggravated by the lack of clarity in both the statutory scheme and jurisprudence governing Sixteenth Section land. Article XII, Section 13 of the Louisiana Constitution grants the state immunity from prescription in all civil matters unless dictated otherwise by statute.⁹ Decisions by Louisiana Courts of Appeal have split over whether the state's constitutional

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1. See ROBERT M. HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 179 (1970).

2. THOMAS JEFFERSON, Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in WRITINGS 918 (1984).

3. See HEALEY, *supra* note 1, at 179.

4. See *Andrus v. Utah*, 446 U.S. 500, 523 (1980).

5. See Part II.A. (defining Sixteenth Section land). See generally C. Maison Heidelberg, Note, *Closing the Book on the School Trust Lands*, 45 VAND. L. REV. 1581, 1584-91 (1992).

6. See *infra* Part II and note 19.

7. *Andrus*, 446 U.S. at 523.

8. See *infra* Part III.D.

9. LA. CONST. art. XII, § 13.

immunity from prescription should apply to actions involving Sixteenth Section lands when that land is engaged in commerce with the oil industry.¹⁰

If Sixteenth Section lands benefit from the state's prescription immunity, those companies that contract with school boards for mineral exploration on Sixteenth Section land could potentially face permanent exposure to imprescriptible causes of action. On the other hand, if prescription is allowed to run, elected school board officials must provide legal protection for Sixteenth Section lands, a task for which the state is far better suited. Ultimately, Congress intended that Sixteenth Sections should be held by the state solely for the purpose of furthering public education. Elected school boards should not be burdened with the legal responsibility of managing legal claims involving Sixteenth Sections within standard prescriptive time periods. Therefore, the state's immunity from prescription should be extended to actions involving Sixteenth Section land.

The jurisprudential split on this issue does not stem from a value judgment about these lands, but from a failure to properly categorize Sixteenth Section land within Louisiana law. This Comment attempts to provide the appropriate categorization for Sixteenth Section land by examining the governing statutes and relevant jurisprudence while focusing on policy considerations and civil law concepts. This Comment then provides two judicial solutions to the issue that the Louisiana Supreme Court may implement in lieu of sweeping revision to the statutes governing Sixteenth Section land. Part II examines the history of Sixteenth Section lands and how they evolved into their present state. Part II also discusses the split among the circuits over prescription on actions involving Sixteenth Section land. Part III attempts to properly classify Sixteenth Section land in civil law terms and suggests two legal solutions provided in the existing framework of trust law and the public trust doctrine.

II. BACKGROUND

A. The History of Sixteenth Section Lands

At the conclusion of the American Revolution, Great Britain ceded the vast Northwest Territory to the United States, leaving the new federal government in control of over 200,000 square miles of land.¹¹ In order to efficiently transfer this land to private ownership and better prepare it for statehood, the Continental Congress

10. See *infra* Part III.D.

11. Heidelberg, *supra* note 5, at 1585.

passed the Land Ordinance of 1785, which, among other things, created the rectangular survey system for public land.¹² Under this system, all federal land was divided into six-mile square townships.¹³ These townships were further subdivided into thirty-six, one-mile square Sections.¹⁴ The Sixteenth Section of each township was deemed to be reserved “for the maintenance of public schools.”¹⁵ The Northwest Ordinance of 1787, which provided for the governance of the Northwest Territory, expressly stated the underlying policy of the reservation by declaring that “religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹⁶

These ordinances established a series of “honorary,” if not legal, trust relationships between the federal government and the states.¹⁷ Upon completion of the surveys, ownership of each township and section was taken out of the federal government’s control and vested in the new states.¹⁸ Congress subsequently extended this reservation to all land acquired through the Louisiana Purchase.¹⁹ As a result, when Louisiana was admitted into the Union as a separate state in 1812, ownership of the reserved Sixteenth Section land in each township passed to Louisiana’s state government. In 1843, an Act of Congress granted states the right to sell any land reserved for school use, so long as the proceeds from any such sales were placed in “some productive fund” directed by the state legislatures for the use and support of public schools.²⁰

12. See *Papasan v. United States*, 756 F.2d 1087 (5th Cir. 1985) (discussing public land survey practices in Mississippi), *aff’d in part and vacated in part*, *Papasan v. Allain*, 478 U.S. 265 (1986); see also Vernon Carstensen, *Patterns on the American Land*, PUBLIUS, Autumn 1988, at 31, 31–39 (1988) (offering a concise description of the public land survey system).

13. *Land Ordinance of May 20, 1785*, in 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 375–406 (J.C. Fitzpatrick ed., 1933); see also *Papasan v. Allain*, 478 U.S. 265, 268 (citing 1 LAWS OF THE UNITED STATES 565 (1815)).

14. *Id.*

15. *Id.*

16. Northwest Ordinance of 1787, reprinted in 1 USC at LVII (2012).

17. See *Alabama v. Schmidt*, 232 U.S. 168, 173–74 (1914) (“The gift to the state is absolute, although, no doubt, as said in *Cooper v. Roberts*, ‘there is a sacred obligation imposed on its public faith.’ But that obligation is honorary . . .”).

18. See Act of Apr. 21, 1806, ch. 39, § 11, 2 Stat. 391, 394 (1806); Act of March 3, 1811, ch. 46 § 10, 2 Stat. 662, 665 (1811); see also *Papasan v. United States*, 756 F. 2d 1087, 1089 (5th Cir. 1985), *aff’d in part and vacated in part*, *Papasan v. Allain*, 478 U.S. 265 (1986).

19. Act of Apr. 21, 1806, ch. 39, § 11, 2 Stat. 391, 394 (1806); see also JOHN L. MADDEN, *FEDERAL AND STATE LANDS IN LOUISIANA* 232 (1973).

20. *Louisiana v. William T. Joyce Co.*, 261 F. 128, 129 (5th Cir. 1919) (At least one scholar has suggested that this statute was unnecessary considering the

Decisions in both federal and Louisiana courts during the next half-century confirmed that Congress donated their title to the land in the form of a grant to each state, with the express condition of reserving Sixteenth Sections for school use.²¹ While never expressly using the term, the text of the federal grants often describe the state as a trustee of the land on behalf of the people of the state for the purposes of public education.²² Despite the school boards' administrative authority over Sixteenth Section land, the Louisiana Supreme Court has noted that school boards were not, and had never been, owners of the land.²³ Other Louisiana courts have also maintained that, while the state owns Sixteenth Section lands, they are unique and separate from all other forms of public land and are placed under the administrative control of parish school boards.²⁴

State of Louisiana already possessed the right to sell these lands through its fee simple ownership.). See Ryan M. Seidemann, *Curious Corners of Louisiana Mineral Law: Cemeteries, School Lands, Erosion, Accretion, and Other Oddities*, 23 TUL. ENVTL. L.J. 93, 106 (2009).

21. See *Cooper v. Roberts*, 59 U.S. 173, 181–82 (1855) (“The trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over which the power of the State is plenary and exclusive. In the present instance, the grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith.”); *Garland v. Jackson*, 7 La. Ann. 68, 68 (1852) (“The sixteenth section of every township of the public lands of the United States, have, from the adoption of the Constitution, been reserved from public sales, for the maintenance of public schools in the township; and this reservation has always been considered a grant to the State in which it lies, on the admission of the State into the Union.”).

22. *Bd. of Sch. Dirs. v. Ober*, 32 La. Ann. 417, 419 (1880) (“These lands were donated by Congress to this State for public school purposes. By Act of Feb. 15, 1843, the legislature was authorized by Congress to provide for their sale and the conveyance of a fee simple title to the purchaser, and the manner of sale and disposition of proceeds was prescribed by our legislative Acts of 1855. The State is a trustee of the lands, or of the proceeds of their sale, for the use of the inhabitants of the townships wherein they are located.”). For a discussion of this development in states other than Louisiana, see *Riedel v. Anderson*, 70 P.3d 223 (Wyo. 2003); Sally K. Fairfax et al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 810 (1992).

23. See *Ober*, 32 La. Ann. at 419 (“The title to this land has never been in the parish Board of School Directors. The title was in the State under the donation of the general government, and she held it for a specific purpose, with authority to sell the lands, and a mandate to hold the proceeds and invest them for the benefit of the schools.”).

24. See *State v. Humble Oil & Ref. Co.*, 197 So. 140, 144 (La. 1940) (“For more than one hundred years it has been the settled policy of this State, as reflected in various constitutional and statutory provisions, to treat sixteenth section lands as separate and distinct from all other State lands and to place them under the control of the school authorities.”).

Since Louisiana joined the Union, its legislature has statutorily delegated the power to maintain and dispose of the reserved Sections to the school boards of each parish in which they are located.²⁵ Three sections of Louisiana's Revised Statutes govern Sixteenth Section land, also referred to as "school lands."²⁶ Under current statutes, individual parish school boards have the right to administer and use Sixteenth Section land for public school purposes.²⁷ School boards may rent the land or even sell excess land within a Sixteenth Section with voter approval, so long as the revenue from any such sale is used for public school purposes.²⁸ School boards are also empowered to grant mineral leases on Sixteenth Section land, subject to approval by the State Mineral Board.²⁹ However, the statutes do not discuss the school boards' relationship to the state in regards to the state's constitutional immunity from prescription. The failure of the statutes to directly address the nature of this ambiguous relationship has led to a divided jurisprudence on the issue.

B. Liberative Prescription in Louisiana Law

Prescription is a mode of acquiring or discharging rights through the passage of time.³⁰ There are three types of prescription: acquisitive, liberative, and nonuse.³¹ Acquisitive prescription solidifies ownership in a possessor after a set amount of time.³² Prescription of nonuse, on the other hand, extinguishes the right of a possessor if that possessor fails to exercise his or her right during a set amount of time.³³ Liberative prescription, of which this Comment is chiefly concerned, is a mode of

25. See LA. REV. STAT. ANN. § 17:100.6 (2013); see also *Humble Oil*, 197 So. 140.

26. See LA. REV. STAT. ANN. §§ 41:631–41:981 (2006 & Supp. 2014) (governing the rules associated with public lands and chapter six of that title contains the rules relating to sixteenth section "school lands"); LA. REV. STAT. ANN. §§ 30:151–30:159 (2007 & Supp. 2014) (governing leases by State political subdivisions in which school lands are included); LA. REV. STAT. ANN. § 17:87–17:87.9 (2013) (governing the administration of sixteenth section land by school boards).

27. See LA. REV. STAT. ANN. § 41:638 (2006).

28. See LA. REV. STAT. ANN. §§ 41:639 (2006); LA. REV. STAT. ANN. 41:714 (2006); LA. REV. STAT. ANN. 41:841 (2006); LA. REV. STAT. ANN. 41:981(E) (2006).

29. See LA. REV. STAT. ANN. §§ 30:152, 30:158.

30. Baudry-Lacantinerie & Tissier, *Prescription*, in YIANNOPOULOS' CIVIL LAW PROPERTY COURSEBOOK 294 (9th ed. 2009).

31. LA. CIV. CODE ANN. art. 3445 (2014).

32. LA. CIV. CODE ANN. art. 3446 (2014).

33. LA. CIV. CODE ANN. art. 3448 (2014).

extinguishing certain legal claims after the passage of a certain amount of time.³⁴ Liberative prescription functions as the civil law equivalent of common law statutes of limitation.³⁵ Prescription is fundamental in civil law jurisdictions.³⁶ Cicero described prescription as that which “ends the fear of the dangers of litigation.”³⁷ Indeed, civilian scholars have often noted that the primary social utility of prescription is stability achieved by assuaging such fears in the general public.³⁸ After a set time, owners no longer must prove the validity of their title, and individuals no longer need to protect their patrimony from legal claims.

While the policy behind prescription is rational, the time periods imposed are varied and often appear arbitrary.³⁹ In Louisiana law, the Civil Code of 1825 established prescriptive periods of ten years for contract claims, three years for delinquent pay, and one year for tort claims.⁴⁰ However, the Civil Code of 1825 maintained numerous exceptions to these three varieties, each themselves of a different length of time.⁴¹ Title XXIV of the current Louisiana Civil Code was last revised in 1983⁴² and contains the articles governing prescription.⁴³ Prescriptive periods

34. LA. CIV. CODE ANN. art. 3447 (2014).

35. See FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 10.02 (2d ed. 2004).

36. Baudry-Lacantinerie & Tissier, *supra* note 30, at 294. See also DIAN TOOLEY-KNOBLETT ET AL., *YIANNPOULOS’ CIVIL LAW PROPERTY COURSEBOOK* 295–330 (9th ed. 2009).

37. “[F]inis solici tudinis ac periculi litium.” M. TULLII CICERONIS, *ORATIONES*, VOLUME II 288 (George Long & A.J. Macleane eds., 1855).

38. Gabriel Baudry-Lacantinerie & Albert-Anatole Tissier, *Prescription*, in 5 *CIVIL LAW TRANSLATIONS* 16 (La. State Law Inst. Trans., 1972).

39. See generally Benjamin West Janke, *The Failure of Louisiana’s Bifurcated Liberative Prescription Regime*, 54 *LOY. L. REV.* 620 (2008). In Louisiana’s original Digest of 1808, largely based on the French Civil Code, a general prescriptive period of 30 years was imposed for all actions with a multitude of exceptions. For example, “architects or undertakers were granted either a ten- or five-year prescriptive period depending on the type of building material used.” LA. CIV. CODE art. 73 (1808). The Civil Code of 1825 eliminated the general time period and imposed a prescriptive period of ten years for contract claims, three years for delinquent pay, and one year for tort claims while retaining numerous exceptions of varying lengths of time.

40. See Benjamin West Janke, *The Failure of Louisiana’s Bifurcated Liberative Prescription Regime*, 54 *LOY. L. REV.* 620, 641 (2008).

41. *Id.*

42. See Act No. 173, 1983 La. Acts 429 (revising Title XXIV articles on prescription).

43. LA. CIV. CODE ANN. arts. 3445–3505 (2014).

range from thirty, ten, five, two, and one year(s).⁴⁴ Regarding Sixteenth Sections, Louisiana prescription law makes it necessary for school board members, who are often not attorneys, to be cognizant of this varied structure when contracting mineral leases.

Though the time period of prescription varies widely with the type of property and the cause of action, all actions involving private persons and private things are susceptible of prescription unless prohibited by statute.⁴⁵ Prescription does not, however, run against public things.⁴⁶ Additionally, Article XII of the Louisiana Constitution of 1974 specifically prohibits the running of prescription against the state.⁴⁷ The effects of these provisions for disputes over Sixteenth Section land are easily recognizable. If the state is considered the owner, prescription cannot run against any potential action brought by a school board for any issue regarding Sixteenth Section land.

C. Prescription and Sixteenth Section Land: Differing Interpretations

During the twentieth century, a jurisprudential divide emerged over whether school boards enjoyed the immunity from prescription provided to the state by the Louisiana Constitution. One line of jurisprudence, beginning early in the twentieth century, held that actions involving these lands benefited from the state's prescription immunity even though school boards were statutorily empowered to administer Sixteenth Section land in a fairly autonomous way. In 1912, the Louisiana Supreme Court decided *State v. F.B. Williams Cypress Co.*⁴⁸ In that case, the Assumption Parish School Board sued for damages resulting from unlawful

44. See, e.g., LA. CIV. CODE ANN. art. 3486 (establishing acquisitive prescription of thirty years for immovables); LA. CIV. CODE ANN. art. 3491 (establishing acquisitive prescription of ten years for movables); LA. CIV. CODE ANN. art. 3497 (establishing liberative prescription of five years for the included actions); LA. CIV. CODE ANN. art. 3494 (establishing liberative prescription of three years for the included actions); LA. CIV. CODE ANN. art. 3493.10 (establishing liberative prescription of two years for delictual actions as a result of an act of violence); LA. CIV. CODE ANN. art. 3492 (establishing liberative prescription of one year for all other delictual actions).

45. See LA. CIV. CODE ANN. art. 3467; LA. CIV. CODE ANN. art. 3485.

46. LA. CIV. CODE ANN. art. 405 (2014) (noting that the imprescriptibility of such things is a consequence of their insusceptibility of private ownership).

47. See LA. CONST. art. XII, § 13 (reasoning *expressio unius exclusion alterius*).

48. *State v. F. B. Williams Cypress Co.*, 58 So. 1033 (La. 1912), amended by 61 So. 988 (La. 1913).

conversion of timber on Sixteenth Section land.⁴⁹ The defendant timber company claimed the one-year prescriptive period for conversion had expired.⁵⁰ The timber company additionally argued that the state's immunity from prescription only applied in situations where the state sued on her own behalf and not when it was merely represented as a trustee by a particular school board.⁵¹ The Louisiana Supreme Court rejected this argument.⁵² The court held that, although the school boards aided the state in directing the land towards an educational purpose, the state remained the owner, and therefore prescription could run against the state in a Sixteenth Section action.⁵³

In 1915, in *State v. New Orleans Land Co.*, the board of directors of public schools in Orleans Parish sued to reclaim Sixteenth Section land previously purchased by the defendant.⁵⁴ The defendant land company claimed that its ancestors in title had predated Louisiana's admission to the Union and acquired ownership through acquisitive prescription after the passage of the requisite thirty years.⁵⁵ The Louisiana Supreme Court held in favor of the school board and stated that prescription could not run against the state on its own property, which included Sixteenth Section land.⁵⁶

During the 1920s, the Louisiana Supreme Court shifted perspective and held that school boards were state agencies, which are not entitled to the immunity from prescription granted to the state. The Louisiana Supreme Court first propounded this reasoning in regards to state levee boards. In *Board of Commissioners v. Pure Oil Co.*, the levee district sued for unpaid royalties due under a mineral lease.⁵⁷ The defendants pled three-year liberative prescription.⁵⁸ The levee board argued that it was a state agency created by the state for the sole purpose of carrying

49. *Id.* at 1034.

50. *Id.* at 1036.

51. *Id.*

52. *Id.*

53. *Id.* at 1037 ("The proposition that the rule of prescription established by the Constitution does not apply to the state in her capacity as trustee is untenable. Everything that the state holds in her capacity as sovereign she holds as trustee.")

54. *State v. New Orleans Land Co.*, 79 So. 515, 516 (La. 1918).

55. *Id.*

56. *Id.* at 519. ("Prescription acquirendi causa does not run against the state for her own property. Still less could it be allowed to run against the state for school land.")

57. *Bd. of Comm'rs v. Pure Oil Co.*, 120 So. 373, 374 (La. 1928).

58. *Id.* at 374.

out state duties and should therefore be immune from prescription.⁵⁹ The court rejected this argument and held that:

[P]laintiff has, and always has had, the right to sue and to be sued in its corporate name. It is a separate entity from the state, created by the state, it is true, to accomplish certain public purposes, but is nevertheless distinct from it. . . . [W]e therefore rule that the prescription pleaded runs against plaintiff.⁶⁰

In 1959, the Louisiana Supreme Court extended this reasoning to school boards in *Stokes v. Harrison*.⁶¹ In *Stokes*, the Beauregard Parish School Board purchased a tract of non-Sixteenth Section land and subsequently sold it.⁶² Thirty-five years later, and after a handful of subsequent sales and purchases of the land, the final purchaser executed a mineral lease on the property.⁶³ Shortly thereafter, the school board executed its own mineral lease on same the property.⁶⁴ In the suit that followed, the school board claimed that the tract of land became state land after its purchase by the school board.⁶⁵ Therefore, as state land, the state and the school board retained ownership of the mineral rights for the land based on the Louisiana Constitution's prohibition against state alienation of minerals.⁶⁶ The defendant argued he was owner of the land's mineral rights by acquisitive prescription of thirty years.⁶⁷

The Supreme Court ruled against the school board on constitutional grounds.⁶⁸ The court examined the applicable portion of Article IV of the Louisiana Constitution of 1921 and found the text illustrative.⁶⁹ In the sections of that article dealing with the inalienability of the state's mineral rights, the court found that the word "state" appeared alone, where other sections referred to the "state or any political corporation thereof."⁷⁰ The 1922 legislative act that provided for the creation of Louisiana's school boards stated that "parish school boards are constituted bodies

59. *Id.* at 809.

60. *Id.* at 377; *see also* Bd. of Comm'rs v. Toyo Kisen Kaisha, 113 So. 127, 128 (La. 1927) (applying identical rule to New Orleans Port Commissioners Board).

61. *Stokes v. Harrison*, 115 So. 2d 373 (La. 1959).

62. *Id.* at 375.

63. *See id.*

64. *See id.*

65. *Id.*

66. *See id.* (referencing LA. CONST. art. IV, § 2 (1921)).

67. *Stokes*, 115 So. 2d at 375.

68. *Id.* at 380.

69. *See id.* at 378.

70. *See id.* at 379.

corporate.”⁷¹ The court noted that “[n]owhere, however, do we find a parish school board called the ‘State.’”⁷² Therefore, the court held that a school board is an “agency of the state, a corporate body and political corporation, the recipient from the Legislature of certain delegated powers”, but not itself the state.⁷³

In 1978, the Louisiana Supreme Court refined this position in *Dynamic Exploration, Inc. v. LeBlanc*.⁷⁴ The Louisiana Constitution of 1974 altered the provision of the previous constitution on which the *Stokes* court relied.⁷⁵ The new constitution’s provision dealing with the alienability of mineral rights stated that “mineral interests of the state, of a school board, or of a levee district shall not be lost by prescription.”⁷⁶ Based on this new provision, the *LeBlanc* court acknowledged that the 1974 Constitution expressly overruled the *Stokes* holding and affirmed a lower court, ruling that levee districts were to be considered the “state” under the new constitution.⁷⁷ While this provision dealt only with mineral rights and not with prescription in general, it suggested that Louisiana’s legislature intended to include school boards, like levee districts, as the state with regards to prescription.⁷⁸

Despite the holding in *LeBlanc*, in 1981, the Louisiana Supreme Court returned to the subject in *State ex rel. Department of Highways v. City of Pineville*.⁷⁹ In that case, the Department of Highways advanced the City of Pineville a substantial sum of money in order to relocate water lines for the expansion of a local highway.⁸⁰ The city accepted the cash advances but failed to repay them.⁸¹ The suit occurred six years after the advances, and the trial court held the cash advance to be a loan, which has a prescriptive period of three years.⁸² The Louisiana Supreme Court held that,

71. *Id.* at 376 (citing Act. 100, 1922 La. Acts 204).

72. *Id.* at 377.

73. *Id.*

74. *Dynamic Exploration, Inc. v. LeBlanc*, 362 So. 2d 734 (La. 1978).

75. *Id.* at 734 n.1.

76. *Id.* (internal quotation marks omitted).

77. *Id.*

78. *Id.* at 734 (citing *Shell Oil Co. v. Bd. of Comm’rs*, 336 So. 2d 248, 253 (La. Ct. App. 1976) (“Accordingly, we hold that a levee district, which was created as an arm of the executive branch of government for the purpose of carrying out a governmental function, i.e., flood control, is the ‘state’ within the intent of Section 2, Article IV of the Constitution of 1921.”)).

79. *State ex rel. Dep’t of Highways v. City of Pineville*, 403 So. 2d 49 (La. 1981).

80. *Id.* at 50.

81. *Id.* at 50–51.

82. *Id.* at 51.

even though the Department of Highways was a portion of the executive branch of the Louisiana state government, it was not to be considered the “state” and was therefore not entitled to immunity from prescription.⁸³ This holding seemingly returned to the reasoning of the *Stokes* court. The court held that, while a school board was a state agency and therefore an “instrument” of the state, it could still sue and be sued independently and therefore was subject to prescription.⁸⁴

Most recently, the United States Court of Appeals for the Fifth Circuit adopted this reasoning regarding Sixteenth Section lands in *Terrebonne Parish School Board v. Mobil Oil Corp.*⁸⁵ In that case, the school board leased a certain tract of Sixteenth Section land in Terrebonne Parish to the Southern Natural Gas Company in 1957.⁸⁶ The lease specifically granted Southern the right to dredge canals and perform other actions conducive to mineral exploration on the property.⁸⁷ Southern subsequently assigned the lease to Mobil Oil.⁸⁸ Mobil then drilled and operated an oil well on the Sixteenth Section in question until 1959, when the well was capped and abandoned.⁸⁹ Terrebonne Parish School Board eventually filed a petition in its own name.⁹⁰ The Terrebonne Parish School Board sought damages under both tort and contract law against Mobil Oil for environmental damages to the leased Sixteenth Section due to erosion allegedly caused by Mobil’s drilling.⁹¹

Mobil filed a motion for summary judgment asserting the affirmative defense of liberative prescription against the plaintiff’s delictual claims.⁹² In opposition to the motion, the school board argued that claims related to Sixteenth Section lands came under

83. *See id.* at 52.

84. *Id.* (“[T]he ‘State’ . . . does not include a state agency which is a body corporate with the power to sue and be sued and which, when vested with a cause of action, is the sole party capable of asserting it. Regardless of its status as an instrumentality of the state, such an agency remains a distinct legal entity subject to claims of prescription except where the law provides otherwise.”).

85. *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870 (5th Cir. 2002).

86. *Id.* at 873.

87. *Id.*

88. The assignment in question is known as “farm-out agreement.” *See id.* at 873 n.2 (noting that “[f]arm-out agreements are frequently utilized in the petroleum industry in instances where the owner of a mineral lease is unable or unwilling to drill a lease nearing expiration but is willing to assign an interest to one willing to assume the drilling obligations and save the lease from expiring”).

89. *Mobil Oil*, 310 F.3d at 873.

90. *Id.* at 876.

91. *Id.*

92. *Id.*

the protection of the state's constitutional immunity from prescription.⁹³ The Fifth Circuit analyzed the statutes relating to school boards and Sixteenth Section land and concluded that the school board was a separate entity from the state.⁹⁴ Therefore, the Fifth Circuit held that the school board, which entered into a mineral lease under its own name and of its own choosing, could not claim to be acting as the "state" and could not avail itself of the state's constitutional immunity from prescription.⁹⁵

D. The Problem: Current Circuit Split

As shown above, twentieth century jurisprudence addressing Louisiana's Sixteenth Sections did not develop a clear image of a school board's relationship with regards to prescription in cases involving those lands. In the last decade, two decisions by Louisiana courts of appeal have again raised the issue. While one court ruled that Sixteenth Section land should benefit from the state's prescription immunity, another ruled that they should not.

1. Terrebonne Parish School Board v. Southdown

In a suit similar to its 1998 action in federal court against Mobil Oil, the Terrebonne Parish School Board filed suit against various oil companies in *Terrebonne Parish School Board v. Southdown, Inc.* in 1999,⁹⁶ claiming the defendant companies caused erosion and diminishment to a Sixteenth Section composed largely of marshland that the school board had leased to Southdown.⁹⁷ The school board sought full restoration of the property and monetary damages in tort and contract for what was specifically described as "severe ecological damage."⁹⁸ The defendants argued prescription had run on the claims, and the trial court agreed.⁹⁹

93. *Id.*

94. *See id.* at 878–79.

95. *Mobil Oil Corp.*, 310 F.3d at 881, 883.

96. *Terrebonne Parish Sch. Bd. v. Southdown, Inc.*, 887 So. 2d 8 (La. Ct. App. 2004).

97. *Id.* at 9–10.

98. *Id.* at 10 ("The [Terrebonne Parish School Board] further claimed that this continuing failure [by defendants] to restore the [school board] property has caused and continues to cause severe ecological damage . . . by altering and/or destroying the natural hydrology of the [marsh] located in Section 16, in addition to causing loss of acreage due to continuing erosion.") (internal quotation marks omitted).

99. *See id.* at 11.

On appeal, the Louisiana First Circuit considered the issue of whether the state's constitutional immunity from prescription applied to the school board's claims regarding Sixteenth Sections.¹⁰⁰ Relying on the Louisiana Supreme Court's decision in *State ex rel. Department of Highways v. City of Pineville*, the school board argued that when the state owns property, prescription cannot run against it, even if a state agency administers that property.¹⁰¹ The defendants countered that the proposition advanced by the school board was merely dicta and was not an accurate representation of the Louisiana Supreme Court's holding in *City of Pineville*, which was that a school board, having independent power to sue and be sued, could not be considered the "state."¹⁰²

The First Circuit echoed the reasoning of the Louisiana Supreme Court in *City of Pineville* and the Fifth Circuit in *Terrebonne Parish School Board v. Mobil Oil*: a state agency filing suit on its own behalf and of its own volition did not qualify for the state's constitutional immunity.¹⁰³ Applying this reasoning, the First Circuit held in favor of the defendant oil companies and dismissed the school board's claims.¹⁰⁴ The court stated, "The State of Louisiana is not a plaintiff in the instant case, and the governing authority of the parish, Terrebonne Parish Consolidated Government, did not file suit on behalf of the State. Instead, the [school board] asserts that it is the owner of all of the [Terrebonne Parish School Board] property."¹⁰⁵ With this holding, the First Circuit extended the line of jurisprudence rejecting a state agency's, in this case a school board's, ability to invoke the state's constitutional immunity from prescription to the present.

2. *Vermilion Parish School Board v. ConocoPhillips*

The Louisiana Court of Appeal, Third Circuit produced a contrary decision in 2012 in *Vermilion Parish School Board v. ConocoPhillips*.¹⁰⁶ The case, as it appeared before the court of appeal, was a consolidation of three separate actions for the underpayment of royalties derived from Sixteenth Section mineral

100. *See id.*

101. *Id.* at 12.

102. *Southdown*, 887 So. 2d at 12.

103. *See id.*

104. *Id.* at 14.

105. *Id.* at 12.

106. *Vermilion Parish Sch. Bd. v. ConocoPhillips Co.*, 83 So. 3d 1234 (La. Ct. App. 2012).

leases occurring in the 1990s.¹⁰⁷ All defendants filed exceptions of prescription.¹⁰⁸ The trial court ruled that the state was not a party to the mineral leases, that the school board is a separate body with the sole power to enter into the mineral lease and that the school board has the power to sue and be sued.¹⁰⁹ Therefore, the court granted the exception of prescription for each defendant, finding that the three-year prescriptive period was applicable because only the state is granted constitutional immunity from suit.¹¹⁰

On appeal, the school board argued that it entered into the leases on behalf of the state, as trustee for the state as true owner of the land and its mineral rights, and on behalf of the school children, the beneficiaries of the trust.¹¹¹ Actions for the recovery of royalty payments were, therefore, subject to a three-year prescriptive period unless the payment was derived from “state-owned properties.”¹¹² Defendants cited *City of Pineville* and argued that the school board was given the exclusive right to lease Sixteenth Section lands.¹¹³ As the mineral lessor, the school board has the capacity to sue to enforce the contractual rights under the Sixteenth Section land leases, and the defendants argued that it could not assert the state’s constitutional immunity.¹¹⁴

In its analysis, the court confirmed that the title to Sixteenth Section lands lies with the state.¹¹⁵ Therefore, the state owned both the land and the mineral rights, and the school boards merely administered the lands in the state’s name.¹¹⁶ Thus, the school board was a state agency against which prescription could potentially run, but actions involving Sixteenth Section lands were an exception because the school board was merely acting as an agent for the state.¹¹⁷ The court distinguished the case from

107. *See id.* at 1236.

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1237.

112. *ConocoPhillips*, 83 So. 3d at 1237.

113. *Id.*

114. *Id.* at 1239.

115. *Id.*

116. *Id.* at 1238. Although this Comment focuses on the decision in *ConocoPhillips*, at least one other Louisiana Court of Appeal has joined this reasoning. *See State ex rel. Plaquemines Parish Sch. Bd. v. La. Dep’t of Natural Res.*, 99 So. 3d 1028, 1034 (La. Ct. App. 2012) (holding that prescription does not run against the state in an action involving Sixteenth Sections), *writ denied* 107 So. 3d 614 (La. 2013).

117. *See ConocoPhillips*, 83 So. 3d at 1240 (“The law is clear that a state agency can sue and be sued as an independent entity. In that case, the benefit the State has of immunity from prescription is not applicable. However, Section 16

Southdown and stated that the Vermilion Parish School Board benefited from the state's constitutional immunity because the Vermilion Parish School Board included the State as a nominal party in its suit whereas the Terrebonne Parish School Board had not.¹¹⁸ Therefore, Vermilion Parish School Board's action for recovery of royalty payments was not susceptible to prescription.

III. TOWARDS A SOLUTION

When reading the decisions in *Southdown* and *ConocoPhillips* in conjunction with one another, problems become immediately apparent. The rationales of each case are in direct conflict with one another. Both cases involved Sixteenth Section land and prescription issues over mineral leases. The first obvious question is whether the land or the lease was the determinant factor for triggering prescription. *Southdown* holds that the parties to the lease are key in determining whether prescription began to run.¹¹⁹ In *Southdown*, the Terrebonne Parish School Board was an agency acting on its own behalf in making the lease.¹²⁰ As a result, prescription could accrue regardless of the ownership of the land.¹²¹ The court in *ConocoPhillips*, on the other hand, held the presence of Sixteenth Section land as the key issue.¹²² Regardless of the factual autonomy of the school board in its ability to enter into and litigate over mineral leases, the state remained the owner of the land; therefore, claims involving those lands were immune from prescription.¹²³

lands are a different matter. Section 16 lands are lands owned by the State but managed by the school boards for the benefit of public education.”).

118. *See id.* at 1241 (“[T]he [Vermilion Parish School Board] entered into mineral leases as an agent of the State. The [Vermilion Parish School Board] has sued on behalf of the State and makes no claims that it owns the Section 16 lands at issue. Section 16 lands and minerals are owned by the State. The State has a right to sue for underpayment of royalties on Section 16 lands in its own name. The immunity from prescription provision of La. Civ. Code art. 3494(5) clearly applies to “state-owned properties.” The [Vermilion Parish School Board’s] claims that Defendants have improperly calculated and underpaid royalties on the Section 16 lands mineral leases are not prescribed pursuant to La. Civ. Code art. 3494(5) and La. Const. Art. 12, § 13.”).

119. *Terrebonne Parish Sch. Bd. v. Southdown, Inc.*, 887 So. 2d 8, 9 (La. Ct. App. 2004).

120. *Id.* at 12.

121. *Id.*

122. *ConocoPhillips*, 83 So. 3d at 1241.

123. *Id.*

Another problem is one of statutory construction. The court in *ConocoPhillips* cited the language of Louisiana Civil Code article 3494 and noted that three-year liberative prescription did not run against state-owned properties.¹²⁴ As a result, the school board sued for damages in tort rather than for payment of royalties in *Southdown*.¹²⁵ The prescriptive period for tort claims is only one year and is governed by a different provision of the Civil Code: Article 3492.¹²⁶ Article 3492 contains no language exempting actions involving state owned property.¹²⁷ The absence of such language could imply that the Louisiana Legislature intended for claims involving Sixteenth Section lands to only benefit from immunity from prescription in suits involving underpayment of royalties and not in suits involving torts or contracts. It is difficult to imagine that such a result is what the legislature intended. The patchwork nature of both the statutory scheme regarding Sixteenth Section lands, as well as the divided jurisprudence, stems from a problem of classification of the relationship between the state and the land.

A. Classification of the Sixteenth Sections

The language used throughout the Acts of Congress that delegated Sixteenth Sections for public education purposes in all states was described as a reservation.¹²⁸ As described above, Louisiana jurisprudence also adopted much of the language of a trust relationship in describing Sixteenth Section land.¹²⁹ However, in other cases, the relationship has been described as a mandate.¹³⁰ At least one other case has described school boards as owners of the Sixteenth Sections themselves.¹³¹ Each of these classifications has a strong presence in both the civilian tradition and Louisiana

124. *Id.* at 1237.

125. *Southdown*, 887 So. 2d at 8.

126. *See* LA. CIV. CODE ANN. art. 3492 (2014).

127. *See id.*

128. 2 Stat. 391 (1806) (“And be it further enacted, that the President of the United States be, and he is hereby authorized, whenever he shall think it proper, to direct so much of the public lands lying in the western district of the territory of Orleans, as shall have been surveyed in conformity with the provisions of the act to which this act is a supplement, to be offered for sale. All such land shall, with the exception of the section “number sixteen,” which shall be reserved in each township for the support of schools within the same.”).

129. *See supra* Part II.C.

130. *See* Bd. of Dirs. of Public Sch. v. New Orleans Land Co., 70 So. 27, 56 (La. 1915).

131. *See* State *ex rel.* Plaquemines Parish Sch. Bd. v. Plaquemines Parish Gov’t, 652 So. 2d 1, 5 (La. Ct. App. 1994).

law, leaving open the possibility that one of these relationships may help to better define the relationship and alleviate the present confusion. In civil law systems, things are classified for systematic reasons to facilitate understanding and legal regulation.¹³² It is therefore worth stepping away from the current patchwork system of various revised statutes governing Sixteenth Sections in order to properly classify Sixteenth Section land in civilian terminology.

1. Public Things and Private Things

First, it is necessary to classify the Sixteenth Section land. Land, a physical object that can form part of an individual's fortune, is clearly a thing according to the Civil Code.¹³³ Things are divided into common, public, and private things.¹³⁴ The Louisiana Civil Code defines public things as things owned by the state or its political subdivisions in their capacity as public persons.¹³⁵ Private things, by contrast, are owned by individuals or by the state and its subdivisions in their capacity as private persons.¹³⁶ The distinction is important. If Sixteenth Sections are public things, they cannot be owned by school boards unless school boards are considered a subdivision of the state, as all public things are owned by the state or its subdivisions.¹³⁷

Professor Yiannopoulos states that public things may be further divided into two categories.¹³⁸ The first category consists of things that are inalienable and necessarily owned by the state or its political subdivisions.¹³⁹ The second category consists of things that, though alienable and thus susceptible of ownership by private persons, are applied to some public purpose and are held by the state or its political subdivisions in their capacity as public

132. 2 A.N. YIANNPOULOS, PROPERTY § 18, *in* LOUISIANA CIVIL LAW TREATISE 35 (4th ed. 2001).

133. *See* A.N. Yiannopoulos, *Introduction to the Law of Things: Louisiana and Comparative Law*, 22 LA. L. REV. 756, 761 (Louisiana historically defines a thing as anything “which forms the fortunes of individuals.”). The Louisiana Civil Code does not contain a definition of a “thing,” though Louisiana case law traditionally attributed Pothier’s definition to the Code. *See, e.g.,* Lombard v. Sewerage & Water Bd., 284 So. 2d 905, 914 (La. 1973) (noting that the Civil Code of 1870 defined an estate as anything of which riches or fortune may consist) (internal quotation marks omitted).

134. LA. CIV. CODE ANN. art. 448 (2014).

135. LA. CIV. CODE ANN. art. 450 (2014).

136. LA. CIV. CODE ANN. art. 453 (2014).

137. *See* LA. CIV. CODE ANN. art. 450.

138. 3 A.N. YIANNPOULOS, PROPERTY § 45, *in* LOUISIANA CIVIL LAW TREATISE (4th ed. 2001).

139. *Id.*

persons.¹⁴⁰ Sixteenth Section lands would certainly appear to fall into the latter category. The central problem with classifying Sixteenth Sections as public things, however, is commerce. The Louisiana Supreme Court has stated that public things are removed from commerce.¹⁴¹ It is difficult to contemplate describing Sixteenth Section land, which can be sold, leased, and rented as “out of commerce.” It seems more appropriate then that Sixteenth Sections are private things subject to public use.¹⁴² The Civil Code states that private things may be made subject to public use by law or by dedication.¹⁴³ In this case, the original Acts of Congress call for this reservation, but that call has never been expressly translated into Louisiana law.¹⁴⁴ However, the same Acts of Congress qualify as a formal dedication under Louisiana law.¹⁴⁵ It seems rational to classify Sixteenth Section lands as a private thing subject to public use. However, as a private thing, it is necessary to determine if the state or the school boards are the true owner of Sixteenth Sections.

2. *Ownership of Sixteenth Section Lands*

At least one Louisiana court has stated that school boards are the owners of Sixteenth Section lands.¹⁴⁶ However, the vast majority of Louisiana jurisprudence has held this is not correct.¹⁴⁷ Congress reserved and dedicated the Sixteenth Section in each township for the support of public schools.¹⁴⁸ All statutes dealing with Sixteenth Sections expressly explain that the state owns the

140. LA. CIV. CODE ANN. art. 450 cmt. c.

141. *See* *City of New Orleans v. Carrollton Land Co.*, 60 So. 2d 695, 697 (La. 1913).

142. LA. CIV. CODE ANN. art. 455 (2014).

143. *Id.*

144. 2 Stat. 391 (1806).

145. *See* *Cenac v. Public Access Water Rights Ass’n*, 851 So. 2d 1006, 1011 (La. 2003) (“Our legislature has never enacted a comprehensive scheme governing dedication to public use. . . . In the absence of such a comprehensive scheme, our courts have recognized four modes of dedication to public use: (1) formal, (2) statutory, (3) implied, and (4) tacit.”).

146. *State ex rel. Plaquemines Parish Sch. Bd. v. Plaquemines Parish Gov’t*, 652 So. 2d 1, 6 (La. Ct. App. 1994). (“[T]he Louisiana Supreme Court held that passage of the legislation creating the State Mineral Board did not divest parish school boards of their ownership and rights to lease sixteenth section lands and the State Mineral Board had no power to do so absent an express legislative statement, which was not made in the subject legislation.”).

147. *See supra* Part II.

148. *See* 2 Stat. 391 (1806); 2 Stat. 662 (1811).

land in its capacity to own private things, and the school boards administer the Sixteenth Sections.¹⁴⁹

The school boards did not acquire Sixteenth Sections in their own right; instead, they are merely custodians of the property.¹⁵⁰ The State of Louisiana owns Sixteenth Sections in its capacity as a private person, and those Sections are private things applied to some public purpose: public education. Therefore, the school boards are not the actual and true owners of Sixteenth Section lands since it is clear that the state holds title to the land.

3. Co-Ownership

One possible classification for Sixteenth Sections, considering the ambiguous treatment of their ownership, is that school boards and the state are co-owners of Sixteenth Section lands. The Civil Code states that two or more persons may each own an equal share of the same thing.¹⁵¹ This possibility is dubious at best. At no point has any Louisiana statute or any part of the jurisprudence described the relationship between school boards and the state as co-ownership of the Sixteenth Sections. Additionally, there are several factual circumstances that would not suggest a co-ownership situation.

While a school board as well as the state may use and dispose of Sixteenth Section lands, a school board does not, as required by the Civil Code's articles governing co-ownership, need consent of the state to make substantial alterations or improvements to the land.¹⁵² Further, a school board, as a state agency, rather than a true co-owner, does not possess the right to demand a partition of Sixteenth Section provided by Article 807.¹⁵³ Most importantly, co-ownership does little, if anything, to alleviate the issues posed by prescription. Co-ownership would mean that both the state and school board own the land indivisibly. There would remain two owners, one against whom prescription could run and one against whom prescription is constitutionally barred, thereby providing no relief to the present confusion. As such, it is best to look elsewhere to classify this relationship.

149. See LA. REV. STAT. ANN. § 17:100.6 (2013); *supra* note 26.

150. See *supra* Part II.

151. LA. CIV. CODE ANN. art. 480 (2014).

152. See LA. CIV. CODE ANN. art. 804 (2014).

153. *Id.*; LA. CIV. CODE ANN. art. 807 (2014).

4. Mandate

When the Louisiana Supreme Court has attempted to define the ownership of Sixteenth Sections, they articulated the relationship as a donation from the United States Congress with a mandate to manage the land for the benefit of public education.¹⁵⁴ This definition provides another possible civilian legal institution for describing the Sixteenth Section relationship: mandate.¹⁵⁵ A mandate is a “contract in which a person, called the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.”¹⁵⁶ This contract may serve the interests of the mandatary, the principal, both, or a third person.¹⁵⁷ A mandate seems to fit the relationship between the state and the school boards. Louisiana acquired land from the United States Congress as a donation and acts as the principal. The school boards, therefore, function as a mandatary to administer Sixteenth Sections for the purpose of fostering public education for the benefit of the state’s school children.

The main obstacle to classifying this relationship as a mandate, however, is the absence of an express contractual agreement. At its essence, a mandate is a contract.¹⁵⁸ Some statutes governing the authority of school boards come close to accomplishing the job, but they ultimately fall short. For instance, one revised statute dictates a school board’s jurisdiction to include all property dedicated to education within a specific parish.¹⁵⁹ While this statute and others already mentioned¹⁶⁰ define many of the

154. *See* Bd. of Sch. Dirs. v. Ober, 32 La. Ann. 417, 419 (La. 1880) (“The title to this land has never been in the parish Board of School Directors. The title was in the State under the donation of the general government, and she held it for a specific purpose, with authority to sell the lands, and a mandate to hold the proceeds and invest them for the benefit of the schools.”).

155. *See* LA. CIV. CODE ANN. arts. 2989–3033 (2014).

156. LA. CIV. CODE ANN. art. 2989.

157. LA. CIV. CODE ANN. art. 2991.

158. LA. CIV. CODE ANN. art. 2989.

159. *See* LA. REV. STAT. ANN. § 17:100.6 (2013) (“[A]ll lands, buildings and improvements, facilities, and other property having title vested in the public and subject to management, administration, and control by a parish school board for public education purposes but located within the geographic boundaries of a public school board created by the legislature after January 1, 1995, shall be managed, administered, and controlled by the public school board in whose geographic boundaries the lands, buildings and improvements, facilities, or other property is located, effective on the date such school board begins its initial year of actual operation providing for the education of students within its jurisdiction.”).

160. *See* LA. REV. STAT. ANN. § 41:638 (2006) (“Whenever any real property has been acquired by the state of Louisiana, any municipality, parish school board, or any other subdivision or agency of the state of Louisiana by virtue of a deed, act

contours of a school board's responsibilities regarding Sixteenth Sections, they can hardly be called a contract between the state and school boards. The Civil Code requires that each party to a contract consent to its formation.¹⁶¹ Consent to a contract requires an offer to be made by one party and then accepted by the other.¹⁶² A school board is an agency of the state created by the state through the state constitution.¹⁶³ Their administration of Sixteenth Sections devolves on them through operation of law through a statute, rather than their consent to a contract.¹⁶⁴ While school boards have capacity to contract, it cannot be said that the relationship between them and the state regarding Sixteenth Sections is a true mandate.

5. Trust

A third, and potentially more fruitful, mechanism to classify this particular relationship is through the institute of a trust. As noted earlier, the jurisprudence is heavy with references to Sixteenth Section lands being held in trust by the state and the school boards for the benefit of public education. A trust is a common law legal relationship where the trustee undertakes an obligation at the request of a settlor for the benefit of a beneficiary third party,¹⁶⁵ despite the long history of trusts in the United States,¹⁶⁶ they were long unknown in civil law.¹⁶⁷ While always allowed in common law, separation of management and enjoyment

of sale, donation, or other form of transfer, which contains a stipulation that such property is to be used for public school or public educational purposes, said deed, act of sale, donation, or other form of transfer, shall constitute a dedication of such property to the public for such purposes and the school board in whose district the property lies shall have the right to administer and use the property for public school purposes.”).

161. See LA. CIV. CODE ANN. art. 1927 (2014).

162. See *id.*

163. See LA. CONST. art. VIII, § 9(A) (“The legislature shall create parish school boards and provide for the election of their members.”).

164. See LA. REV. STAT. ANN. § 17:100.6 (2013).

165. See BLACK'S LAW DICTIONARY 1546 (8th ed. 1999) (“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*).”); see also GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, HANDBOOK OF THE LAW OF TRUSTS (5th ed. 1973).

166. See generally Carly Howard, *Trust Funds in Common Law and Civil Law Systems: A Comparative Analysis*, 13 U. MIAMI INT'L & COMP. L. REV. 343, 351 (2006).

167. See Pierre Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126, 1126 (1927).

of property is generally only allowed in civil law when a person lacks capacity to manage on their own.¹⁶⁸ Regardless, many of the concepts embodied in the common law trust have traditionally been accomplished in civil law jurisdictions.¹⁶⁹ Louisiana, as a mixed civil law jurisdiction and surrounded on all sides by common law states, chose to adopt its own trust code in 1964¹⁷⁰ rather than adopt traditional civilian approaches to the same relationship.¹⁷¹ The Louisiana Trust Code essentially adopts the common law institution of trust and attempts to structure it in a civilian framework.

The current Louisiana Trust Code defines a trust as “the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another.”¹⁷² Any property susceptible of private ownership or any interest in such property may be transferred in a trust.¹⁷³ The relationship between the state, school boards, and Sixteenth Sections seems well situated to be defined as a trust through the Trust Code. However, there are several statutory difficulties to defining the relationship through the Trust Code. First, the Code only contemplates that natural persons, financial institutions, or private non-profit corporations as these that can serve as trustees

168. See LA. CIV. CODE ANN. art. 48 (2014); LA. CIV. CODE ANN. art. 221 (2014).

169. See Lepaule, *supra* note 168, at 1126; see also Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust*, 42 LA. L. REV. 1721, 1730 (1982). The functions of a trust were accomplished by two Roman institutions, the *fiducia* and the *fidei commissum*. The *fiducia* was a two-party relationship composed of two elements: (1) the real portion, consisting of the conveyance of *dominium* of the *res* to the fiduciary, and (2) the personal or contractual portion, consisting of the agreement by which the fiduciary assumes duties toward the beneficiary, or *fideicomitente*, to use the property for the latter's benefit under specified conditions imposed and then to return the property when the purpose is fulfilled, either to the original transferor or to a third party nominated by him. The beneficiary in the *fiducia* has no enforceable action at strict law, but only an action *in personam*. The *fidei commissum* was a relationship in which property is given to a fiduciary, who is to later turn the property over to another, the *fidei commissarius*. This mechanism differs significantly from a trust in that the first grantee or beneficiary manages the property for his own interests and under no specific instructions from the transferor. The interests of the grantees are thus successive, rather than concurrent, as in a trust. Finally, the *fidei commissum* may only be created by testament.

170. See Lorio, *supra* note 170, at 1729–39 (discussing Louisiana's trouble with adopting a trust code).

171. *Id.*

172. LA. REV. STAT. ANN. § 9:1731 (2005).

173. LA. REV. STAT. ANN. § 9:1771 (2005).

and beneficiaries.¹⁷⁴ Second, the Trust Code specifies that trusts be made by authentic act under private signature.¹⁷⁵

Clearly, the Louisiana Trust Code only contemplates written instruments between individuals and corporations, rather than an agreement between the state and the public. However, if the state and school boards are considered to be acting in their capacity as private persons, the trust relationship seems to properly account for all of the facets of the relationship. The state, as trustee, holds the Sixteenth Section land and all fruits and products thereof in trust for the beneficiary, which are the state's citizens in this case. The trustee delegates the authority to administer the property to school boards. Conceivably, this classification would solve the issue of prescription as the state, in its capacity as trustee, holds title to the Sixteenth Section lands and school boards merely act on the state's behalf.

For the purposes of Sixteenth Sections, the beneficiary is not clearly stated. The benefit should devolve on public education. This would seem to suggest that the public is the beneficiary of this agreement. The Trust Code allows a trust to be created for a class of persons; however, it only contemplates a collection of an individual's descendants.¹⁷⁶ Regardless, the trust relationship offers a much more workable classification than other civilian options available.

To summarize, it is clear that Sixteenth Sections are private things subject to public use that are owned by the state and administered by school boards. Viewed as a trust relationship, the United States as settlor granted Sixteenth Section land to the state of Louisiana. The state holds these lands as trustee; when school boards engage in juridical acts involving Sixteenth Sections, they function as the state in its capacity as trustee.¹⁷⁷ Therefore, actions involving Sixteenth Section lands should not be subject to prescription because the state, in its capacity as a private person, owns these lands that are merely administered by school boards.

B. The Public Trust Doctrine and the Louisiana Constitution

Another potential solution to the issue of prescription involves the interplay between Article IX of the Louisiana Constitution and

174. See LA. REV. STAT. ANN. § 9:1783 (2005); LA. REV. STAT. ANN. § 9:1801 (2005).

175. LA. REV. STAT. ANN. § 9:2051 (2005).

176. See LA. REV. STAT. ANN. § 9:1893 (2005 & Supp. 2014).

177. See *State ex rel. Plaquemines Parish Sch. Bd. v. La. Dep't of Natural Res.*, 99 So. 3d 1028, 1034 (La. Ct. App. 2012), *writ denied* 107 So. 3d 614 (La. 2013) (adopting the theory that the state acts as trustee for Sixteenth Section lands).

the one legal framework that allows the general public to function as a trust beneficiary: the public trust doctrine. The public trust doctrine provides that public trust lands, waters, and living resources in a state, are held by the state in trust for the benefit of all of the people. The public trust doctrine also establishes the right of the public to fully enjoy public trust lands, waters, and living resources for a wide variety of recognized public uses.¹⁷⁸ As a common law doctrine, the public trust doctrine is not a codified body of law, but a loose conglomeration of maxims that allows common law judges to restrict improper uses of public lands.¹⁷⁹

Clearly, the public trust doctrine provides an ideological foundation for extending prescription immunity to Sixteenth Section lands. Additionally, the doctrine has previously been well-received in other aspects of Louisiana policymaking. For example, some have advocated for an increased reliance on the public trust doctrine as a foundation for governmental defense of Louisiana's coastal wetlands.¹⁸⁰ Others, however, have pointed out that adoption of a loose common law doctrine is non-civilian and not consistent with Louisiana law.¹⁸¹ Louisiana, as a mixed jurisdiction state, already has many statutes addressing the same principles. Louisiana has never expressly adopted the public trust doctrine; however, it is embodied in parts of both the Louisiana Constitution and the Civil Code.¹⁸²

Article IX, Section 1 of the Louisiana Constitution states that “[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”¹⁸³ This article demonstrates a firm commitment by the Louisiana government to protect the natural resources of the state. Similarly, the Civil Code states that some things are owned by the

178. James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 862 (1992).

179. See Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 LA. L. REV. 1535, 1535 (1993) (“Though the expression public trust doctrine is often used with different meanings, it is used here to refer to a body of law governing use of public lands and water bottoms that contains some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality.”) (internal quotation marks omitted).

180. See Wilkins & Wascom, *supra* note 179, at 861; see also Sam Brandao, Comment, *Louisiana's Mono Lake: The Public Trust Doctrine and Oil Company Liability for Louisiana's Vanishing Wetlands*, 86 TUL. L. REV. 759, 776 (2012).

181. See Hargrave, *supra* note 180, at 1536.

182. See Wilkins & Wascom, *supra* note 179, at 868.

183. LA. CONST. art. IX, § 1.

state for the benefit of public use.¹⁸⁴ The Louisiana Supreme Court has also directly acknowledged that the public trust doctrine is implicitly embodied in Article IX of the Louisiana Constitution. In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,¹⁸⁵ the Louisiana Supreme Court considered whether Article IX of the Constitution permitted the state's Environmental Control Commission to grant permits for a hazardous waste disposal facility.¹⁸⁶ The court held that Article IX's rule was a "rule of reasonableness," which "requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."¹⁸⁷

Subsequently, in *Avenal v. State*, the Louisiana Supreme Court considered whether a project to introduce freshwater from the Mississippi River into saltwater marshes to combat coastal erosion was allowed under Article IX.¹⁸⁸ The added freshwater made the particular marshes less adequate for oyster cultivation, and various oyster fisherman sued in a class action.¹⁸⁹ The court held that the freshwater diversion plan was in line with the public trust doctrine and was constitutional despite the economic hardships imposed on fishermen.¹⁹⁰

Considering the public trust doctrine together with jurisprudence produces an additional judicial solution for the prescription problem with Sixteenth Sections. Just as the Louisiana Supreme Court defined coastal wetlands as a protected resource under Article IX in *Save Ourselves*, it is well within the power of the court to define Sixteenth Sections as a protected natural

184. See LA. CIV. CODE ANN. art. 450 (2014); LA. CIV. CODE ANN. art. 452 (2014).

185. *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152 (La. 1984).

186. *Id.* at 1154.

187. *Id.* at 1157.

188. *Avenal v. State*, 886 So. 2d 1085 (La. 2004).

189. *Id.* at 1091–92.

190. *Id.* at 1101–02 (“We find that the implementation of the Caernarvon coastal diversion project fits precisely within the public trust doctrine. The public resource at issue is our very coastline, the loss of which is occurring at an alarming rate. The risks involved are not just environmental, but involve the health, safety, and welfare of our people, as coastal erosion removes an important barrier between large populations and ever-threatening hurricanes and storms. Left unchecked, it will result in the loss of the very land on which Louisianans reside and work, not to mention the loss of businesses that rely on the coastal region as a transportation infrastructure vital to the region's industry and commerce. The State simply cannot allow coastal erosion to continue; the redistribution of existing productive oyster beds to other areas must be tolerated under the public trust doctrine in furtherance of this goal.”).

resource as well. This reclassification would effectively resolve the prescription issue and render the ownership of Sixteenth Section land a moot point. Additionally, considering the original and enduring purpose of Sixteenth Section lands, it would be proper to hold actions involving Sixteenth Section lands immune from prescription despite the potential for economic hardships oil companies, just as the court did in *Avenal*.

IV. CONCLUSION

It is becoming increasingly difficult to separate energy policy from the policy of natural resources.¹⁹¹ Whether it is oil, natural gas, wind, water, or nuclear power, each energy source has implications for public and natural resources. Louisiana has, for many years, occupied a critical place in the United States' energy industry. Oil and gas drilling and mineral exploration are central components of Louisiana's economy. As the nation's energy consumption continues to expand, more natural resources will need to be expended to satisfy the demand. In the long term, lawmakers will be forced to make more value judgments about which resources will and will not be sacrificed to satisfy America's energy demand.

In the short term, the law controlling Louisiana's Sixteenth Section land demands clarity. If Louisiana's legislators can control the future, Louisiana's judges can control the present. The solutions discussed are not the only solutions to the problems surrounding Sixteenth Section land. A comprehensive revision of the revised statutes governing public school lands could also be beneficial to Louisiana and would alleviate this problem and others. Even without such a revision, however, the current jurisprudence provides the Louisiana Supreme Court two avenues to mend the current circuit split and provide some future security to Louisiana public education.

While not as visible as an endangered species or a vanishing wetland, the land set aside in Louisiana and other states for public education by the founding fathers is an immense natural resource, and it deserves protection, even if that protection requires inconvenience for the energy industry. Sixteenth Section lands were granted to the state solely to enhance the quality of education for the state's youth. Only if these lands remain solely reserved for that purpose, will they function as Thomas Jefferson once hoped. The realization of those hopes is certainly worth forcing company

191. See generally Sam Kalen, *Replacing a National Energy Policy with a National Resources Policy*, NATURAL RES. & ENV'T, Winter 2005, at 9.

lessees into a greater burden of vigilance in legal actions. Regardless of whether the Louisiana Supreme Court adopts a trust classification or grants natural resource status to Sixteenth Section lands, it must overturn the line of cases ending in *Southdown* and hold actions involving Sixteenth Section lands immune from prescription. To do otherwise betrays the goals for which these lands were originally entrusted to the state.

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