Laying to Rest an Ancien Régime: Antiquated Institutions in Louisiana Civil Law and Their Incompatibility with Modern Public Policies

Christopher K. Odinet

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol70/iss4/11
Laying to Rest an *Ancien Régime*: Antiquated Institutions in Louisiana Civil Law and Their Incompatibility with Modern Public Policies

TABLE OF CONTENTS

I. Introduction...........................................................................................................1368

II. The Current Louisiana Institutions: Rules, Origins, and Developments..............................1369
   A. Conflicting Possession ..............................................................1370
      1. The Possessory Rules and Legal Framework ........1370
      2. The Historical “Coming of Age” of Conflicting Possession ..............................................................1372
   B. Prohibited Substitutions .........................................................1375
      1. The Rules and Prohibitions on Substitutions ........1375
      2. The Historical Mistreatment of Prohibited Substitutions..............................................................1375
   C. Partition by Co-Owners .........................................................1380
      1. The Rules on Partition by Co-Owners ..................1380
      2. Co-Ownership’s Troubled History ......................1381

III. Overthrowing Louisiana’s *Ancien Régime*: The Need to Reevaluate and Harmonize the Civil Law with Contemporary Public Policies.................................1384
   A. Wetlands and Coastal Conservation .........................1385
      1. Louisiana’s Commitment to Maintaining Wetlands ..........1385
      2. Revisiting Prohibited Substitutions Through a Conservationist Perspective ..............................................................1388
   B. Creation and Maintenance of Green Spaces .............1390
      1. Keeping Louisiana Green ........................................1390
      2. Revisiting Co-Ownership and Partition with an Eye Toward Green Space ......................1391
   C. Combating Urban Sprawl: The Push for Smart-Growth ..............................................................1393
      1. Louisiana Growing Smart ......................................1393
      2. Revisiting Conflicting Possession Alongside Urban Sprawl ..............................................................1396

IV. Conclusion ...............................................................................................1398
Man faces unprecedented challenges as he barrels through the twenty-first century. The world is now approaching a population of seven billion people, concentrated largely in crowded, overdeveloped urban centers. Global climate change is predicted to cause massive population displacement related to the disappearance of coastal lands and to create dire food shortages within the coming decade. Increasingly, societies are forced to make systemic adaptations to handle the strain of these modern-day crises. Governments must be innovative and adaptive in their efforts to protect the public. When the fundamental goals and objectives of society shift, the law should be modified to encourage these changes.

Nowhere is the need for forward-thinking greater than in the state of Louisiana. Traditionally an agrarian society with a sparse population, Louisiana has historically followed a blind-eyed approach to economic development. State policymakers have emphasized a legal system that places land development above all other concerns since the time Louisiana joined the Union. This emphasis on land development is especially true with respect to Louisiana’s civilian legal institutions of conflicting possession, prohibited substitutions, and partition by co-owners; each of these institutions rests on previously favored public policies that encouraged the unsystematic development of land.

However, times have changed in Louisiana and so has public policy. The Louisiana institutions of conflicting possession, prohibited substitutions, and the restriction of partition by co-owners adhere to an archaic framework of pursuing the development and commercialization of land that is pervasive throughout Louisiana civil law. These institutions, drawn largely

Copyright 2010, by CHRISTOPHER K. ODINET.
4. *See infra Part II.A–C.*
5. *See id.*
6. *See id.*
7. *See id.*
from nineteenth century French sources, are not aligned with
Louisiana’s twenty-first-century policy goals. Louisiana is
concerned today with preserving land and ensuring that over-
commercialization does not result in the disappearance of vital
coastal areas, the vanishing of the state’s lush vegetation and green
spaces, and the transformation of its cities into crime-ridden and
congested concrete jungles. Unfortunately, while Louisiana public
policies have changed over the course of the last 200 years, its
laws on land development are still anchored to principles dating
back to France’s nineteenth century ancien régime.

This Comment argues that the Louisiana civil law institutions
of conflicting possession, prohibited substitutions, and partition by
co-owners are in need of reexamination because they rest on
antiquated public policies. Part I describes the current Louisiana
rules on each of the institutions, explores their origins, and
chronicles Louisiana’s experience with each. Part II analyzes the
policy of commercial development that underpins each institution
in light of the contemporary public policies of conserving coastal
wetlands, cultivating green space, and combating urban sprawl
through smart-growth planning. Part III concludes that the current
development-intensive framework of each institution should be
reevaluated in light of today’s competing policy considerations.

II. THE CURRENT LOUISIANA INSTITUTIONS: RULES, ORIGINS, AND
DEVELOPMENTS

Conflicting possession, prohibited substitutions, and the
restriction of partition by co-owners have a common nexus in their
drive toward the unrestrained development of land. Though each
institution operates separately and plays a distinctly different role
in Louisiana law, together they represent the policy design that
land should always remain within the stream of commerce and
susceptible to development.

8. Many, if not most, provisions of the Louisiana Digest of 1808 were
drawn directly from the French Civil Code and other French sources. The
French Civil Code was a direct reflection on the changing social and political
climate of France during the post-Revolution period. The country was moving
away from its hereditary and hierarchical aristocratic social structure under the
monarchy—commonly called the ancien régime. See Robert A. Pascal, Sources
of the Digest of 1808: A Reply to Professor Batiza, 46 TUL. L. REV. 603, 606
(1972); see also John T. Hood, Jr., The History and Development of the
9. See infra Part III.A–C.
10. See infra Part II.A–C.
11. Id.
12. Id.
A. Conflicting Possession

Possession is one of the most powerful legal concepts within Louisiana law because it concerns the ability to acquire and maintain control of property. The rules governing possession are particularly contrary to modern public policies in that possession is chiefly awarded to the individual who physically develops the land in dispute.

1. The Possessory Rules and Legal Framework

Corporeal possession is achieved when the possessor performs actual "physical acts of use, detention and enjoyment on the land." For example, if a person farms or lives on a tract of land, he is in corporeal possession of that land. From the moment his possession begins, the clock ticks toward his eventual ownership through acquisitive prescription.

Civil possession begins with physical acts on the land and continues after these acts have ceased by virtue of the individual's intent to continue possessing. This type of possession rests on the fact that at one time the possessor was actually performing physical acts on the disputed area but thereafter left the land while still maintaining his intent to continue possessing it. From the point at which he physically left the land, he is considered to continue possessing it by the mere presumption that he still has the "intent to possess." As long as the individual maintains his intent

14. See Yiannopoulos, infra note 27.
15. LA. CIV. CODE ANN. art. 3425 (2007). Sufficient physical acts, according to Louisiana courts, include things like maintaining a pipeline under grant, painting a line as a boundary around the property, and perhaps even the grazing of cattle. See Harper v. Willis, 383 So. 2d 1299, 1301 (La. App. 3d Cir. 1980), writ denied, 390 So. 2d 202 (La. 1980); Antulovich v. Whitley, 289 So. 2d 174, 176 (La. App. 1st Cir. 1973); Manson Realty Co. v. Plaisance, 196 So. 2d 555, 557 (La. App. 4th Cir. 1967), writ denied, 199 So. 2d 915 (La. 1967).
16. LA. CIV. CODE ANN. art. 3446 cmt. b (2007). Acquisitive prescription is the process where if an individual possesses a thing for long enough, he will become the owner of that thing. See Kinsella, infra note 39.
17. LA. CIV. CODE ANN. art. 3431 (2007).
18. Id. cmt. c.
19. Id. cmt. b. For example, if an individual purchases one hundred acres of rural land and clears the land, he is considered to have corporeal possession of it by virtue of his physical, corporeal acts. If the owner then leaves the acreage to return to his home in the city, but still continues to pay property taxes on the rural property, he is considered to have civil possession of the property. It is not necessary for him to continuously, physically interact with the land in order to
to possess as owner, his possession remains intact despite his physical absence.\textsuperscript{20}

In contrast to corporeal or civil possession, constructive possession is a legal fiction whereby a person may corporeally possess only a portion of his land but nevertheless be in possession of everything within his title.\textsuperscript{21} To constructively possess, the possessor must have title to the land, but he need only perform physical acts on a portion of the tract.\textsuperscript{22} Constructive possession rests solely on the premise that as long as a portion of the titled land is corporeally possessed, other portions of the land need not be disturbed.\textsuperscript{23}

Each of the three types of possession shares a commonality in supporting land development. Although each type requires a varying degree of development, some kind of physical activity on the land is required for each possession to commence. Corporeal possession requires physical acts on the entire tract, civil possession requires only initial physical acts, and constructive possession requires physical acts on just a portion of the land. Whatever the measure, the law of possession centers on some degree of physical development of land for possession to begin.

Interestingly, conflicting possession is not mentioned anywhere in Louisiana legislation, leaving it to the courts to form and mold a framework for situations where possessions conflict.\textsuperscript{24} This is maintain his possession. The paying of taxes is evidence of his intent to continue possessing the land as owner despite not being physically present, e.g., \textit{Manson Realty Co.}, 196 So. 2d at 558.


\textsuperscript{21} \textsc{La. Civ. Code Ann.} art. 3426 (2007); \textit{see also} State v. Sylvia, 845 So. 2d 358, 363 (La. 2003).

\textsuperscript{22} \textsc{La. Civ. Code Ann.} art. 3426 (2007). The Louisiana Supreme Court case of \textit{Bolding v. Eason Oil Co.} demonstrates the basic factual scenario giving rise to constructive possession. 178 So. 2d 246 (La. 1965). In that case, the landowner Mr. Ames had title to a large plantation including land on the backside of a levee abutting the property. \textit{Id.} at 289. Mr. Ames employed eighty laborers, grew and harvested sugar, and raised goats and sheep on the vast majority of the land, but he never set foot onto the backside of the levee. \textit{Id.} at 288. In a possessory dispute that later arose between Ames’ heirs and the holder of a purported mineral lease on the land behind the levee, the court held that Mr. Ames constructively possessed the entire land within the bounds of his title, despite the fact that neither he nor his laborers ever so much as set foot on the area behind the levee. \textit{Id.} at 289.


\textsuperscript{24} \textit{See also} \textsc{La. Civ. Code Bk. III, Tit. XXIII, § 2} (2008). \textit{See generally LaMaster, supra} note 13.
particularly relevant in the context of possessory actions because whoever wins the possessory action is presumed to be the owner of the disputed land.\textsuperscript{25} At that point, the clock toward becoming owner through acquisitive prescription continues to run in the possessor's favor.\textsuperscript{26} When confronted with conflicting possessions, Louisiana courts have consistently held that the property owner loses his constructive or civil possession if another appears and begins corporeal possession on the same tract of land.\textsuperscript{27} Simply put, in any dispute among the possessions, corporeal possession always prevails.\textsuperscript{28}

2. The Historical "Coming of Age" of Conflicting Possession

While Louisiana jurisprudence makes it clear that the result of the rules governing conflicting possession is to reward the corporeal possessor,\textsuperscript{29} it is not clear in the jurisprudence why corporeal possession is the preferred form under Louisiana law. Making this determination requires a look back to the roots of Louisiana law.\textsuperscript{30}

French legislation, like Louisiana legislation, never met the question of conflicting possession head on, but French jurisprudence also supports the theory that corporeal possession should prevail in a possessory dispute.\textsuperscript{31} French civil law commentator Marcel Planiol describes civil and corporeal possession as the only two types of possession, with French jurisprudence endorsing corporeal possession as the superior of the two.\textsuperscript{32}

The reason behind corporeal possession's superiority in French law likely is based on the public policy of the State toward land

\begin{itemize}
  \item \textsuperscript{25} LA. CODE Civ. PROC. ANN. art. 3655 (2008).
  \item \textsuperscript{26} See LaMaster, supra note 13, at 980.
  \item \textsuperscript{27} See A.N. YIANNOPoulos, PROPERTY § 313, in 2 LOUISIANA CIVIL LAW TREATISE 621 (4th ed. 2001).
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} See supra Part II.A.1.
  \item \textsuperscript{31} 3 MARCEL PLANIOI & GEORGES RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS § 152, at 169 (2d ed. 1952) (trans. by J.-R. Trahan) (“C'est ce qui arrive si une autre personne s'empare du fonds et en jouit paisiblement pendant un an.” ["Possession is lost when another person enters onto the land and peacefully performs physical acts of enjoyment for a year."]).
  \item \textsuperscript{32} Id. at 169. Generally, section 152 in the first paragraph describes corporeal possession, and the second paragraph speaks to civil possession; the idea of constructive possession is never mentioned.
\end{itemize}
development in the nineteenth-century.\textsuperscript{33} Both before and after the French Revolution, France was concerned with the development and cultivation of land for agricultural purposes.\textsuperscript{34} The favoritism that French jurisprudence showed toward corporeal possession furthered France's nineteenth century development policy by encouraging individuals to commercialize their land. Thus, the rules on conflicting possession can be rationalized by the social circumstances in France following the French Revolution. However, it was not until French civil law was adopted and progressed in Louisiana that the rules governing possession and the distinctive term “conflicting possession” were developed.\textsuperscript{35}

Louisiana adopted France's theory that corporeal possession trumps other forms of possession, but the state took an original approach to possession. Specifically, constructive possession is never mentioned in French doctrine or jurisprudence, but it was nevertheless created, and is continually discussed, by Louisiana courts.\textsuperscript{36} The doctrine behind conflicting possession gradually progressed over time as courts confronted “adverse,” or conflicting, types of possession.\textsuperscript{37} In each case of a possessory conflict, the courts allowed the corporeal possessor to overcome adverse civil or constructive possession; however, the courts never mention the purpose behind this decision.\textsuperscript{38}

The purpose of the law’s bent toward development is revealed in the concept of acquisitive prescription: the institution with which possessory contests culminate. Acquisitive prescription allows a person who possesses a tract of land for long enough to become the true owner.\textsuperscript{39} The French, from whom the institution of acquisitive prescription was borrowed, view acquisitive

\begin{itemize}
  \item \textsuperscript{33} A central issue surrounding French economic history was to what extent legal institutions under the ancien régime held back agricultural development. \textit{See} Jean-Laurent Rosenthal, \textit{The Fruits of Revolution: Property Rights, Litigation, and French Agriculture 1700–1860} (1992).
  \item \textsuperscript{35} \textit{See generally} \textit{La. Civ. Code} Bk. III, Tit. XXIII, § 2 (2008) (displaying the lack of guidance in the Louisiana Civil Code concerning the rules for conflicting possession, largely leaving the matter up to the courts).
  \item \textsuperscript{36} \textit{La. Civ. Code Ann.} art. 3426 (2007); \textit{see} Bd. of Comm’rs v. S.D. Hunter Found., 354 So. 2d 156, 177 (La. 1978); Bolding v. Eason Oil Co., 178 So. 2d 246, 290 (La. 1965); Winjum v. J.G. Duplantis, 393 So. 2d 405, 408 (La. App. 1st Cir. 1980).
  \item \textsuperscript{37} \textit{See} State v. Sylvia, 845 So. 2d 358 (La. 2003); Oliver v. Kennington, 458 So. 2d 130 (La. App. 2d Cir. 1984); Mason Realty Co. v. Plaisance, 196 So. 2d 555 (La. App. 4th Cir. 1967), \textit{wit denied}, 199 So. 2d 915 (La. 1967).
  \item \textsuperscript{38} \textit{See id.}
  \item \textsuperscript{39} \textit{See} N. Stephan Kinsella, \textit{A Civil Law to Common Law Dictionary}, 54 \textit{La. L. Rev.} 1265 (1994).
\end{itemize}
prescription as a method whereby a person may obtain valid and complete ownership over a thing without fear of future revindication. Moreover, Planiol contends that acquisitive prescription serves as a mechanism that forces individuals who do not perform physical acts of possession on their land to potentially surrender their ownership rights. The idea that an individual must perform material acts of possession underpins the theory that the law seeks to reward the possessor who physically interacts with the land and punish the individual who leaves his land at rest. Superimposing the purpose of acquisitive prescription over the institution of conflicting possession, it becomes clear that the reason corporeal possession defeats civil or constructive possession is that the law seeks to reward the possessor who develops the land—the same rationale that drove the French to permit corporeal possession to overcome civil possession back in the nineteenth century.

Through favoring corporeal possession, Robertson v. Morgan clearly demonstrates the law’s favoritism of land development. The owner in Robertson purchased a forty-acre tract of land in 1902. He fenced in a portion of his property and performed corporeal acts thereon while leaving the other portions undisturbed. In 1912, a neighbor—believing the owner’s undisturbed tract belonged to him—built a dipping vat, a road, and a pond on the disputed land. The court held that “whatever constructive possession of the strip [the owner] may have had by virtue of title to it was lost by the corporeal detention of the property by [the neighbor] in 1912 and following.” The court awarded possession to the neighbor because of his commercial acts on the land. This case demonstrates that Louisiana law punishes the passive owner and rewards the active possessor, regardless of the owner’s motivations for not developing his land.

41. Id. (“And [ownership through acquisitive prescription through a bad faith possessor] would happen even more infrequently that the owner despoiled through prescription had not been guilty of negligence. Why did he remain for such a long time without performing an act of possession as regards his [land] or without laying claim to it?”).
42. See Weber, supra note 34 and accompanying discussion of the nineteenth-century view toward land in France.
44. Id.
45. Id. at 143.
46. Id. at 144.
47. Id.
B. Prohibited Substitutions

Unlike conflicting possession, which encourages an individual to develop his land often so as to not lose his possession to another, the doctrine of prohibited substitutions restricts an individual from taking land out of commerce, thus rending the property commercially immobile.

1. The Rules and Prohibitions on Substitutions

Louisiana Civil Code article 1519 prohibits any kind of donation that attaches to it a condition that is impossible, illegal, or immoral. Despite this vague and unhelpful language, courts have held that conditions that withhold land from commerce fall within this category of illegal conditions and are thus void. Prohibited substitutions—described in Louisiana Civil Code article 1520—offer a specific application of the law’s pro-commercial land-use policy. Distinctively, prohibited substitutions require, as an essential element, that the donee preserve the property from the flows of commerce. With its varied history, its frequent application to real property, and its key element of preservation, the doctrine of prohibited substitutions provides a fitting institution to illustrate Louisiana’s adherence to old notions pertaining to land development, which do not reflect modern public policies.

“The essential elements [of a] prohibited substitution are that the immediate donee is obliged to keep the title of the legacy inalienable during his lifetime, to be transmitted at his death to a third person designated by the original donor or testator.” Put another way, the doctrine of prohibited substitutions restricts an individual from donating his property in full-ownership to another with the condition that the donee be required to preserve the property and, upon the donee’s death, transmit it to another individual in successive full-ownership.

2. The Historical Mistreatment of Prohibited Substitutions

Much like the doctrine of conflicting possession, the Louisiana doctrine of prohibited substitutions was borrowed from the French
in the early 1800s. The origins of the doctrine, however, can be traced back even further to Roman law, which recognized the fideicommissa—"a bequest or gift given to a person under the request or exhortation that the donation be given to another." Although somewhat different from the substitutions prohibited in the Louisiana Civil Code, the fideicommissa served the functional role in Roman society of providing a form of dispossession that entailed little to no form requirements and allowed a testator to "channel the property to someone who could not be made an heir or legatee directly," such as non-Roman citizens or women. For the Romans, taking land out of commerce was a negligible, residual effect of an institution that they believed served a viable, justifiable public and social purpose.

The fideicommissa of the Roman law carried over into French customary law at the time of the "Renaissance of the Roman law," which spread the civil law of Rome to many of Europe's western countries in the eleventh century. However, a prohibition on substitutions—not a part of Roman law—was eventually adopted in France and soon became an important part of post-Revolutionary French law.

55. The fideicommissa, the early ancestors to the substitutions prohibited in the Louisiana Civil Code, were allowed during Roman times. Id. at 719–24 (citing HANS JULIUS WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION 13 (1951)). The Roman fideicommissa, although somewhat similar, was different than the type of substitutions presently prohibited in the Louisiana Civil Code because the fideicommissa came in two forms and gave more discretion to the donee to do what he wished with the bequest. See id. The first kind was where the donor would donate land to an heir and, should the heir reject the bequest or be incapacitated, a third party would be substituted for the heir, who would then inherit the property. Id. In the other form, the donee received the property and was only obligated to transfer to a third party any of the original property that still remained upon the donee's death. Id.
56. Id. (citing MARCEL PLANIOL & GEORGES RIPERT, TREATISE ON THE CIVIL LAW no. 3267, at 589 (La. St. Law Inst. trans., 11th ed. 1959)); see also id. at 719–20 ("[I]n Roman times, 'none but Roman citizens could be validly instituted as heirs.' The Lex Voconia forbade wives or daughters from acquiring goods either by will or succession. Consequently, testators had to be clever and address themselves to intermediaries or fiduciaries. The testator would bequeath property to these fiduciaries and ask that the property be passed on to a designated person, known as the fideicommissarius.").
57. Id.
58. Id. at 723–24.
59. ANDRÉ TRASBOT ET YVON LOUSSOUARN, DONATIONS ET TESTAMENTS, in 5 MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no. 284, at 393 (2d ed. 1957) (trans. by author) ("Le développement des substitutions dans l'ancien Droit est dû à la constitution
The French prohibition on substitutions had no connection to promoting the development of land, which later Louisiana courts have consistently concluded is the purpose behind prohibiting substitutions in Louisiana. In nineteenth-century France, land was the predominant indicator of wealth. Substitutions allowed families—particularly the nobility—to keep land within their clans despite the delinquent acts of an aberrant heir. French Kings made some limitations on substitutions concerning the length of the successive dispossession, but generally the French freely used the device with little government interference. The French, especially the nobility, desired to keep their lands and wealth within certain family lines; substitutions allowed them to achieve this objective.

After the French Revolution, a general prohibition against substitutions was set out for the first time in the French Code Civil. The post-Revolutionary French were resentful of substitutions, viewing them as a way for the nobility to preserve their land and wealth to the detriment of the lower and middle classes. Thus, the initial reason for prohibiting substitutions was that the post-Revolutionary French viewed them—and most all laws of the pre-Revolutionary ancien régime—as vestiges of the hated monarchy.

Both the Romans and the French had social and political reasons for historically either allowing or prohibiting substitutions. Their decisions on how to handle the institution mirrored the idiosyncrasies of the times. For Romans, it was a way to bestow...
bequests on those who could not be heirs or legatees directly under the law. For the French, it served as a way to erase the past injustices of the aristocracy. The French Civil Code provided many of the provisions adopted by the Louisiana Digest of 1808, including provisions related to prohibited substitutions. Curiously, Louisiana’s experience with substitutions is not reflective of any socio-political events surrounding the time when the institution was first adopted into state law. Rather, the doctrine of prohibited substitutions blindly became part of Louisiana’s civil law without any clear historical factors urging its adoption at all.

It is uncertain why the drafters of the Louisiana Digest of 1808 chose a wholesale adoption of the French article prohibiting substitutions when compiling their projet, particularly considering that the Spanish law then in force in Louisiana allowed for substitutions. From a historical standpoint, the Louisiana adoption of the French article prohibiting substitutions makes little sense. There was no uprising in Louisiana between an aristocracy and the working class, but the state nevertheless adopted, and has continued to unalteringly adhere to, the post-Revolutionary French doctrine of prohibiting any and all substitutions without any regard to their original purpose and rationale. Of particular note is the fact that Louisiana retains the prohibition against substitutions even though the French—recognizing the institution’s practical functions—have repealed the prohibition in their own civil code. The problem of land being tied up in a very small portion of the populace—e.g., the aristocracy—is not a problem today in France and has never been a problem in Louisiana. Moreover, the donee in a substitution still has the right to use and enjoy the property; he merely lacks the ability to alienate or encumber it. Substitutions are, therefore, not as calamitous as the post-Revolutionary French Civil Code—or the Louisiana Civil Code—would envision them to be.

Despite the actual historical context from which the prohibition on substitutions evolved, Louisiana courts have unilaterally declared the purpose behind prohibiting them to be deeply rooted in the policy of the state to leave land free and unfettered for the purposes of commerce and development. The essence of the

68. See Tucker, supra note 62, at 470.
69. See C. civ. art. 896 (1804), repealed on L. 13 mai 1835 (Fr.); see also Scalise, supra note 54, at n.55 (citing PHILIPPE MALAURIE ET LAURENT AYNÈS, COURS DE DROIT CIVIL 409 (4th ed. 1998)).
70. See Scalise, supra note 54, at 748–49.
71. Id.
72. See Female Orphan Soc’y v. Young Men’s Christian Ass’n, 44 So. 15, 18 (La. 1907) (“The policy of our law, in prohibiting substitutions, is founded on
doctrine of prohibited substitutions is that the law does not want individuals to remove property from commerce for a prolonged period of time.\textsuperscript{73} If the law allowed donors to donate property in a successive order with the duty to preserve, then development of the property could not occur. Because the original donee (called the institute) would have a duty to preserve the property for a subsequent donee (called the substitute), the original donee would be prohibited from otherwise transferring or encumbering the property. The immobility that would be imposed on the property would prevent the property from being developed or commercialized.\textsuperscript{74} Thus, Louisiana law prohibits such substitutions.

This effect is evident in the Louisiana Supreme Court's decision in \textit{Succession of Guillory}. In that case, the decedent left a portion of her property to Citizens National Bank, which was to hold and preserve the property and deliver to her son the property's monthly incomes for the remainder of his life.\textsuperscript{75} Upon the death of the decedent's son, the bank was to transfer the property in full ownership to the decedent's church.\textsuperscript{76} The decedent's son, desiring the entire property and not content with merely the monthly income, brought suit against the administrator of the succession, arguing that the disposition made by his mother was the type of substitution that was prohibited under the Louisiana Civil Code.\textsuperscript{77} The court held that because the donation would cause one individual, the bank, to hold property, preserve that property, and transfer the property upon the death of a third party, the son, the

reasons of public convenience and utility, to preserve the order of successions uniform, to prevent confusion, difficulties, and uncertainties of titles to property held under entails, and \textit{to leave it free for the purpose of commerce.}\textsuperscript{78} (emphasis added) (quoting Arnaud v. Tarbe, 4 La. 502, *3 (La. 1832)); State v. McDonogh's Ex'rs, 8 La. Ann. 171, *38 (La. 1853); see also Succession of Kerman, 26 So. 749, 750 (La. 1899) (stating that the substitution in the will sought to place property out of commerce: a disposition against public policy).

\textsuperscript{73} See id.; see also LA. 
CIV. CODE ANN. art. 1520 (Supp. 2010).

\textsuperscript{74} The Louisiana Civil Code contains other broader restrictions on taking property out of commerce, such as the general prohibition against illegal or immoral conditions. See LA. 
CIV. CODE ANN. art. 1519 (2000). However, the issue of prohibited substitutions typically involves situations where, specifically, land is being rendered inalienable and is thus the institution that this Comment addresses. See, e.g., Succession of Guillory, 94 So. 2d 38 (La. 1957); Succession of Hunter, 105 So. 596, 596 (La. 1925); Succession of Reilly, 67 So. 27 (La. 1914).

\textsuperscript{75} Guillory, 94 So. 2d at 39-40.

\textsuperscript{76} Id. at 39.

\textsuperscript{77} Id.
conditional disposition represented a prohibited substitution and was therefore invalid.\textsuperscript{78} The court paid no deference to the decedent’s ability to place conditions on donations left in her testament. Rather, because this disposition came within the language of the Civil Code article on prohibited substitutions, the donation was declared null.\textsuperscript{79} Thus, prohibited substitutions, like conflicting possession, emphasize the development of land by disallowing individuals from making conditional donations that would restrict development for future owners.

\textit{C. Partition by Co-Owners}

Like prohibited substitutions, restrictions on co-owners to prohibit partition prevent individuals from impeding the development of land. The development objective is chiefly advanced through the inability of individuals to contractually lock themselves into a state of co-ownership for a lengthy period of time.

\textit{1. The Rules on Partition by Co-Owners}

Co-ownership necessarily involves some constraint on individual free will. The state of shared ownership of a single thing—in this case a single piece of land—serves as a natural restraint on the ability of any one individual to develop and commercialize the land without agreement by the other co-owners.\textsuperscript{80} However, no individual may be forced to remain a party to this co-ownership state.\textsuperscript{81} In Louisiana, any and all co-owners have, as a matter of right, the ability “to [unilaterally] demand partition of a thing held in indivision.”\textsuperscript{82}

Nevertheless, the law does carve out a very limited exception that allows co-owners to stipulate against partition. Specifically, the Louisiana Civil Code provides that partition may be excluded contractually between the co-owners “for up to fifteen years.”\textsuperscript{83} If agreement to prohibit partition exceeds that fifteen-year limitation,

\textsuperscript{78} Id. at 39–40.
\textsuperscript{79} Id. at 39.
\textsuperscript{80} LA. CIV. CODE ANN. art. 804 (2008). However, although a co-owner may not dispossess the entire co-owned thing, he may “freely lease, alienate, or encumber his share of the thing held in indivision.” LA. CIV. CODE ANN. art. 805 (2008).
\textsuperscript{81} LA. CIV. CODE ANN. art. 807 (2008).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
Louisiana courts will reduce the time period to the allowable amount without regard to any valid reasons for the extended period. 84

2. Co-Ownership's Troubled History

The rules and rationale behind co-ownership and partition are a product of their tumultuous history. The power of co-owners to unilaterally demand partition of co-owned property is a legal right that dates back to the Romans. 85 Roman law preferred that full ownership of land rest with one person, and it discouraged situations in which multiple individuals shared co-ownership rights. 86 The Romans viewed co-ownership as an undesirable state of affairs and one that should be, at most, only temporary. 87 The Romans did, however, make some exceptions to the general rule prohibiting partition. Co-owners could agree that property would remain held in indivision provided that it was only for *intra certum tempus*, but the law did not provide how long the time period could be. 88

The French, in creating their Civil Code, thought co-ownership was too reminiscent of the ancien régime and omitted any provisions on the matter. 89 Thus, rules on the power of co-owners to partition land and the ability to suspend that authority did not exist in the French Civil Code of 1804. 90 Yet, even though the French did not adopt a provision on contractual partition by co-owners, the Civil Code did contain a provision concerning the right to demand partition among co-heirs of a succession—a notion very similar to the Roman law on co-ownership. 91 This provision

84. See supra notes 79–80.
87. SIR HENRY SUMNER MAINE, ANCIENT LAW, ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 253 (Sir Frederick Pollock ed., Henry Holt & Co. 1906) (1861).
88. A.P., Partition—Restriction Pending Rise in Real Estate Values, 10 TUL. L. REV. 318, 319 (1972) (trans. by A.P.) ("intra certum tempus" [within a certain time]).
89. See 2 AUBRY & RAU, ORDINARY COOWNERSHIP § 221, in II DROIT CIVIL FRANCAIS 385 (1961).
90. See Bell, supra note 86, at 148–49.
91. C. civ. art. 815 (1804) ("No one can be compelled to remain without division, and distribution may be always sued for, notwithstanding prohibitions and conventions to the contrary. The distribution may nevertheless be suspended by agreement during a limited time; such agreement cannot be made obligatory beyond five years; but it may be renewed." (emphasis added)).
allowed co-heirs to suspend partition of a succession for five years subject to a renewal. The renewal option allowed co-heirs, upon the expiration of the allowable five-year period, to renew their agreement to prohibit partition for an additional five years. Although the French Civil Code did not specifically address co-ownership of property, French legal scholars have stated that the rules on co-ownership of a succession that were in the French Civil Code would have been the same for co-owners. Reasoning a pari, if co-ownership articles were included in the French Civil Code, the renewal of a stipulation against partition would have been allowed just as it was allowed for co-owners of a succession. Thus, the rules governing partition by co-owners and the ability to prohibit partition would have been more flexible in France than what was eventually adopted in Louisiana because co-owners would have had the option to continuously renew their agreement. Under the French rule, co-owners could continue to suspend the possibility of development of the co-owned land by renewing their agreement to prohibit partition, whereas in Louisiana the ability of co-owners to limit themselves is stringently capped at fifteen years.

Like the French Civil Code, for some time the only Louisiana Civil Code article pertaining to a co-owner’s rights was a provision on co-heirs of a succession. It was not until the Louisiana Civil Code of 1825 that articles were incorporated to include the recognition of co-ownership of property and a basic framework of rules to govern it. The later-adopted co-ownership articles give the power of partition to co-owners in an effort to encourage the "localization of the right of ownership." The law seeks to discourage the forced common ownership of property by giving each co-owner the power to unilaterally demand that the property be divided accordingly, thus ending the state of indivision. Without the "coexistence of competitive rights" between co-

92. Id.
93. Id.
94. See Aubry & Rau, supra note 89, at 389.
96. See 1 Louisiana Legal Archives, A Republication of the Projet of the Civil Code of 1825, at 43 (1937).
97. See id. (tacitly endorsing a situation where co-ownership of a thing may be permissible under the Civil Code, but the provision makes no mention of the right to demand partition by a co-owner of land held in indivision).
99. Id.
owners in indivision, the owner becomes free to develop his portion of the land as he sees fit.\textsuperscript{100} Louisiana courts have historically endorsed the Civil Code’s prohibition of lengthy agreements to prohibit partition. In \textit{Giardina v. Giardina} a group of siblings who held a piece of land in indivision agreed among themselves that none of them would unilaterally demand partition until the value of the land had increased.\textsuperscript{101} The siblings’ desire was to prevent one sibling from possibly demanding partition of the co-owned land at an unfavorable time, thereby causing all of the co-owners to lose a potentially profitable real estate opportunity.\textsuperscript{102} When one of the siblings later sought partition unilaterally, the Louisiana Supreme Court held that—despite the stipulation’s logic from a business and investment standpoint—this type of stipulation was outside the stringent, black letter rules laid out in the Louisiana Civil Code.\textsuperscript{103} The stipulation not to partition the co-owned property simply went on for longer than the Civil Code allowed, and the time frame was judicially reduced.\textsuperscript{104} Collectively, the laws of conflicting possession, prohibited substitutions, and partition by co-owners speak to the prevalent and underlying policy of keeping land in commerce and encouraging its development. The rules on conflicting possession call for the ousting of the passive holder and for possession to be awarded to the developer.\textsuperscript{105} Prohibited substitutions prevent a testator from conditioning that his land be kept out of commerce when it passes to his heirs.\textsuperscript{106} Similarly, co-owners are limited in their ability to bind themselves against partition for a period of their choosing.\textsuperscript{107} The aim behind each of these rules is to ensure that land is developed whenever possible and is never removed from commerce.

In each of these institutions the policy is absolute: no matter the reason, land should never to be taken out of commerce for an extended period of time, if at all. This policy, irrespective of whether brought to Louisiana from France, the Romans, or mere caprice, is not as valid today as it was in the nineteenth century. Each of the three institutions operates under different rules and in different contexts, but they share a common theme in promoting

\begin{itemize}
\item[100.] \textit{Id.}
\item[101.] 158 So. 615 (La. 1935).
\item[102.] \textit{Id. at} 615.
\item[103.] \textit{Id. at} 616.
\item[104.] \textit{Id.}
\item[105.] See discussion \textit{supra} Part II.A on conflicting possession.
\item[106.] See discussion \textit{supra} Part II.B on prohibited substitutions.
\item[107.] See discussion \textit{supra} Part II.C on the rules for partition by co-owners.
\end{itemize}
the indiscriminate development of land. The questions of who will be the ultimate possessor, whether a donation in a will is valid, and when land may be partitioned all turn on the issue of commercial development. With each institution, the governing principle centers on the premise of development. This legal predilection for development was adopted as a result of public policies that were important in the past; however, the social concerns and public policies of Louisiana have progressed since the nineteenth century and the drafting of the Louisiana Digest of 1808.

III. OVERTHROWING LOUISIANA’S ANCIEN RÉGIME: THE NEED TO REEVALUATE AND HARMONIZE THE CIVIL LAW WITH CONTEMPORARY PUBLIC POLICIES

Louisiana has taken steps to respond to changing economic and social concerns relating to development. The state’s technologies have advanced, industry has become vital to the state’s economy, and science and discovery have revealed some imminent realities regarding how Louisiana conducts its land-use planning. Louisiana and the entire country have become concerned with the specific problems and negative effects related to the over-development and commercialization of land. If Louisiana is looking for balance in promoting or discouraging commercialization of land, the Louisiana Civil Code should not continue to carry forward an ancien nineteenth-century approach toward development.

To combat these problems, Louisiana has embraced specific policies that foster wetland conservation, create green spaces, and combat urban sprawl. Each policy represents a change in thinking on how to best and most efficiently handle land-use planning so as to maximize resources and minimize adverse effects on an area. These broad and far-reaching public policies are not objectives that come and go with the shifting political winds, but rather are concretely rooted in the state’s long-term “big picture”

109. Id.
112. See infra Part III.A–C.
113. Id.
planning. As a result, Louisiana’s private law should be reevaluated in order to be consistent with these enduring societal goals. The Louisiana Civil Code, exemplified by the three aforementioned institutions, must better adapt and thus be attuned with these modern public policies.

A. Wetlands and Coastal Conservation

A public policy consideration pertinent to reassessing civilian legal institutions that promote development—and one that is particularly important to a Gulf Coast state like Louisiana—is the conservation of wetlands and coastal areas. These lands are vital to the state because they protect against massive and destructive hurricane storm surge and serve as a major source of energy production to the rest of the country. It is important that wetlands be kept from eroding away due to over-commercialization. Louisiana’s civil law should be consistent with this goal, even if it means that land development must sometimes yield to preservation.

1. Louisiana’s Commitment to Maintaining Wetlands

The dramatic loss of wetlands is important to each of the five Gulf Coast states, but the phenomenon is particularly causing alarm in Louisiana, in part, because of the state’s structural control over Mississippi River navigation through wetland and coastal channels. As wetland passageways to the Mississippi vanish, the ability to transport goods through Louisiana to the rest of the country has become greatly hindered. A study conducted over the past several years by the United States Census Bureau found that most of the state’s population lives near the coast, although Louisiana’s wetlands are disappearing at a rate of “25 to 40 square

114. See infra note 118; see also CWPPRA, infra note 126; ABOUT SPRAWL, infra note 181.
116. See infra note 130 and accompanying text.
119. Id.
miles per year."¹²¹ Between 1930 and 1995, Louisiana lost 1.2 million acres of coastal land.¹²² The loss of those vital regions is relevant to any discussion of development because a great deal of the damage is attributed to human activity.¹²³ Environmental scientists have long concluded that the "the loss of land is caused by human actions—the siting and protection of industries, communities, levees, and transportation infrastructure—as much as by natural occurrences."¹²⁴ Thus, the commercialization and development of land is a powerful contributor toward the loss of Louisiana's critical wetlands.¹²⁵

Louisiana's coast is one of the most hurricane-frequented areas in the country.¹²⁶ Wetlands have always provided a buffer during hurricanes and other strong storms by absorbing storm surge.¹²⁷ In addition, over 68,000 Louisianans depend on the coastal wetlands for employment, and these jobs provide $148 million in wage taxes


¹²². See COASTAL LOUISIANA COAL., supra note 121; see also CWPPRA, supra note 126, at 5–6 ("During 20th century, coastal Louisiana has lost over 1.2 million acres (1,875 square miles), an area more than 25 times larger than Washington D.C. Scientists estimate the State will lose an additional 431,000 (673 square miles) acres by 2050 . . . . Preliminary estimates from the U.S. Geological Survey indicate that 75,520 acres (118 square miles) of marshland along Louisiana's coast were shredded or sank as a result of Hurricanes Katrina and Rita, further exposing the area to the detrimental effects of powerful storms . . . . Sadly, it has become common to hear south Louisiana residents reminisce about tracts of land their families used just 10 or 20 years ago—land that is now under water.").

¹²³. See Wetland Trends, supra note 117; see also R.H. CAFFEY, K. SAVOIE & M. SHIRLEY, NAT'L SEA GRANT LIBRARY, STEWARDSHIP INCENTIVES FOR LOUISIANA'S COASTAL LANDOWNERS (2003) ("[A]griculture has historically been the primary cause of wetland loss in Louisiana. Of the more than 16 million acres of wetlands that covered 54% of Louisiana in 1780, approximately half have been lost, with the greatest amount of conversion occurring on forested 'palustrine' wetlands.").

¹²⁴. See COASTAL LOUISIANA COAL., supra note 121; see also Wetland Trends, supra note 117 ("In Louisiana, where most of the country's coastal wetland loss is occurring, wetlands are being lost to open water due to a combination of factors including canals dredged through the marshes, dams on the Mississippi River reducing sediment to the marshes, land subsidence, and sea level rise.").

¹²⁵. See id.


¹²⁷. Id. at 1.
for the operation of state government. With the loss of wetland barriers, the existing oil and natural gas reserves and pipelines have been easily damaged and some times destroyed by hurricanes.

Louisiana’s $96 billion worth of commercial infrastructure, which provides fisheries, navigation, and energy services to the rest of the country, rely on these valuable wetlands for protection. In terms of food supply, Louisiana is the largest catcher and exporter of menhaden fish in the country. The vital services and resources that the coastal wetlands provide to the state make them an asset that must be protected.

Louisiana’s acceptance of public policies designed to preserve the state’s wetlands is evident through the recent acts of its legislature. Louisiana specifically recognized the harms that development can have on wetlands when it passed a 1989 constitutional provision known as the Louisiana Wetlands Conservation and Restoration Fund. This provision provides the first state-sponsored funding for coastal restoration projects with monies that are generated by a portion of the royalties and severance taxes on state land oil and gas revenues. Efforts to prevent further loss of Louisiana’s wetlands have not stopped there; Louisiana activists also successfully lobbied Congress in 1990 to provide $40 million per year to the state for coastal restoration. In 2005, Louisiana obtained nearly $67 million from Congress to rebuild wetlands along the Mississippi River’s outlet to the Gulf of Mexico and surrounding waterways. Through these efforts, Louisiana has made it unequivocally clear that a recognized public policy of the state is to deride the negative

129. See CWPPRA, supra note 126, at 6.
130. Id.
131. Id.
132. LA. CONST. art. VII, § 10.2; see COASTAL LOUISIANA COAL., supra note 121.
134. See COASTAL LOUISIANA COAL., supra note 121; see also LaCoast, CWPPRA Restoration Programs, http://www.lacoast.gov/education/overview/programs.htm (last visited Jan. 1, 2010).
impacts of over-development on coastal wetlands. Louisiana’s civil law should be in line with this mission as well.

2. Revisiting Prohibited Substitutions Through a Conservationist Perspective

Despite the emphasis that the state places on protecting wetlands, Louisiana’s property law is still indiscriminate about barring the removal of land from commerce. Prohibited substitutions provide an apt example of the civil law’s resistance to comport with preservation and conservation policies.

The Louisiana Supreme Court decision in Succession of Kernan demonstrates just how Louisiana’s development policy toward land must be reassessed in light of modern societal goals. In that case, the decedent made a disposition in his will of a certain piece of property to the Archbishop of New Orleans. The property and its rental income were to be vested in the archbishop and his successors for the purposes of the “founding and support of an asylum for the poor.” Despite the philanthropic and unselfish motivations of the decedent, the court cited the Louisiana law prohibiting substitutions and struck the disposition from the will, stating that this donation “sought to introduce a tenure unknown to our law [by placing] the property out of commerce; and . . . was against public policy.” The donation made by the decedent to the archbishop required that the property be preserved—thus removing it from commerce—in addition to requiring that the archbishop, upon his death, transfer the property to a third-party successor. The court’s result denied the decedent the ability to do with his property what he wished. The decedent’s good intentions were thwarted by a blind restriction on taking land out of commerce—a blind restriction that is contrary to conservationists’ policies today.

Louisiana should abandon the belief that there is some inherent evil in holding land in the hands of individuals for a lengthy period.

---

137. See supra Part II.B.
138. 26 So. 749 (La. 1899).
139. Id. at 750.
140. Id.
141. See id. (citing the defendant’s argument in the petition, upon which the court ultimately agreed, and affirming the trials court’s ruling to nullify Mr. Kernan’s donation mortis causa to the archbishop).
142. Id.
of time.\footnote{143}{Succession of McCan, 19 So. 220, 226–27 (La. 1895) (Watkins, J., concurring).} Many common law jurisdictions in the United States have repealed their rules against perpetuities, a similar doctrine to prohibited substitutions.\footnote{144}{See Joel C. Dobris, \textit{Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay}, 35 \textit{REAL PROP. PROB. \& TR.} J. 601 (2000); see also JOSEPH WILLIAM SINGER, \textit{INTRODUCTION TO PROPERTY} 318 (2001) ("The rule against perpetuities invalidates future interests unless they are certain to ‘vest’ or fail to vest within the lifetime of someone who is alive (‘in being’) at the creation of the interest or no later than 21 years after her death.").} At least twenty states have abolished the rule against perpetuities, and similar legislation is pending in several more states.\footnote{145}{Robert H. Sitkoff, \textit{The Lurking Rule Against Accumulations of Income} (Northwestern Univ. Sch. of Law Law \& Econ. Papers, Paper No. 2, 2005), available at http://law.be press.com/cgi/viewcontent.cgi?article=1005&context=nwwps.} These common law jurisdictions recognize that the ability to render property inalienable for a lengthy period of time can be functional, particularly through the use of trusts.\footnote{146}{See generally Stewart E. Sterk, \textit{Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.}, 24 \textit{CARDozo L. REV.} 2097 (2003) (discussing the demise of the rule against perpetuities alongside the increasing utilization of trusts).} Trusts allow property to be taken out of commerce for a period of time extending beyond the death of the holder, whereas the property of a donee with a duty to preserve will reenter the commercial sphere upon the donee's death.\footnote{147}{See generally ROGER W. ANDERSEN, \textit{UNDERSTANDING TRUSTS AND ESTATES} 8 (2003).} Moreover, France, the very birthplace of the current Louisiana provision, repealed its own article prohibiting substitutions.\footnote{148}{C. civ. art. 896 (1804), repealed on L. 13 mai 1835 (Fr.).} Even France has been willing to recognize that changing times call for a reevaluation of antiquated rules. These common law states and France have appreciated, just as Louisiana should, that there are valid societal reasons for allowing land to be preserved out of commerce.\footnote{149}{See Dobris, supra note 144. Professor Dobris argues that society has come to believe that perpetuities can be a valuable legal device in furthering certain societal goals. \textit{Id.} at 631. Professor Dobris particularly points out the decline of the true effectiveness of the rule against perpetuities in light of the creation and use of trusts. \textit{Id.} Louisiana also utilizes trusts as being an exception to the general prohibition on substitutions. \textit{LA. CIV. CODE. ANN.} art. 1520 (2000).} The logic behind prohibiting substitutions is out dated, especially in the context of the economic and social advantages of taking land out of commerce as exemplified by wetland conservation. The state recognizes the importance of conserving vital wetlands, which are disappearing due to over-
commercialization; therefore, Louisiana civil law should be consistent with this policy, rather than the antiquated French policy on which prohibited substitutions rests.

B. Creation and Maintenance of Green Spaces

In a state rich with vegetation and wildlife, it is natural that Louisiana is more attentive to creating and maintaining green spaces as various metropolitan areas of the state continue to grow. Louisiana, a proud state that is committed to preserving its verdant landscape, has naturally moved toward policies that maintain and preserve its lush, green spaces. Louisiana civil law must be reevaluated so as to be coherent with this over-riding public policy of preservation.

1. Keeping Louisiana Green

Many cities and towns in Louisiana have shifted away from a total development of land policy to a more nature-friendly approach to growth. For example, in 2000 Governor Mike Foster instituted a taskforce to study the effects of maintained green spaces on quality of life and economic development. As a result of that committee’s work, the state partnered with private businesses and a national non-profit organization to create Keep Louisiana Beautiful, which has served to promote clean communities and the creation and preservation of Louisiana’s natural green spaces. In addition, many local municipalities and governing bodies in Louisiana have designated areas within their urban centers for the specific purpose of providing green spaces. More recently, in 2002 the New Iberia City Council began dedicating public lands as green spaces and parks for its community. Places like St. Tammany Parish, which experienced

---

151. See Mary Catherine Martin, Council to Return Land, THE DAILY IBERIAN, Sept. 17, 2008 (discussing the actions of the New Iberia City Council to designate a certain area of land for green space to combat over-development); Parish Rezoning Meeting Delayed Until Tuesday, ST. TAMMANY NEWS, Sept. 17, 2008 (discussing St. Tammany’s and other areas’ rezoning efforts to balance green space with development).
153. Id.
154. Id.
155. See Martin, supra note 151.
a large population growth since Hurricane Katrina drove many residents out of New Orleans, rezoned areas within the parish to better balance commercial growth with green space.\textsuperscript{156} Over the past several years, the Baton Rouge City Planning Commission has launched a major zoning overhaul to map off green spaces in an effort to reduce pollution in addition to setting new construction guidelines to further the protection of green areas within local communities.\textsuperscript{157}

This shift in focus is fully warranted; green spaces provide many benefits both to the environment and to individual communities.\textsuperscript{158} Green space adds more plants and vegetation, which produce oxygen and consume major contributors to global climate change like carbon dioxide.\textsuperscript{159} "Unpaved green space allows rainfall" and water runoff, both of which "recharge ground water" and preserve biodiverse habitats and migration corridors.\textsuperscript{160} With respect to individual communities, expanded green spaces supply open areas away from urban noise, congestion, and endless pavement.\textsuperscript{161} They also "remove[ ] unattractive blight and [decrease] safety hazards that detract from livability."\textsuperscript{162} Of great economic importance, green spaces "[enhance] property values by providing amenities that draw people to live and work in their communities."\textsuperscript{163} With such broad and far-reaching benefits, Louisiana's adoption of green-space principles in planning is simply good policy.

2. Revisiting Co-Ownership and Partition with an Eye Toward Green Space

Because Louisiana has taken action—specifically at the municipal level—to create and preserve green spaces, state law should also seek to promote and be consistent with this goal. The institutional rules of co-ownership with respect to partition provide a

\textsuperscript{156} See Parish Rezoning Meeting, supra note 151.


\textsuperscript{159} See MINN. POLLUTION CONTROL AGENCY, supra note 158, at 1.

\textsuperscript{160} Id.

\textsuperscript{161} Id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.
good example of how the antiquated rules of Louisiana civil law pertaining to development are inconsistent with this public policy.  

The limitations on suspending partition, originating from the French aversion to co-ownership, have been articulated by courts in stating that the right to partition is an absolute right held by every co-owner that may be exercised at any time, and a court may not impede the enforcement of this right in any way. However, there are valid reasons as to why co-owners might sometimes wish to keep their land whole. From an economic standpoint, in many instances a co-owned property's true value can only be maintained by keeping land whole, and partition by licitation would only detract from the economic significance of the land. The law gives no consideration as to why a tract of land should not be partitioned for a period of time; it merely sets strict and uniform temporal limitations to which co-owners are forced to adhere. Louisiana courts have stated that the reason behind limiting the power to suspend partition is to "prevent the tying up of property by conditions imposed in donations and bequests." But the law does not currently recognize that the setting aside of land for the purposes of providing green space can be a valid public purpose that counters any potential harms in taking the land out of commerce. Civil law scholars have long stated that the underlying rationale behind the restriction on prohibiting partition is to discourage competing rights so as to afford the greatest opportunity for development. Yet the prevailing public policy is that immobilizing land or "tying it up" is sometimes exactly what society is trying to do because having these green spaces provides the greatest economic benefit.

164. See Part II.C.
165. Dobrowolski v. Dobrowolski, 42 So. 2d 760 (La. 1949) (plaintiffs, who were co-owners in indivision with defendants of realty and unwilling to continue such ownership in indivision, sought to exercise their right to have the co-owned land partitioned by licitation); see also Land v. Smith, 11 So. 577 (La. 1892); see Succession of Manson, 121 So. 868 (La. 1929) (stipulation prohibiting division after the testator's death of the reserved portion of the estate that was given to the forced heirs was void).
166. Partition by licitation is a court-ordered partition by private sale where the proceeds are distributed to the co-owners in proportion to their shares. See LA. CIV. CODE ANN. art. 811 (2008).
167. Land, 11 So. at 557-78.
170. See PLANIOL, supra note 98, § 2498, at 474.
Despite these valid factors being supported by environmental and urban planning policies, the law adopts a blind, temporal constraint without regard to policy or strategy. This framework is counterintuitive considering that the state has recognized that there is a public policy for occasionally maintaining land in its natural state. Despite this policy, the law continues to uphold the restriction on partition with its underlying purpose of land development. As land development policies in Louisiana have changed, the civil law should be reevaluated so as to be consistent with these new green-space perspectives.

C. Combating Urban Sprawl: The Push for Smart-Growth

While creating and maintaining green space has become an important objective in Louisiana, economic development remains a core goal and an important driver of state policy. When engaging in economic development activities, state leaders have remained cognizant that new developments must have their foundations built on smart-growth principles. Smart-growth is the idea that communities should develop land in a thoughtful and strategic way so as to avoid the negative effects of urban sprawl and over-development. Because most land in Louisiana remains rural, smart-growth planning has provided a helpful guide to ensure that as the state grows and expands, it does so strategically. Louisiana law on conflicting possession represents a random and unchecked method for land development that is inconsistent with smart-growth principles.

1. Louisiana Growing Smart

There are significant advantages associated with exercising smart-growth principles. Smart-growth creates savings in local service networks when developments use building features that...
reduce water requirements, sewage flow, and storm run-off. Additionally, smart-growth can create large savings in municipal-wide networks by reducing service demands and reducing the requirements for “new water supply and storage, sanitary treatment capacity[,] and municipal storm water systems . . . ”176 Smart-growth is important because it is a doctrine that city planners and governing bodies utilize to develop and expand their areas in ways that promote public health, cost effectiveness, and heightened livability.177 Over-development creates air and water pollution, harms wildlife, and stamps out existing open spaces.178

Smart-growth strives to combat urban sprawl, the haphazard development of land exemplified by poor accessibility to housing, jobs, schools, hospitals, and other services.179 These undesirable development patterns include “commercial strip [malls], low-density residential [areas], and scattered, isolated developments that leapfrog over the landscape.”180 Sprawl creates a number of social and economic problems, such as “traffic congestion, air pollution, large-scale absorption of open spaces, extensive use of energy for movement, [and the] inability to provide adequate infrastructures.”181 Furthermore, sprawl causes a wanting of affordable housing near jobs as well as a dearth of suburban labor.182 In addition to these negative effects of sprawl, an indirect effect is the concentration of high populations of poverty in certain areas, resulting in an increase in criminal activity and poor public education.183

175. Id.
176. Id.
178. Id.
179. Sprawl Guide (last visited May 18, 2010), http://www.plannersweb.com/sprawl/focus.html). The definition of “sprawl” that is mostly widely used, and the one cited herein, was created by Dr. Reid Ewing, associate professor in the College of Engineering and Design at Florida International University in Miami. Id.
180. Id.
182. Id.
183. Id. at 2. For Louisiana, the concentration of poor minorities in older areas—and its potential negative consequences—is of particular concern. Louisiana’s poverty rate—the second highest in the country and the highest in the southern region—is 18.5%. See U.S. Census Bureau: Louisiana (2008), http://www.factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=04000US22 &-qr_name=ACS_2008_3YR_G00_S1701&-ds_name=ACS_2008_3YR_G00 &-redoLog=false; see also Dominique Duval Diop, La. Div. of Admin., Mapping
Most people envision cities like Chicago and Los Angeles when thinking of urban sprawl, believing it to be a remote threat that has little real-time consequence in Louisiana; however, sprawl may not be that far off for some of the state’s major cities. As Louisiana’s major cities have grown and expanded—Baton Rouge in particular—local and state governing bodies have focused on the dangers of urban sprawl. In the mid-1990s, Baton Rouge embarked on a city- and state-sponsored initiative to strategically develop its downtown so as to balance the flow of cars and people, make the area more pedestrian friendly, and add small parks and trees to public spaces. The city officials and citizen activists of Baton Rouge decided that in developing downtown real estate, taking a thoughtful and “smart” approach was the best way to encourage new investment and increase property values.

The early signs of sprawl are evident throughout the New Orleans area, and architects and planners have encouraged the city to use the aftermath of Hurricane Katrina to address the growing problem of uncontrolled development. For instance, the New Orleans City Council, in coordination with local smart-growth organizations, recently rezoned the downtown area to encourage denser and more mixed-income land-use development. The new plan includes opportunities for community members to take part in the land-use decision-making process, thus ensuring that low-income populations continue to have affordable housing and are not driven out of neighborhoods by high-dollar developments.

Indicators of Econ. & Social Well-Being in Louisiana (2002), http://www.doa.louisiana.gov/tanf/Poverty%20Mapping.pdf. Because of its large and dense poverty-stricken population compared to other states, Louisiana has a commitment to ensuring that these groups are not segregated to outlying areas, which can result in higher crime rates and poor public education overall. See id.
187. Id.
190. Id.
Shreveport has also recognized that it has succumbed to sprawl in certain areas, and the city's mayor and planning institutes have attempted to be more proactive in slowing down future over-development. In these ways, smart-growth encourages a more systematic and strategic approach to land development and commercialization than what has been embarked upon in the past.

Sprawl comes gradually over time and often is imperceptible until it is too late. The negative implications of sprawl and Louisiana's concerted efforts to combat it are indicative of the public policy of the state to ensure that over-development in urban areas stays in check. Yet Louisiana civil law—chiefly through the lens of the rules on possession—is inconsistent with this policy of strategic and mindful expansion because it encourages an indiscriminate approach to development where planning plays no part.

2. Revisiting Conflicting Possession Alongside Urban Sprawl

The current framework of conflicting possession provides a model for analyzing the law's inconsistent development policy against the backdrop of preventing sprawl through smart-growth theories. Louisiana's antiquated rules on possession confer preferential treatment to activity that physically develops land while, at least in some cases, penalizing more passive activity. This legal framework conflicts with the more modern policy that moves away from the haphazard development of land and toward a more planning-oriented regime.

The Louisiana case of Norton v. Addie provides a classic example of Louisiana's legal policy fostering development over preservation. In Norton, the owner held a piece of land with legal, valid title, which he occasionally used for hunting. In 1904 a neighbor built a fence around his property, part of which encroached onto the owner's hunting land. The neighbor then performed various acts of development and commercialization on the fenced tract, including maintaining a fence, grazing cattle, building soil erosion prevention terraces, and leasing the tract to others for business-related, agricultural purposes. The court held

193. See supra Part II.A.
195. Id. at 435.
196. Id.
that the owner had been in constructive possession of his hunting grounds, but the commercial, corporeal possession of his neighbor successfully defeated the owner’s possession. The neighbor was awarded possession because of his commercial acts on the land. This type of reasoning is at odds with contemporary policies on land development because it ignores the value of leaving land undeveloped. The plaintiff in Norton should not be penalized because he chose to keep a certain tract of his land undeveloped, or at least undeveloped at that particular time. The law should not have a built-in prejudice against individuals who choose not to commercialize their land as the owner in Norton did.

As the state has moved toward a smart-growth method of planning, where choosing not to arbitrarily develop land is valued, Louisiana civil law should not operate in the background to reward individuals who come onto land and begin randomly developing it for the purposes of possession; the two policies are inconsistent. Louisiana courts essentially hold that owners should never leave their land undeveloped for fear of losing possession, and even ownership, to an aggressive developer. The arbitrary developer is always the winner despite any implications that the development might have on contributing to sprawl or frustrating smart-growth community planning.

While the development of land by individuals was important in the early days of statehood and remains significant today, it is not the most vital public policy. The state has recognized that other policies can sometimes compete with the policy that land should be kept in commerce. But Louisiana law on possession still follows the notion that the developer of land should be rewarded, and the possessor who merely allows his land to remain undisturbed should be penalized. Sprawl takes place when land is overdeveloped with no clear plan as to how areas should grow and expand so as to meet the needs and resources of the area. As Louisiana tries to become “smart” in how it develops urban and suburban areas, the state’s property law should be reassessed and harmonized with these worthy and necessary public policies.

197. Id. at 436.
198. Id.
199. See supra Part III.
201. See id.
202. See supra Part II.A (discussing the origins and purposes of conflicting possession in early Louisiana).
203. See supra Part III.A–C (discussing the public policies of wetland preservation, green-space expansion, and urban-sprawl control).
204. See discussion supra Part III.C.
Today, Louisiana legislation embraces the principles of wetland conservation, green-space preservation, and smart-growth planning. Despite the state’s changing priorities, these modern policy concerns are in direct ideological conflict with the underpinnings of pro-development, civilian institutions, such as conflicting possession, prohibited substitutions, and partition by co-owners. Such institutions rest on the antiquated notion that land must be constantly developed, regardless of the cost, while prevailing public policies promote more strategic land-use through planning and regulation.

IV. CONCLUSION

Few of the beliefs strongly held in Louisiana’s early days of statehood maintain the support today that they once had. In the early 1800s, developing land was a primary concern in the state. Promoting vigorous land use was logical during this period given the agrarian nature of Louisiana’s economy. However, times have changed and so have the state’s public policies. As the foundational policies for the rules in the Louisiana Digest of 1808 progressed over time, so did the state’s laws. These changes in state policy make it absurd to continue to rely on the original notions that influenced the 1808 Digest. Unfortunately, in the case of conflicting possession, prohibited substitutions, and partition by co-owners, Louisiana does just that.

The doctrines of conflicting possession, prohibited substitutions, and partition by co-owners represent an outmoded idea that the aggressive development of land is the premier state policy concern. Presently, Louisiana embraces public policies that contradict these antiquated rules; instead of unbridled development, today the leaders of Louisiana are promoting preservation, conservation, and strategic planning in land-use policy. These values now rest as the foundation for future legal progress regarding the development of land. As such, Louisiana’s civil law policy toward land development must be reevaluated and made consistent with contemporary policies that promote a more balanced, conservationist, and strategic planning approach to the development of real property.

It is time for Louisiana to lay to rest its ancien régime. The state must revitalize old institutions in its civil law so that they are attuned with prevailing public policies. As the Louisiana Law Institute continues to recommend revisions to the Louisiana Civil

205. See supra Part III.
206. See supra Part II.
Code for consideration by the legislature, it should reevaluate the institutions mentioned herein, as well as others pertaining to land development, in light of contemporary public policies and seek a progressive and "smart" strategy for Louisiana’s future growth and land-use.

Christopher K. Odinet*

* The author would like to thank a brilliant scholar and teacher, Professor Andrea B. Carroll, without whose guidance, patience, and support this Comment would not have been possible. The author also thanks Professor Ronald J. Scalise, Jr., Professor Melissa T. Lonegrass, Dean David Cronrath, Sally Brown Richardson, and McHenry Lee II for their invaluable editing and support. Lastly, the author thanks his parents and family, without whose love and encouragement nothing worthwhile was ever accomplished.