

Louisiana Law Review

Volume 76 | Number 3
Spring 2016

Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana

Jacques Mestayer

Repository Citation

Jacques Mestayer, *Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana*, 76 La. L. Rev. (2016)
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Saving Sportsman’s Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana

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INTRODUCTION

Louisiana is Sportsman’s Paradise—home to some of the most sought-after hunting, fishing, and nature-viewing opportunities in the world.¹ Seeking to net the best catch, sportsmen and commercial fishermen scour Louisiana’s coast. Due to the current legal landscape and Louisiana’s constantly morphing coastal environment, however, these fishermen often find that lawfully using Louisiana’s coastal waters is impossible.

Unlike most other coastal states, the vast majority of Louisiana’s coastal lands are private.² These lands are swiftly submerging,³ as Louisiana loses the equivalent of a football field of coastal land every hour.⁴ Under the current practice in Louisiana, many of these large tracts of coastal land remain in private hands after they submerge.⁵ As a result, even to the trained eye, the line between public and private coastal property is often indiscernible.

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1. Craig Gautreaux, *Keeping Louisiana a Sportsman’s Paradise*, LSUAG CENTER.COM, <http://www.lsuagcenter.com/en/communications/publications/agmag/Archive/2012/Spring/Keeping-Louisiana-a-Sportsmans-Paradise.htm> [perma.cc/KX D4-ENY2] (last updated June 24, 2012, 6:32 PM) (noting Louisiana has long been known as “Sportsman’s Paradise” and highlighting the many sporting opportunities available in Louisiana).

2. See Brett Anderson, *Louisiana Loses Its Boot*, MATTER (Sept. 8, 2014), <https://medium.com/matter/louisiana-loses-its-boot-b55b3bd52d1e> [perma.cc/H6C9-FCM5] (noting that 80% of Louisiana’s coastal environment is private).

3. See ROBERT R. TWILLEY, COASTAL WETLANDS & GLOBAL CLIMATE CHANGE: GULF COAST WETLANDS SUSTAINABILITY IN A CHANGING CLIMATE 5 (2007), available at http://nctc.fws.gov/courses/csp/csp3112/resources/Climate_Change/GulfCoastImpacts.pdf [perma.cc/GDW6-D2H7].

4. See Mark Schleifstein, *Louisiana is Losing a Football Field of Wetlands Every Hour*, *New U.S. Geological Survey Study Says*, NOLA.COM (June 2, 2011, 9:37 PM), http://www.nola.com/environment/index.ssf/2011/06/louisiana_is_losing_a_football.html [perma.cc/S8XT-ZADB].

5. Telephone Interview with Ryan Seidemann, Assistant Attorney Gen., Civil Div., La. Dep’t of Justice (Sept. 23, 2014). This Comment questions the legitimacy of this result.

In 2006, the Louisiana Legislature realized that permitting private ownership of some submerged lands made the public's utilization of state lands and water bottoms difficult.⁶ As a result, the legislature commissioned the State Lands Office to use an interactive mapping system to determine the ownership of Louisiana's lands and water bottoms.⁷ As the State Lands Office began reviewing Louisiana's coast, it found that large areas of submerged land were formerly private land.⁸ Believing that, under article 450 of the Louisiana Civil Code,⁹ ownership of these lands reverted to the State once the land became submerged, Louisiana informally claimed title to the lands through the State Lands Office review.¹⁰ Prominent private landowners strongly opposed these title claims and began lobbying the State Lands Office not to take formal action.¹¹ Apparently overlooking that article 450 may dictate that many submerged lands belong to the State,¹² the State Lands Office officials decided that a further assertion of State ownership would lead to an onslaught of litigation that the State could not afford.¹³ In the absence of a legislative solution to the problem, and in an effort to minimize litigation, the State Lands Office opted to classify most of the submerged land as "claimed by the state and the adjoining property owner" and cautioned citizens to enter at their own risk.¹⁴ Instead of clearing up titles, this classification clouded title to vast areas of submerged land. Although any state's failure to declare that it owns certain areas of submerged land would be problematic, that failure is especially problematic for Louisiana because Louisiana's coastal environment is submerging faster than any other landmass in the United States.¹⁵

6. *Id.* Because there is a history of trespassing within Louisiana's coastal marshlands and waterbottoms, the Louisiana Legislature presumably knew of this difficulty well before 2006. For an example of such a trespassing case, see *La. Navigation Co. v. Oyster Comm'n of La.*, 51 So. 706 (La. 1910).

7. See S. Res. 115, 105th Leg., Reg. Sess. (La. 2006).

8. Telephone Interview with Ryan Seidemann, *supra* note 5.

9. LA. CIV. CODE art. 450 (2015) ("Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.").

10. Telephone Interview with Ryan Seidemann, *supra* note 5.

11. *Id.*

12. See *infra* Part III.

13. Telephone Interview with Ryan Seidemann, *supra* note 5.

14. *Id.* This land category and disclaimer can be viewed in the legend on the Louisiana Office of State Lands' website. *Disclaimer for SONRIS Interactive Maps*, SONRIS, <http://sonris-www.dnr.state.la.us/gis/agsweb/IE/JSViewer/index.html?TemplateID=381> [perma.cc/NV8M-U6RB] (last visited Oct. 21, 2015).

15. See TWILLEY, *supra* note 3, at 5.

Between 1932 and 2000, Louisiana lost over one million acres of coastal land to the Gulf of Mexico's inescapable grasp.¹⁶ Due to a variety of natural processes,¹⁷ over a million more acres of land will likely submerge within the next 50 years.¹⁸ By then, Louisiana's total land loss will be roughly equivalent to two times the entire landmass of Delaware.¹⁹ Though some mitigating measures are in place,²⁰ severe land loss will continue unless the state or federal government subsidizes drastic corrective action.²¹

As time passes, a combination of natural and manmade forces will submerge larger quantities of Louisiana's coast, thereby creating an underwater labyrinth riddled with tracts of private land.²² Thus, promptly declaring the ownership of submerged lands is imperative to give Louisiana's citizens some valuable direction regarding what lands are public. The legislature should take note of the current and future issues regarding submerged lands and formally declare ownership over them. Until then, Louisiana's citizens remain deprived of not only valuable property rights, but also significant revenue from mineral transactions that accompany State-owned submerged lands.

Part I of this Comment introduces the growing controversy involving submerged coastal lands in Louisiana and illustrates the unique

16. See Anderson, *supra* note 2. For a noteworthy geomorphology study describing extensive land change as a simple and expected result of delta lobe switching, see David E. Frazier, *Recent Deltaic Deposits of the Mississippi River: Their Development and Chronology*, 17 GULF COAST ASS'N GEOLOGICAL SOC'IES TRANSACTIONS 287 (1967). For an in-depth presentation exploring land loss, land change, and the natural factors responsible for most of the coastal change in Louisiana, see Chris McLindon, PowerPoint Presentation, *Rethinking Coastal Restoration: The Delta Cycle and Land Area Change in the Louisiana Coastal Plain*, http://biotech.law.lsu.edu/climate/docs/The_Delta_Cycle_and_Land_Area_Change_in_Coastal_Louisiana.pptx (last visited Oct. 24, 2015).

17. See TWILLEY, *supra* note 3, at 4–5. Louisiana's total land loss is undoubtedly due to a combination of natural and man-caused forces. *Id.* However, due to the different and numerous concerns present when human action causes land loss, this Comment seeks only to address land issues caused by natural forces.

18. See Anderson, *supra* note 2.

19. *Id.*

20. See 2 U.S. DEP'T OF THE INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS 67 (1994); LA. COASTAL PROT. & RESTORATION AUTH., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 29 (2012), available at http://issuu.com/coastalmasterplan/docs/coastal_master_plan-v2?e=3722998/2447530 [perma.cc/C2NE-4FNQ].

21. See *id.* at 19.

22. See Anderson, *supra* note 2.

significance that these lands offer to the people of Louisiana. Part II focuses on the origin and historical treatment of submerged lands in Louisiana, specifically concentrating on the scope of Louisiana Civil Code article 450 and the jurisprudence dealing with its categories, namely “natural navigable water bottoms,” “arms of the sea,” and “seashore.” Part III recognizes that the State owns submerged lands that became natural navigable water bottoms, sea bottoms, and seashore prior to alienation by the State.²³ Further, Part III argues that no sound reason exists to distinguish natural navigable water bottoms, sea bottoms, and seashore that existed *before* state alienation and those that came into existence *following* state alienation. Finally, Part IV contemplates potential remedies to this arbitrary distinction regarding submerged lands and then proposes a legislative amendment that will clearly assert the State’s ownership over those submerged lands, thereby ensuring that private landowners shall no longer reap fruits lawfully belonging to the State of Louisiana.

I. THE VITAL IMPORTANCE OF LOUISIANA’S SUBMERGED COASTAL MARSHLANDS SHOULD PROMPT THE STATE TO FORMALLY DECLARE OWNERSHIP OVER THEM

A growing “emphasis on coastal resource management and increasing conflicts of interest between private owners and the state have led to . . . ‘a tidal wave’ of boundary disputes” throughout the coastal United States.²⁴ Louisiana is no stranger to this phenomenon. In fact, the battle between public interests and private property rights is particularly fierce in Louisiana.²⁵

Fearful of surrendering any of their land due to the significant economic and property losses that would occur, private landowners strongly oppose a declaration that the ownership of formerly dry ground reverts to the State upon submersion.²⁶ These landowners believe that

23. BLACK’S LAW DICTIONARY 31 (9th ed. 2009) (defining “alienation” as a “[c]onveyance or transfer of property to another”).

24. See Sue Nichols, *Tidal Boundary Delimitation: Some North American Perspectives*, N.Z. SURVEYOR, Feb. 1987, at 560, 570, available at http://coast.noaa.gov/mbwg/_pdf/biblio/Nichols.pdf [perma.cc/N9YY-CYF4].

25. See Katy Reckdahl, *Mixing Oil and Water: An Inside Look at What Happens When Land Sinks and Oil Money is on the Line*, WEATHER CHANNEL, <http://stories.weather.com/mixingoilandwater> [perma.cc/P86M-M237] (last visited Oct. 16, 2015).

26. *Id.* For this land to become State-owned, it must submerge to such an extent that it could properly be classified as either a natural navigable water bottom, sea bottom, or seashore. See *infra* Part II.A.

forcing them to relinquish land to the State merely because Mother Nature irrepressibly overtakes their land is unfair.²⁷ This usurpation of land appears even more unjust considering that billions of dollars in minerals lie beneath these lands. Although a change in ownership of the submerged land would not affect existing mineral rights that already burden the submerged land²⁸—such as mineral leases, royalty agreements, or servitude agreements—private landowners would still lose all future mineral rights to that land.²⁹

In stark contrast to the interests of private landowners, Louisiana's sportsmen and commercial fishermen favor a declaration that the State owns certain submerged lands. The more submerged lands the State owns, the more area these individuals can utilize for their business and pleasure.³⁰ According to a survey conducted by the American Sportfishing Association, in 2001, non-resident anglers spent approximately five million hours fishing in Louisiana.³¹ That year, the sportfishing industry reeled in approximately \$959 million in retail sales, \$453 million in salaries and wages, and \$93 million in state and local tax revenues.³² One cannot overstate this industry's value to the people of Louisiana; however, Louisiana's coastal environment is even more highly valued for commercial fishing purposes. Louisiana's commercial fishing industry regularly nets nearly \$2 billion in sales.³³ Such a significant contribution to the economy is unsurprising because this

27. Reckdahl, *supra* note 25.

28. See LA. REV. STAT. ANN. § 9:1151 (2006) (dictating that when the title to land transfers to another through a variety of ways, including naturally caused land loss, the transferee of title receives the land without affecting some encumbrances of mineral rights).

29. *Id.* Importantly, however, a declaration that the State owns certain submerged coastal lands would not have a significant net effect on oil and gas exploration and extraction. Rather, a declaration would merely change the primary beneficiaries of those efforts. The State, instead of private landowners, would have the right to lease the submerged land and to receive mineral royalties and bonuses.

30. See, e.g., Todd Masson, *Popular South Louisiana Fishing Area Now Off-Limits to Anglers*, NOLA.COM (Aug. 1, 2014, 9:18 AM), http://www.nola.com/outdoors/index.ssf/2014/08/popular_fishing_area_now_off-l.html [perma.cc/UX8V-3TA3].

31. See NAT'L MARINE FISHERIES SERV., NOAA, U.S. DEP'T OF COMMERCE, FISHERIES ECONOMICS OF THE UNITED STATES, 2012, at 130 (2014), available at <http://media.nola.com/environment/other/Fisheries%20Economics%20of%20the%20U.S.%202012.pdf> [perma.cc/A8CT-BWUP].

32. *Id.*

33. *Id.*

industry hauls in nearly 25% of all the seafood in the United States.³⁴ Opening up more of Louisiana's coastal environment to sportsmen and commercial fishermen would cause an appreciable increase in profits for all of these industries.

Although both sides have significant interests and compelling reasons for their position on the issue, private landowners' interests have prevailed up until this point. Oil and gas companies, the most prominent private landowners of Louisiana's marshlands, employ nearly 300,000 people in Louisiana.³⁵ Louisiana's oil and gas industry generates over \$20 billion in household earnings annually.³⁶ Because of its pervasive economic impact, that industry has influence. Nevertheless, Louisiana's policies and laws should not neglect the interests of Louisiana's sportsmen and commercial fishermen.³⁷ Leaving so many coastal boundaries unsettled not only deprives those individuals of substantial revenue, it also exposes them to criminal trespass liability.³⁸ Declaring that the State owns certain submerged lands would allow sportsmen and commercial fishermen to access more land while having little net effect on oil and gas exploration and extraction in Louisiana.³⁹

34. *A Look at Louisiana Agriculture*, AGCLASSROOM.ORG, <https://www.agclassroom.org/teacher/stats/louisiana.pdf> [perma.cc/G8GR-H83B] (last visited Oct. 30, 2015).

35. *See Newest Economic Impact Study Reinforces Oil and Gas Industry's Importance to Louisiana*, GROW LA. COAL. (July 10, 2014), <http://www.growlouisianacoalition.com/newest-economic-impact-study-reinforces-oil-gas-industrys-importance-louisiana/> [perma.cc/MN6F-A6SC].

36. *Id.*

37. *See* LA. CONST. art. IX, § 1 ("The 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. The legislature shall enact laws to implement this policy.").

38. For decades, law enforcement agencies have fined and arrested anglers, crawfish fishermen, hunters, and other types of sportsmen for trespassing on submerged land. *See, e.g.*, *Brown v. Rougon*, 552 So. 2d 1052 (La. Ct. App. 1989); *State v. Barras*, 602 So. 2d 301 (La. Ct. App. 1992); *Buckskin Hunting Club v. Bayard*, 868 So. 2d 266 (La. Ct. App. 2004).

39. *See supra* note 29. In the event that submerged lands become state-owned, pursuant to Louisiana Revised Statutes section 9:1151, existing mineral rights remain unaffected. However, any new mineral rights, meaning those that did not burden the land at the time ownership reverted but that subsequently burden the land after ownership changes, will become vested in the State. Although this would effectively remove these mineral interests from the hands of private landowners, little net effect on oil and gas exploration and extraction

II. THE HISTORY, DOCTRINE, AND JURISPRUDENCE PERTAINING TO SUBMERGED LAND OWNERSHIP IN LOUISIANA

Due to the vast economic and sentimental value of Louisiana's submerged coastal marshlands, declaring that the State owns certain submerged coastal lands is vitally important to the people of Louisiana. Examining the history of Louisiana's coastal environment elucidates how such a significant mass of submerged land found its way into private hands in the first place.

A. Tracing the Origin of Louisiana's Privately Owned Coastal Marshlands

Currently, most of Louisiana's coastal marshlands are private.⁴⁰ This private ownership is an anomaly, as most states have a broad reach with respect to coastal land ownership.⁴¹ This abnormality in Louisiana is largely attributable to the Swamp Land Grant Acts of 1849 and 1850,⁴² which gave Louisiana an estimated nine million acres of "swamp and overflowed lands" that were unfit for cultivation.⁴³ The collective purpose of these grants was to permit Louisiana to sell these lands and use the proceeds to protect valuable agricultural lands near the banks of the Mississippi River.⁴⁴ In furtherance of this objective, Louisiana began passing legislation permitting the alienation of a vast amount of coastal swamplands.⁴⁵ In particular, the legislature passed Act 75 of 1880 that seemingly extended the alienability of Louisiana's lands beyond the original scope of the Swamp Land Grants. Although those federal grants gave Louisiana "swamp and overflowed lands," Act 75 allowed the

would occur, because oil and gas companies would still likely want to lease lands from the State to explore for minerals due to the profits that these companies would be able to realize via production.

40. See Anderson, *supra* note 2.

41. For example, Mississippi claims state ownership over all lands naturally subject to tidal influence up to the present-day mean high water mark. See *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 520 (Miss. 1986) ("Only those lands, not tidelands in 1817, which have become such via the natural process of accretion or the general rising or inland expansion of the tide have in law been added to the trust so that title is held by the State.").

42. Cf. Patrick G. Tracy, Jr., *Public Use Issues*, 54TH MIN. L. INST., Apr. 12–13, 2007, at II-5 n.14.

43. *Id.*

44. *Id.*

45. See Act No. 247, 1855 La. Acts 306; Act No. 306, 1855 La. Acts 372.

alienation of “sea marsh or prairie, subject to *tidal* overflow.”⁴⁶ As noted by Professor A.N. Yiannopoulos:

This Act was destined to create confusion [because] it seemed to obliterate the difference between lands “subject to the ebb and flow of the tide[,]” [otherwise known as lands subject to tidal overflow] that Louisiana acquired from the United States under the equal footing doctrine, and “swamp lands subject to overflow” that Louisiana acquired from the United States under the Swamp Land Grant Acts.⁴⁷

Indeed, after the passage of Act 75, courts began jumbling land descriptions by classifying “sea marsh and sea prairie subject to tidal overflow” separately from “lands within the tidewaters of the sea.”⁴⁸ Thus, all sea marsh and sea prairie subject to tidal overflow became alienable,⁴⁹ thereby permitting private ownership of vast areas of land highly susceptible to submersion. As a result, 80% of Louisiana’s coastal marshlands are now private.⁵⁰

Most of these private coastal marshlands either are submerged or will become submerged in the near future.⁵¹ Avoiding those lands when

46. See Act No. 75, § 11, 1880 La. Acts 87 (“That the public lands donated by Congress to the State of Louisiana, designated as sea marsh or prairie, subject to *tidal* overflow, so as to render them unfit for settlement and cultivation, shall be subject to entry and sale” (emphasis added)).

47. See A.N. YIANNPOULOS, PROPERTY § 66, in 2 LOUISIANA CIVIL LAW TREATISE 125 (4th ed. 2001); cf. Pollard v. Hagan, 44 U.S. (3 How.) 212, 218 (1845) (distinguishing between waters subject to the ebb and flow of the tide and swamplands, and noting that tidelands “between the low and high” tide that are covered by the ebb and flow of the tide belong to the State).

48. This arbitrary distinction is significant, because lands that were “sea marsh and sea prairie subject to tidal overflow” were alienable, while “lands within the tidewaters of the sea” were inalienable. See *State v. Sweet Lake Land & Oil Co.*, 113 So. 833, 836 (La. 1927). For a thorough discussion of the practical difficulties present when making tidal boundary determinations, see Nichols, *supra* note 24.

49. Cf. *Sweet Lake Land & Oil Co.*, 113 So. at 836 (“The Legislature, in providing for the sale of the vast areas of land, described ‘as sea marsh, subject to tidal overflow,’ acknowledged that such lands were included in the donations by the Congress of the United States, by the swamp land grants of 1849 and 1850, in which grants the lands donated were described as ‘the swamp and overflowed lands.’”).

50. See Anderson, *supra* note 2; Judith Perhay, *Louisiana Coastal Restoration: Challenges and Controversies*, 27 S.U. L. REV. 149, 153 (2000).

51. See text accompanying *supra* notes 16–18.

navigating, fishing, or hunting near Louisiana's coast is a formidable task,⁵² which has become even more difficult since the passage of House Bill 667 in 2003. That bill removed the requirement that landowners place signs indicating that their land is private.⁵³ Declaring that the State owns all submerged lands within the scope of Louisiana Civil Code article 450 would allow Louisiana's sportsmen to utilize many coastal areas without subjecting themselves to liability for trespassing. Further, this declaration would align with the explicit language in article 450.

B. Article 450 and its Effect on the Origin of Submerged Coastal Land Ownership in Louisiana

Several different types of submerged land exist in Louisiana, including bottoms of navigable waterways, seashores, the banks of streams and rivers, and beds and bottoms of bays and lagoons. The Louisiana Civil Code treats these submerged land categories differently depending on their physical qualities.

According to the Code, submerged lands may be common, public, or private things.⁵⁴ Article 450 of the 1870 Louisiana Civil Code stated that common things "are those the ownership of which belongs to nobody in particular, and which all men may freely use . . . such as air, running water, the sea, and its shores."⁵⁵ That principle, however, underwent significant revision in 1979. The current version of that article, Louisiana Civil Code article 449, illustrates that common things are things "such as air and the high seas that may be freely used by everyone," and that the "common" category no longer includes running water, the seashore, and the waters and beds of the sea within Louisiana's boundaries.⁵⁶ Because this Comment is only concerned with submerged lands, and comment (c) to Article 449 notes that legislation removed several types of submerged land from the category of common things, that category is inapplicable. Thus, submerged lands may be public things, or they may fall under the residual category of private things.⁵⁷

52. See *supra* note 38.

53. See H.B. 667, 102d Leg., Reg. Sess. (La. 2003).

54. See LA. CIV. CODE art. 448 (2015).

55. LA. CIV. CODE art. 450 (1870).

56. LA. CIV. CODE art. 449 (2015); see also *id.* cmt. c.

57. See *id.* art. 453 cmt. a.

If submerged lands are public, they likely fall within the scope of article 450.⁵⁸ Article 450 provides that “running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore” are public things that are insusceptible of private ownership.⁵⁹ Sea bottoms, seashore, and navigable water bottoms are each a type of submerged land because water covers each. In addition, each category includes land commonly found near Louisiana’s coast. Thus, article 450 possibly covers submerged land that private individuals owned when the land was above water.⁶⁰ If this submerged land fits under one of the three land categories covered by article 450, then the land is state-owned and insusceptible of private ownership.

1. The Traditional Definition of “Natural Navigable Water Bodies”

Although article 450 dictates that the bottoms of natural navigable water bodies, sea bottoms, and seashore are public things, the Louisiana Civil Code fails to define these submerged land categories.⁶¹ Nevertheless, Louisiana doctrine and jurisprudence offer some guidance.⁶² Since the mid-1800s, Louisiana courts have utilized a variety of factors to define a “natural navigable water body,” but they have not applied the factors consistently.⁶³ Despite the lack of clarity within each prong, separately analyzing “natural” and “navigable” is the proper approach to define the term “natural navigable water bodies.” If a body of water is both “natural” and “navigable,” then, in theory, that water body and its bottoms should belong to the State rather than the private parties currently claiming ownership.⁶⁴

58. Cf. YIANNOPOULOS, *supra* note 47, § 63, at 116 (noting that a literal interpretation of article 450 could lead to a conclusion that the bottoms of newly navigable water bodies are public things).

59. See LA. CONST. art. IX, § 3; LA. CIV. CODE art. 450 cmt. c (“The first category consists of things which according to constitutional and legislative provisions are inalienable and necessarily owned by the state or its political subdivisions.”); LA. REV. STAT. ANN. § 9:1101 (2008).

60. See *supra* note 58.

61. See LA. CIV. CODE art. 450 cmt. f.

62. *Id.*

63. See *infra* Part II.B.1.b.

64. See LA. CIV. CODE art. 450.

a. Defining “Natural”

Louisiana courts have consistently dealt with cases addressing the meaning of “natural” in article 450. In *Miami Corp. v. State*, the Louisiana Supreme Court decided the ownership of a portion of private land that eroded into the bed of a navigable water body.⁶⁵ The court implied that erosion and subsidence⁶⁶ are natural forces by finding that “where the[se] forces . . . have operated on the banks of a navigable body of water . . . the submerged area becomes a portion of the bed and is insusceptible of private ownership.”⁶⁷ In *Dardar v. Lafourche Realty Co.*, the United States Fifth Circuit Court of Appeals directly discussed the meaning of “natural.”⁶⁸ Interpreting Louisiana law, the court was “persuaded that waterways made navigable through erosion are ‘naturally’ navigable even though the erosion is caused by increased water flow from a connecting dredged canal.”⁶⁹ If manmade canals cause “natural” erosion, then, *a fortiori*, subsidence of coastal lands, sea-level rise, and erosion caused by wind and water are also “natural” forces. Thus, these natural forces must fall under the scope of “natural” in article 450.

b. Defining “Navigable”

For nearly two centuries, courts have dealt with cases addressing the meaning of “navigable.”⁷⁰ Historically, a water body was navigable in law if the water body was navigable in fact in 1812, the year Louisiana entered the Union.⁷¹ In recent years, courts have expanded this interpretation. In *Vermilion Bay Land Co. v. Phillips Petroleum Co.*, the Louisiana Fourth Circuit Court of Appeal found that water bodies are navigable in law if they became navigable in fact before the State alienated them to private

65. 173 So. 315 (La. 1936).

66. Subsidence is defined as “the sinking or settling of land to a lower level in response to various natural and man-caused factors.” *Definition of Land Subsidence*, ECOLOGYDICTIONARY.ORG, www.ecologydictionary.org/land_subsidence (last visited Jan. 20, 2015).

67. See *Miami Corp.*, 173 So. at 322.

68. See 985 F.2d 824, 833 (5th Cir. 1993).

69. *Id.* (citing *O’Brien v. State Mineral Bd.*, 24 So. 2d 470, 473 (La. 1945)).

70. For an early case discussing the meaning of “navigable,” see *The Daniel Ball*, 77 U.S. (9 Wall.) 557, 563 (1870).

71. See, e.g., *Ramsey River Rd. Prop. Owners Ass’n v. Reeves*, 387 So. 2d 1194, 1196 (La. Ct. App. 1980) (“[T]herefore, if the waterway in question was used for the purposes of trade and commerce in 1812, it is to be considered to have been a navigable body of water although it may no longer serve that purpose.”).

parties, regardless of whether they were navigable in fact in 1812.⁷² The court held that “[t]here is no sound reason to distinguish between the inalienable character of navigable waterbeds which existed in 1812 . . . and natural navigable waterbeds which, though non-navigable at the time such bottoms were acquired by the State . . . [became] naturally navigable prior to segregation by the State.”⁷³ This holding echoed Louisiana’s public policy of uninterrupted navigation and transportation, which favors State ownership of navigable water bottoms.⁷⁴ Though courts have not ruled on this particular question since *Vermilion Bay*, prominent Louisiana scholars concur with the reasoning of the Fourth Circuit.⁷⁵ Still, disagreement amongst courts persists regarding what makes a water body navigable in fact.⁷⁶

In general, a water body is navigable in fact if it is susceptible of being used, in its ordinary condition, as a highway of commerce “over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”⁷⁷ Yet Louisiana courts, reciting similar definitions, have reached different conclusions regarding what physical characteristics must be present for a water body to be navigable in fact. In *Burns v. Crescent Gun & Rod Club*, the plaintiff sought a declaration that he had the right to recreationally fish in four water bodies near Lake Pontchartrain.⁷⁸ Notably, the Louisiana Supreme Court found that no commercial activities ever took place in these bodies of water and that the water bodies in question were “grass choked” year round and only susceptible to navigation by pirogues and small skiffs.⁷⁹ Finding that navigable in fact “means when a stream is large enough to float a boat of some size, engaged in carrying trade,” the court held that this waterway was not navigable.⁸⁰ In *Ramsey River Road Property Owners Ass’n v.*

72. 646 So. 2d 408, 411 (La. Ct. App. 1994).

73. *Id.* at 411.

74. *Id.*

75. See Lee Hargrave, “Statutory” and “Hortatory” Provisions of the Louisiana Constitution of 1974, 43 LA. L. REV. 647, 660 (1983) (“If a nonnavigable stream becomes navigable, it would cease to be susceptible of private ownership and would become property of the State.”).

76. See YIANNPOULOS, *supra* note 47, § 64, at 118 (noting that not all courts follow the same test). Given the enactment of the Rivers and Harbors Act of 1899, 33 U.S.C. § 1 (2012), one can make a strong argument that the United States has wholly occupied the field on navigation.

77. *The Daniel Ball*, 77 U.S. (9 Wall.) 557, 563 (1870); see also YIANNPOULOS, *supra* note 47, § 64, at 118.

78. 41 So. 249, 251 (La. 1906).

79. See *id.*

80. *Id.*

Reeves, the Louisiana Supreme Court adopted a slightly broader interpretation of navigable in fact.⁸¹ The court specifically held that the Bogue Falaya River was navigable in fact because it was deep enough to float logs down the river as part of a lumbering operation.⁸² In adopting this interpretation, the court cited *The Montello*, a United States Supreme Court case that decided a Wisconsin river was navigable despite its rapids and falls that “embarrassed the navigation of early days.”⁸³ Noting that not every mode of commerce could successfully traverse the river, the *Montello* Court pronounced that “[t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.”⁸⁴

Though most Louisiana courts readily agree that potential commercial use is necessary to find navigability,⁸⁵ in *Kieff v. Louisiana Land and Exploration Co.*, the Louisiana Fourth Circuit Court of Appeal suggested that the use of a water body by commercial fisherman or crabbers does not necessarily make a water body navigable in fact.⁸⁶ In light of the abundance of jurisprudence suggesting that commercial use is inherently intertwined with a finding of navigability, the Fourth Circuit’s holding in *Kieff* seems untenable. Indeed, the United States District Court for the Western District of Louisiana implied that mere commercial fishing activities can lead to a finding of navigability, even if those activities only

81. See 396 So. 2d 873, 876–77 (La. 1981) (“[I]n 1812 there was no substantial difference in the nature of the river at the respective locations. For instance, there was trial testimony that in the nineteenth century lumbering operations were carried on in the vicinity of defendant’s proposed bridge and that the lumber was floated down the Bogue Falaya to Covington. . . . We conclude that the district court and the Court of Appeal were correct in determining that the Bogue Falaya River at the point where defendants propose to build a bridge was navigable in fact . . .”).

82. *Id.*

83. See 87 U.S. (20 Wall.) 430, 432 (1874).

84. *Id.* at 441.

85. See, e.g., *State ex rel. Bd. Comm’rs of Atchafalaya Basin Levee Dist. v. Capdeville*, 83 So. 421, 425 (La. 1919) (simply stated, a water course is navigable when “by its depth, width, and location [it] is rendered available for commerce”); *Ramsey River Rd. Prop. Owners Ass’n*, 396 So. 2d at 876 (“[T]hey are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”); *State v. Aucoin*, 20 So. 2d 136, 159–61 (La. 1944) (noting that a water body must be available for commercial purposes to be navigable in fact).

86. See 779 So. 2d 85, 92 (La. Ct. App. 2001) (suggesting that use by commercial oystermen and crabbers does not constitute navigability).

occur seasonally.⁸⁷ The district court's holding seems more reasonable than that of the fourth circuit. Some of the most common forms of commerce or trade in coastal Louisiana are commercial fishing, oyster farming, crabbing, and shrimping.⁸⁸ When an oysterman hauls in 400 pounds of oysters and then transports them from his fishing area to the dock, one may reasonably conclude that he is engaging in commerce. Whether these kinds of commercial activities satisfy the definition of navigable in fact, however, is still an open question.

Interpreting the existing jurisprudence, a water body existing in 1812 or created by natural forces—such as erosion, subsidence, and sea level rise prior to State alienation⁸⁹—that readily allows travel for commercial purposes is a natural navigable water body within the purview of article 450. No law or jurisprudence, however, addresses whether a water body that submerges after State alienation is properly classified as a natural navigable water body.⁹⁰

2. The Traditional Definition of the Territorial Sea and its Extensions

Similar to natural navigable water bottoms, land categorized as sea bottom belongs to the State under article 450.⁹¹ Ever since the legislature's passage of Louisiana Revised Statutes title 49, section 3, "territorial sea" has referred to, at the very least, the seawater and sea bottoms between Louisiana's coastline and its territorial boundary, which extends three miles from the coastline.⁹² The territorial sea likely reaches further inland, however. First discussed in *Pollard v. Hagan*, the equal footing doctrine

87. *Cf.* *Boudreaux v. La. Dep't of Wildlife & Fisheries*, No. 6:11-CV-0834, 2014 WL 4219446 (W.D. La. Aug. 22, 2014) (refusing to grant summary judgment because Boudreaux offered evidence that he fished commercially in the disputed area).

88. *See Plenty to Celebrate*, LA. SEAFOOD, <http://www.louisianaseafood.com/industry> [perma.cc/EVR3-TMT6] (last visited Oct. 30, 2015) (noting that these industries have a vast effect on Louisiana's economy).

89. This list of natural forces is illustrative.

90. *See infra* Part III.B.

91. *See* LA. CIV. CODE art. 450 (2015). Although article 450 only explicitly includes "running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore," the bottom of the territorial sea is implicitly included. *See Milne v. Girodeau*, 12 La. 324 (1838) (declaring that the bed of Lake Pontchartrain is insusceptible of private ownership and thus, by implication, classifying the Lake as "sea").

92. *See* LA. REV. STAT. ANN. § 49:3 (2012); YIANNOPOULOS, *supra* note 47, § 69, at 131.

granted all of the land under navigable waters, including land under seawaters, to the new states upon their admission into the Union.⁹³ Though this doctrine only granted Louisiana ownership of sea bottoms up to the average high water mark in 1812,⁹⁴ Louisiana Civil Code article 451 establishes that Louisiana owns the sea bottom up to the highest normal level of the seawater during winter, without regard for any boundary set in 1812.⁹⁵ The Louisiana Supreme Court in *Miami Corp. v. State* followed the spirit of the Civil Code by implicitly concluding that the “highest ordinary level of the seawater during the winter season”⁹⁶ is a dynamic boundary that shifts due to natural forces.⁹⁷ Responding to the notion that the territorial sea extends further inland than the coastline, Louisiana courts created a distinct category of public water bodies—“arms of the sea”—that is governed by Article 450.⁹⁸

In *Davis Oil Co. v. Citrus Land Co.*, the Louisiana Supreme Court settled years of confusion regarding the definition of arms of the sea.⁹⁹ This case concerned a disagreement between the State and a private

93. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 11–12 (1997).

94. See *Dardar v. Lafourche Realty Co.*, 985 F.2d 824 (5th Cir. 1993), remand to No. 85–1015, 1994 WL 374309 (E.D. La. July 7, 1994), *aff'd*, 55 F.3d 1082 (5th Cir. 1995); YIANNPOULOS, *supra* note 47, § 69, at 131; *cf.* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

95. See LA. CIV. CODE art. 451; *see also* YIANNPOULOS, *supra* note 47, § 69, at 131–32.

96. *Miami Corp. v. State*, 173 So. 2d 315, 322–23 (La. 1936).

97. LA. CIV. CODE art. 451; *see Miami Corp.*, 173 So. 2d at 322–23.

98. See, e.g., *Zeller v. S. Yacht Club*, 34 La. Ann. 837 (1882); *Morgan v. Negodich*, 3 So. 636, 639 (La. 1887); *Buras v. Salinovich*, 97 So. 748, 750 (La. 1923); *see also* LA. CIV. CODE art. 450 cmt. c.

99. See 576 So. 2d 495, 501 (La. 1991). For many years, Louisiana courts did not provide a clear definition of “arm of the sea.” In *D'albora v. Garcia*, the Louisiana Fourth Circuit Court of Appeal adopted an expansive interpretation of an “arm of the sea,” finding that when a body of water connected to an arm of the sea, and the tide ebbed and flowed regularly in that water body, that water body was also an arm of the sea. 144 So. 2d 911, 914 (La. Ct. App. 1962). In *Morgan v. Negodich*, the Louisiana Supreme Court, paying special attention to the route Gulf waters took to enter a bayou, adopted a more restrictive interpretation of “arm of the sea.” 3 So. 636, 639 (La. 1887) (finding that a water body forming a connecting link between an arm of the sea and another bay was not an arm of the sea). The Court in *Morgan* noted if the salt water in a water body adjacent to, or connected with, an arm of the sea does not result from the high tide flooding its banks, then that water body cannot be considered an arm of the sea. *Id.* at 639. Subsequent cases briefly discussed arms of the sea, but to what that term referred was unclear until *Davis*.

landowner over the ownership of a tract of land consisting of alluvion¹⁰⁰ located near the intersection between Shell Island Pass, a river, and Little Bay.¹⁰¹ A dispute over which waterway the alluvion bordered arose because, although alluvion formed on the banks of a river belongs to the bank owner,¹⁰² alluvion formed on the shores of an arm of the sea belongs to the State.¹⁰³ Affirming the appellate court's finding that Little Bay was an arm of the sea, the court delineated several factors that help determine whether a water body is an arm of the sea.¹⁰⁴ If a water body is "immediately adjacent" to the Gulf such that it forms a "bay along the Gulf Coast," then that water body is likely an arm of the sea.¹⁰⁵ Similarly, if the water body's marshline is "washed by the tidal waters of the Gulf," then the water body is likely an arm of the sea.¹⁰⁶ Applying these factors, the court found that arms of the sea are those "bodies of water in the vicinity of the open Gulf and which are directly overflowed by the waters of the Gulf."¹⁰⁷

The existing jurisprudence clarifies that the State owns the bottoms of an arm of the sea when it existed prior to state alienation,¹⁰⁸ as is the case with the bottoms of natural navigable water bodies. No law directly addresses, however, whether the State owns land that became a sea bottom after state alienation.

3. *The Traditional Definition of "Seashore"*

Similar to arms of the sea and natural navigable water bodies, if land is seashore, then that land is a public thing that the State owns.¹⁰⁹ Article 451 defines seashore as "the space of land over which the waters of the sea spread in the highest tide during the winter season."¹¹⁰ According to Professor A.N. Yiannopoulos, this definition necessarily includes the

100. Alluvion is defined as "[a]n accumulation of soil, clay, or other material deposited on the bank of a river." BLACK'S LAW DICTIONARY 33-34 (9th ed. 2009).

101. *Davis Oil Co.*, 576 So. 2d at 496.

102. LA. CIV. CODE art. 499.

103. *Id.* art. 500.

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

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 500.

109. *See* LA. CIV. CODE art. 450.

110. *Id.* art. 451.

shores of arms of the sea and of the open gulf.¹¹¹ Seashore, however, likely does not include the shores of lands merely subject to regular tidal overflow.¹¹²

The Louisiana Supreme Court carved out this limitation in *Morgan v. Negodich* and *Buras v. Salinovich*.¹¹³ In *Morgan*, the parties disputed the ownership of oyster beds.¹¹⁴ One party believed that the oyster beds grew on a riverbank, while the other party believed that they grew on the seashore.¹¹⁵ In finding that the oyster beds grew on the riverbank, the Louisiana Supreme Court noted that the shores of a water body joining an arm of the sea with an inland bay are not seashore.¹¹⁶ Similarly, the *Buras* court found that marshlands ordinarily subject to overflow from gulf tides are not seashore.¹¹⁷ In that case, the court reasoned that the redactors of the Civil Code never intended for article 451 to include “any and all land that is subject to tidal overflow, however remote from the ‘seashore,’ as it is generally understood.”¹¹⁸ In both *Morgan* and *Buras*, the Louisiana Supreme Court implied that the distance between the disputed land and the sea, as well as the path of seawater that covers the land, are indicative of whether land is seashore.¹¹⁹ Thus, land is likely seashore only if seawater directly washes over it during “the highest tide [in] the winter season.”¹²⁰

Under *Morgan* and *Buras*, as with natural navigable water bottoms and sea bottoms, if submerged land was seashore prior to state alienation, then that land falls within the scope of article 450 and is State owned. Even so, though both *Morgan* and *Buras* implied that the State would own land that transformed into seashore after state alienation, no law or case directly addresses that proposition.

111. See YIANNOPOULOS, *supra* note 47, § 72, at 139.

112. See, e.g., *Morgan v. Negodich*, 3 So. 636 (La. 1887); *Buras v. Salinovich*, 97 So. 748 (La. 1923); see also *Burns v. Crescent Gun & Rod Club*, 41 So. 249 (La. 1906).

113. See *Morgan*, 3 So. at 636; *Buras*, 97 So. at 748.

114. 3 So. 636.

115. See *id.* at 637.

116. *Id.* at 638–40.

117. See 97 So. at 749–50.

118. *Id.* at 750.

119. Cf. *id.* (“These expressions in the Code ‘the sea and its shores,’ and ‘seashore,’ have reference to the gulf coast, and to the lakes, bays and sounds along the coast.”); *Morgan*, 3 So. at 636.

120. LA. CIV. CODE art. 451 (2015).

III. LOUISIANA OWNS ALL SUBMERGED LAND FITTING UNDER ARTICLE 450 REGARDLESS OF WHEN THAT LAND SUBMERGED

Under article 450, the State owns several different types of land, including seashore,¹²¹ sea bottoms,¹²² and the beds and bottoms beneath Louisiana's navigable waters. But consider a tract of private marshland that, in 1820, was located five miles inland from the Gulf of Mexico. As the Gulf waters rose, or as the land subsided, that tract became submerged under ten feet of water. Adhering to Louisiana's public policy, Constitution, Civil Code, and the jurisprudential reasoning of many Louisiana courts, this tract of submerged marshland must fall within the scope of article 450 and therefore be owned by the State. Although no cases or doctrine direct a court's analysis on this particular issue, seashore, sea bottoms, and navigable water bottoms created *after* state alienation are public things insusceptible of private ownership.¹²³

A. The State Owns Submerged Land That Bordered Natural Navigable Water Bodies

As private land abutting a natural navigable water body erodes into that body, that land becomes part of the water body's bottom, and, consequently, its ownership is transferred to Louisiana under article 450.¹²⁴ According to the Louisiana Supreme Court in *Miami Corp.*, public policy and sound logic necessitate this result.¹²⁵ In that case, Miami Corporation sought a declaration that it was the owner of an eroded area forming a portion of Grand Lake's bed.¹²⁶ The court noted that "[i]t

121. *See id.* (defining seashore as land directly flooded by seawater during the "highest tide during the winter season").

122. *Davis Oil Co. v. Citrus Land Co.*, 576 So. 2d 495, 501 (La. 1991) (explaining that sea bottoms include land underneath "bodies of water in the vicinity of the open Gulf and which are directly overflowed by the waters of the Gulf").

123. This Comment only seeks to address instances where the transformation of land into an article 450 category is substantially due to natural forces.

124. *See Miami Corp. v. State*, 173 So. 315, 323 (La. 1936) ("[W]hen submersion occurs, the submerged portion becomes a part of the bed or bottom of the navigable body of water in fact, and therefore the property of the State, by virtue of its inherent sovereignty, as a matter of law."); *Buras v. Ellzey*, 233 So. 2d 586 (La. Ct. App. 1970); YIANNPOULOS, *supra* note 47, § 69, at 132.

125. *See Miami Corp.*, 173 So. at 316 ("It is the rule of property and of title in this State, and also a rule of public policy that the State as a sovereignty, holds title to the beds of navigable bodies of water."); LA. CONST. art. IX, § 3.

126. *See Miami Corp.*, 173 So. at 316.

appears to be the rule that where the forces of nature . . . have operated on the banks of a navigable body of water . . . the submerged area becomes a portion of the bed and is insusceptible of private ownership.”¹²⁷ If the rule in *Miami Corp.* was not the law, the entire rim of land surrounding a public lake could erode and become private submerged land, thereby preventing public use of the lake.¹²⁸ Thus, taking policy considerations into account, submerged land that formerly abutted a natural navigable water body must be a public thing under article 450.

B. The State Owns the Bottoms of Natural Navigable Water Bodies Created After State Alienation

Analyzing Louisiana’s jurisprudence that addresses the ownership of the bottoms of natural navigable water bodies created *after* state alienation proves to be quite difficult. No case directly presents the issue, and the courts that tangentially address the issue only provide a framework that might lead to improper interpretation.¹²⁹ Fortunately, Louisiana’s public policy, interpretative maxims, and the Louisiana Constitution—despite the lack of guidance from Louisiana’s jurisprudence—lead to the conclusion that all navigable water bottoms should be State owned, regardless of when they became navigable.¹³⁰

Capturing the essence of Louisiana’s public policy, Chief Justice Fournet, in his dissent in *California Co. v. Price*, stated that a land grant including navigable water bottoms was “equivalent to a patent to air, or to

127. *Id.* at 322.

128. *Id.* at 323.

129. *See* Vermilion Bay Land Co. v. Phillips Petroleum Co., 646 So. 2d 408, 410–12 (La. Ct. App. 1994) (noting that previous cases only dealt with water bodies navigable in 1812, and subsequently, answering the question as to water bodies that were non-navigable in 1812 but became navigable before severance).

130. *See* Gulf Oil Corp. v. State Mineral Bd., 317 So. 2d 576, 590 (La. 1974) (“It has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership” (quoting LA. REV. STAT. ANN. § 1107 (1954))); *but see* Delacroix Corp. v. Jones-O’Brien, Inc., 597 So. 2d 65, 69–70 (La. Ct. App. 1992) (implying that the public policy discussed in *Gulf Oil* does not apply to inland navigable lakes). A landowner’s right of reclamation—the right to apply for a permit that allows a landowner to reclaim land that he has lost due to erosion by essentially rebuilding the land—is the only exception to the prohibition on private ownership of Louisiana’s natural navigable water bottoms. *See* LA. CONST. art. IX, § 3. Louisiana’s submerged coastal environment remains privately owned, or at the very least, privately claimed.

the water running through the Mississippi river on its way to the sea.”¹³¹ Chief Justice Fournet further explained that “[a]n arm of the sea is one of those things which all men may freely use conformable with the use for which it is intended by nature, and is among those things that are insusceptible of private ownership.”¹³² Courts consistently interpret this public policy to mean that Louisiana does not permit private control over the bottoms of channels of commerce; thus, those courts consistently find that navigable water bottoms existing in 1812 or created prior to state alienation are insusceptible of private ownership.¹³³ Those courts did not address the ownership of water bodies that become navigable in fact *after* state alienation, however. “[P]rivately owned land does not become part of a navigable body of water” and thus does not become insusceptible of private ownership “when a nearby navigable body of water overflows its normal bed and *temporarily* covers the property.”¹³⁴ But several sound reasons exist, in addition to strong public policy, for why land should be insusceptible of private ownership when that land *indefinitely* becomes the bottom of a navigable water body.

A literal interpretation of article 450 dictates that these lands become public by operation of law.¹³⁵ Article 450 does not distinguish between the bottoms of water bodies that became navigable in fact before severance from state ownership and water bodies that become navigable in fact after state alienation. The article simply states that the bottoms of natural navigable water bodies are public things.¹³⁶ Obeying the maxim “where the law does not distinguish, courts should not distinguish,” the ownership

131. Cal. Co. v. Price, 74 So. 2d 1, 16 (La. 1953) (Fournet, J., dissenting).

132. *Id.* (internal citations omitted).

133. See, e.g., *Gulf Oil Corp.*, 317 So. 2d at 582 (“[N]avigable water bottoms other than rivers are public things insusceptible of private ownership.”); *State v. Barras*, 615 So. 2d 285, 287 (La. 1993) (“The beds of navigable waters are insusceptible of private ownership.”); *Miami Corp.*, 173 So. at 326 (“But, in order to reach this conclusion, the court had to go counter to the long-established sound principles of public policy in our jurisprudence—that the title to the bottoms of navigable bodies of water belong to the State as a result of its inherent sovereignty and are insusceptible of private ownership.”); see also *Vermilion Bay Land Co.*, 646 So. 2d at 410–12 (noting that previous cases only dealt with water bodies navigable in 1812 and, subsequently, answering the question as to water bodies that were non-navigable in 1812 but became navigable before severance).

134. *Walker Lands, Inc. v. E. Carroll Parish Police Jury*, 871 So. 2d 1258, 1264 (La. Ct. App. 2004) (emphasis added).

135. See YIANNPOULOS, *supra* note 47, § 63, at 116 (noting that a literal interpretation of article 450 may lead to this conclusion); cf. LA. CIV. CODE art. 450 (2015).

136. LA. CIV. CODE art. 450.

of the bottoms of newly navigable water bodies should revert to the State.¹³⁷

The Louisiana Constitution also supports this conclusion. Article IX, section 3 provides that “[t]he legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion.”¹³⁸ In ratifying this provision, Louisiana’s voters expressed their desire to keep these water bottoms out of private ownership.¹³⁹ Thus, “if a non-navigable stream” or other body of water “becomes navigable, it would cease to be susceptible of private ownership and would become property of the state.”¹⁴⁰ Further, nothing in the Louisiana Constitution, the Civil Code, or the jurisprudence suggests that a privately owned thing cannot become a public thing by operation of law. As such, as private land submerges beneath seawater or naturally navigable waterways, that private land becomes public by operation of law.¹⁴¹

Lastly, if the bottoms of water bodies that become naturally navigable after state alienation were susceptible of private ownership, then the bottoms of a body of water large enough to support substantial commercial

137. A similar result would be reached in most other states. *See, e.g.*, *Tenney v. Dep’t of Health & Evntl. Control*, 712 S.E.2d 395, 399–400 (S.C. 2011) (noting that when marshland erodes or becomes submerged because of changing tides, ownership reverts back to the state); *City of Long Branch v. Jui Yung Liu*, 4 A.3d 542, 550 (N.J. 2010) (“Under the common law, the owner of oceanfront property . . . loses to the State title over land that becomes tidally flowed as a result of erosion.”); *see also* *TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 184–85 (Tex. App. 2007) (explaining that the boundary of public and private ownership along water bodies is not static, and that as land becomes submerged, ownership reverts back to the State).

138. LA. CONST. art. IX, § 3.

139. *See* Hargrave, *supra* note 75, at 660–61.

140. *Id.* at 661.

141. *See* *Miami Corp. v. State*, 173 So. 315, 322 (La. 1936) (“It appears to be the rule that where the forces of nature—subsidence and erosion—have operated on the banks of a navigable body of water, regardless of whether it be a body of fresh water or the sea, or an arm of the sea, the submerged area becomes a portion of the bed and is insusceptible of private ownership.”); Clinton W. Shinn, *Of Coase, the Takings Clause, and the Inexorably Shrinking Marsh: A Review with Lagniappe*, 29 S.U. L. REV. 271, 284–85 (2002) (“Without the vegetation, the soil crumbles away beneath the encroaching saltwater, first in pools, then ponds, then lakes and bays, all technically navigable and, thus, state owned. By operation of law, private marsh becomes public navigable water bottoms.”). Courts would likely not consider this change in ownership to be an expropriation of private property. *See infra* Part III.C.

activity could be private. If such a water body could be private, the owner could possibly interfere with trade.¹⁴² That result is impermissible because, under Article 450,¹⁴³ the public domain indefinitely retains the right to use Article 450 waters and bottoms without private interference.¹⁴⁴ Considering Louisiana's strong public policy opposing the alienation of navigable water bottoms from the State,¹⁴⁵ the effects of a law that allows the private ownership of navigable water bottoms leads to absurd results that Louisiana's legal regime should not tolerate. Therefore, as a principle of law and public policy, Louisiana must own land that becomes the bottom of a natural navigable water body *after* state alienation.

C. The State Owns Sea Bottoms and Seashores Created After State Alienation

As with the bottoms of natural navigable water bodies, sea bottom and seashore created before state alienation is clearly insusceptible of private ownership.¹⁴⁶ But whether land that transformed into sea bottom and seashore after state alienation is susceptible of private ownership remains undecided. Several courts have implied that the bottoms and shores of

142. Although private ownership of this land would present problems for individuals attempting to engage in trade in these water bodies, the federal navigational servitude, derived from the Commerce Clause of the United States Constitution, would likely substantially curtail the ability of the private landowner to interfere with trade in this instance. *See* U.S. CONST. art. 1, § 8, cl. 3; *see also* *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1382 (Fed. Cir. 2000) (noting the navigational servitude gives the federal government “a dominant servitude” that allows it “to regulate and control the waters of the United States in the interest of commerce”).

143. *See* LA. CIV. CODE art. 450 (2015) (declaring that the waters and bottoms of natural navigable water bodies are always state-owned).

144. *See id.* art. 450 cmt. b (noting that the nature of public things is that they are dedicated to public use and held in the public trust for such use).

145. *See* *Gulf Oil Corp. v. State Mineral Bd.*, 317 So. 2d 576, 586 (La. 1974).

146. *See* LA. REV. STAT. ANN. § 49:3 (2012); YIANNOPOULOS, *supra* note 47, § 72, at 139.

arms of the sea and the Gulf of Mexico are always State owned;¹⁴⁷ however, some older jurisprudence suggests otherwise.¹⁴⁸

Citing this older jurisprudence, Professor Yiannopoulos suggests that private individuals may own portions of sea bottom.¹⁴⁹ Still, Louisiana law only permits sea bottom ownership in extremely rare cases where the State issued patents to the sea bottom prior to 1921.¹⁵⁰ Those patents' validity is a consequence of a line of controversial jurisprudence,¹⁵¹ which further casts doubt on the legitimacy of private ownership of sea bottom and seashore. As to sea bottoms created since 1921, however, Louisiana law is unequivocal: "[W]hen the water bottom in question lies . . . under the sea or an arm of the sea, it is explicitly included among the inalienable things vested in the State."¹⁵² Thus, submerged land that becomes sea bottom or seashore *after* state alienation is a public thing that the State owns.

147. See, e.g., *Gulf Oil Corp.*, 317 So. 2d at 582–83 (“Moreover, when the water bottom in question lies, as in this case, under the sea or an arm of the sea, it is explicitly included among the inalienable things vested in the State.”); *Fradella Const., Inc. v. Roth*, 503 So. 2d 25, 27 (La. Ct. App. 1986) (“Lands that have become sea bottoms as well as accretions formed at a seashore belong to the State.”).

148. See, e.g., *Cal. Co. v. Price*, 74 So. 2d 1 (La. 1953).

149. See YIANNOPOULOS, *supra* note 47, § 69, at 132.

150. *Id.*

151. In *California Co. v. Price*, the Louisiana Supreme Court, in the face of three vigorous dissents, declared that patents to navigable water bottoms and sea bottoms were valid. 74 So. 2d at 13–14. For the next 20 years, courts criticized that opinion and often attempted to circumvent the holding. Finally, in 1974, the Louisiana Supreme Court in *Gulf Oil Corp.*, 317 So. 2d 576, overruled *California Co.* and all cases applying the same reasoning, noting those cases were based upon “erroneous reasoning.” *But see Delacroix Corp. v. Jones-O’Brien, Inc.*, 597 So. 2d 65, 69–70 (La. Ct. App. 1992). In *Delacroix Corp.*, the Fourth Circuit held that the reasoning in *Gulf Oil Corp.* did not apply to an interior lake. *Id.* By doing so, the court may have given new life to *California Co.* and its progeny.

152. *Gulf Oil Corp.*, 317 So. 2d at 582–83; LA. REV. STAT. ANN. § 49:3 (2012) (“The State of Louisiana owns in full and complete ownership the waters of the Gulf of Mexico and of the arms of the Gulf and the beds and shores of the Gulf and the arms of the Gulf, including all lands that are covered by the waters of the Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana.”); see also *La. Navigation Co. v. Oyster Comm’n of La.*, 51 So. 706, 711 (La. 1910) (“Hence, there can be no such thing in this state as private ownership of the bed of a navigable river, and *a fortiori* can there be no such thing as private ownership of the bed of the sea or of an arm of the sea.”); cf. *Cal. Co.*, 74 So. 2d at 17–29 (Hawthorne, J., dissenting) (citing to nine different legislative acts clearly evincing a public policy opposed to private ownership of sea bottoms: Act No. 106 of 1886, Act No. 110 of 1892, Act No. 121 of 1896, Act No. 153 of

The Louisiana Constitution of 1974,¹⁵³ the Louisiana Civil Code,¹⁵⁴ and the Louisiana Revised Statutes¹⁵⁵ dictate that natural navigable water bottoms, sea bottoms, and seashore are insusceptible of private ownership. None of these sources indicate that exceptions exist or that this rule should not apply to lands that, after state alienation, submerge due to natural forces. Rather, jurisprudence and legal scholarship suggest that classifying newly navigable water bottoms, newly created sea bottoms, and newly created seashore as public things under article 450 is reasonable.¹⁵⁶ Further, reading article 450 in light of the majority view of Louisiana's public policy¹⁵⁷ leads to the conclusion that those newly submerged lands fall within the scope of article 450. Thus, all submerged land exhibiting the characteristics of the water bodies explicitly included under article 450, regardless of when they began to exhibit those characteristics, are public things that the State owns.

IV. A PROPOSAL FOR STATE ACTION

As Louisiana law currently stands, no provision directly addresses whether ownership changes when coastal land submerges due to erosion, subsidence, sea-level rise, and other similar forces. Even so, the legislature could fill the gap by drafting a new revised statute that incorporates the spirit of code articles, constitutional provisions, and current statutes.

1902, Act No. 52 of 1904, Act No. 189 of 1910, Act No. 54 of 1914, Act No. 139 of 1924, and Act No. 67 of 1932).

153. LA. CONST. art. IX, § 3 (“The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion.”).

154. LA. CIV. CODE art. 450 (2015) (“Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore.”); *see also id.* art. 450 cmt. c (“The first category consists of things which according to constitutional and legislative provisions are inalienable and necessarily owned by the state or its political subdivisions.”).

155. *See* LA. REV. STAT. ANN. § 49:3 (2012).

156. *See* *Miami Corp. v. State*, 173 So. 315, 322 (La. 1936); *Vermilion Bay Land Co. v. Phillips Petroleum Co.*, 646 So. 2d 408, 411–12 (La. Ct. App. 1994); Hargrave, *supra* note 75, at 660–61; YIANNOPOULOS, *supra* note 47, § 63, at 116 (noting that a literal interpretation of article 450 may lead to this conclusion).

157. *See, e.g., Miami Corp.*, 173 So. at 326 (“But, in order to reach this conclusion, the court had to go counter to the long-established sound principles of public policy in our jurisprudence—that the title to the bottoms of navigable bodies of water belong to the State as a result of its inherent sovereignty and are insusceptible of private ownership.”); *Gulf Oil Corp.*, 317 So. 2d at 590.

A. The Inadequacy of Non-Legislative Solutions

According to the massive amount of scientific data, Louisiana's coastal lands are perpetually submerging, shifting, and rising, particularly in the changing delta lobes of the Mississippi River.¹⁵⁸ This pervasive environmental and societal change necessitates legal adaptation, because that change blurs the traditional line between private and public property. The legislature must address the ownership of submerged lands and can do so in a variety of ways.

The legislature could instruct the State Lands Office to conduct a more comprehensive review of Louisiana's coastal lands. A detailed survey may reveal the submerged lands that the State believes it owns, thus giving the public an idea of what lands it can utilize. An extensive survey, however, would be costly,¹⁵⁹ would likely invite litigation from landowners who feel that the State is informally encroaching on their land,¹⁶⁰ and would not provide finality with respect to land title statewide.¹⁶¹

Conversely, the State, seeking a declaration of its ownership of certain submerged tracts of land, could file suit against private landowners. This action would be conclusive of land title, and, if the State won, would result in more public land.¹⁶² Still, this process would be expensive and cumbersome. Perhaps more importantly, a court could find that even as new land submerges well beneath water, title remains with the private landowner.

Although both of these possible solutions have some benefits, neither solution attacks the heart of the problem: no clear pronouncement of Louisiana law exists regarding newly submerged land. The only option to solve this problem is to draft a piece of legislation directly addressing the ownership of submerged land; however, in doing so, the legislature must diligently draft the legislation to avoid potential obstructions.

158. See Anderson, *supra* note 2; see also Frazier, *supra* note 16; McLindon, *supra* note 16.

159. Telephone Interview with Ryan Seidemann, *supra* note 5.

160. *Id.*

161. *Id.*

162. *Id.*

B. Putting to Rest the State's Potential Concerns Regarding Legislation Asserting Ownership over Certain Submerged Lands

The oil and gas industry owns much of the coastal land in Louisiana and contributes significantly to the Louisiana economy.¹⁶³ As a result, that industry's presence influences the State's decisions. If the Louisiana Legislature passed a statute claiming ownership over a vast majority of submerged land in coastal Louisiana, the statute may disrupt thousands of titles to land where the oil and gas industry is heavily invested.¹⁶⁴ Louisiana may not have the funding or resources to litigate thousands of title claims. Additionally, the State may be hesitant to enact legislation declaring ownership over formerly private lands because doing so may give rise to takings issues under the Federal and Louisiana Constitutions.¹⁶⁵ Inevitably, private landowners would claim that the State could not take their land without giving just compensation. Although these two concerns are significant, neither should keep the State from declaring ownership over all submerged lands constituting sea bottom, seashore, and navigable water bottom.

1. The Takings Clause Would Not Apply to the Reversion of Ownership of Natural Navigable Water Bottoms, Sea Bottoms, or Seashore

The Fifth Amendment to the U.S. Constitution and article I, sections 2 and 4, of the Louisiana Constitution of 1974 prohibit the expropriation of private property without just compensation.¹⁶⁶ A reversion of ownership due to natural submersion may violate this core principle.¹⁶⁷

163. See *Newest Economic Impact Study Reinforces Oil and Gas Industry's Importance to Louisiana*, *supra* note 35.

164. Cf. *Delacroix Corp. v. Jones-O'Brien, Inc.*, 597 So. 2d 65, 70 (La. Ct. App. 1992) (noting that *Phillips Petroleum Co. & Cinque Bambini P'ship v. Mississippi & Saga Petroleum U.S., Inc.* "sets the stage for disruption of land titles across all Louisiana wetlands").

165. See Hargrave, *supra* note 75, at 661.

166. U.S. CONST. amend. V, § 7; LA. CONST. art. I, § 2, § 4.

167. An open question exists regarding precisely what action or inaction by the State would constitute man-caused submersion and what would constitute natural submersion. Some believe that the State may be inclined to neglect coastal erosion and subsidence problems, which would inevitably lead to the submersion of portions of Louisiana's coast and more state-owned land. Additionally, some scholars believe that extensive dredging and other types of disruption by oil and gas companies in prior decades have greatly contributed to Louisiana's current rate of land loss. This Comment does not endeavor to decide where to draw the

According to Professor Yiannopoulos, a “[s]trong argument may be made that the acquisition by the state of the ownership of the beds of formerly non-navigable water bodies is a taking of property without compensation.”¹⁶⁸ After all, the idea that a person can buy waterfront property from the State and then have to give that land back, free of charge, once the property submerges seems unfair. Still, to prevail on a takings clause claim, a party must prove that governmental action proximately and directly caused the damage or taking.¹⁶⁹ When land naturally submerges so significantly that the submersion falls under article 450, government action does not cause the land to revert to State ownership.¹⁷⁰ Rather, the change in ownership occurs by operation of law.¹⁷¹ Yet Louisiana creates the law. One may reasonably conclude that Louisiana’s adoption of a statute dictating that the State owns formerly private land would cause unconstitutional takings unless the State justly compensated private landowners. This argument, however, would call into question several Louisiana Civil Code provisions that dictate that ownership of a thing changes when natural forces change the categorical nature of that thing.¹⁷² For example, when natural forces overtake, destroy, or damage a public road bordering a river, thereby changing the nature of that road into a river bottom, Louisiana Civil Code article 666 requires the owner of the land underneath the road to furnish more land, without compensation, so that the State can construct a new road.¹⁷³

line between man-caused submersion and natural submersion to such a particular extent. Rather, the purpose of this Comment is to offer a possible solution to one problem and to lay a foundation for more extensive debate concerning the many land-loss-related problems confronting Louisiana.

168. YIANNOPOULOS, *supra* note 47, § 63, at 116.

169. *See Sanguinetti v. United States*, 264 U.S. 146, 149–50 (1924); *see also Mongrue v. Monsanto Co.*, 249 F.3d 422, 429–30 (5th Cir. 2001) (explaining that a governmental body or “state actor” has to be involved in the taking for a party to be subject to a takings claim).

170. *See Hargrave, supra* note 75, at 661 (“[I]f a nonnavigable stream becomes navigable, it would cease to be susceptible of private ownership and would become property of the state. The argument that such a change in ownership may be a taking without due process (absent compensation) probably falls because such a loss is not caused by the state itself.” (footnote omitted)).

171. *See Gaudet v. City of Kenner*, 487 So. 2d 446, 448 (La. Ct. App. 1986) (explaining that, with respect to water bottoms, the state is vested with something that looks like “instantaneous prescription” and that ownership reverts by “operation of law”); *see also River Lands Fleeting Corp. v. Ashland Plantation, Inc.*, 498 So. 2d 38, 41 (La. Ct. App. 1986).

172. *See* LA. CIV. CODE arts. 655, 666, 751 (2015).

173. *See id.* art. 666.

Moreover, the Louisiana Constitution impliedly supports the idea that no taking occurs when natural forces overtake privately owned land.¹⁷⁴ The constitution suggests that navigable water bottoms are always State owned, thereby implying that no taking need to occur for the State to become owner of land that has eroded or subsided into a navigable water bottom.¹⁷⁵ This logic applies *a pari* to sea bottoms and seashore. Further, such a notion is not exclusive to Louisiana¹⁷⁶ and is consistent with the sovereign nature of navigable water bottoms, sea bottoms, and seashore. Thus, when ownership changes because natural forces move property boundaries, the change occurs automatically and does not create a taking of private property.

2. Concerns of Litigation Expenses are Unwarranted

Louisiana, although the rightful owner, may be inclined to avoid declaring ownership of submerged lands because state officials do not want to fund the resulting mass of litigation. Most of Louisiana's coastal marshlands are privately owned,¹⁷⁷ and the landowners would be quick to sue if the State threatened to absorb their valuable lands. The "freeze statute,"¹⁷⁸ which leaves preexisting mineral rights on submerged lands unaffected when title to that property reverts to the State, would likely deter some litigation, however.¹⁷⁹ Additionally, a piece of legislation declaring State ownership would be presumptively valid,¹⁸⁰ meaning that parties challenging the statute would face an uphill battle, thereby deterring more litigation. Though these considerations may limit the oncoming litigation, the prospect of future mineral interests would prompt most prominent, affluent private landowners to sue. Even so, the State could address the remaining litigation by asking a court to join all plaintiffs sharing a common interest into one suit or by passing a special venue statute to limit the

174. See LA. CONST. art. IX, § 3.

175. See *id.* This provision does allow for a private landowner to reclaim navigable water bottoms lost through erosion; however, having the right of reclamation necessarily presumes that the ownership of the eroded land changed in the first instance due to the erosion.

176. See *supra* note 137.

177. See Anderson, *supra* note 2.

178. Though the "freeze statute" is still in force, its existence is constitutionally questionable because the statute may violate the public trust doctrine. A discussion of this statute's constitutionality is outside the scope of this Comment, however.

179. LA. REV. STAT. ANN. § 9:1151 (2006).

180. *City of New Orleans v. Toca*, 75 So. 238, 239 (La. 1917) ("A statute or ordinance is not to be supposed to have been adopted without due deliberation This gives rise to a presumption of validity in favor of the legislative action").

locations where suits against the State could be brought, in hopes of consolidating the litigation.¹⁸¹ Thus, despite an expected spike in litigation and the possibility of takings claims, neither practical nor constitutional concerns should be sufficient to prevent the legislature from enacting this long-overdue legislation.

C. A Revised Statute to Address the Ownership of Submerged Land

The legislation that this Comment proposes includes the benefits that the two lesser solutions offer and also unites certain provisions of Louisiana's law with Louisiana's public policy, which dictates that the State must own certain submerged lands.¹⁸² Article IX, section 3 of the Louisiana Constitution of 1974 provides that the State may not alienate a navigable water bottom unless that land became bottom via erosion, and the previous landowners want to rebuild the land.¹⁸³ Thus, this constitutional provision implies that when land becomes a navigable water bottom via erosion, the State owns that land.¹⁸⁴ Similarly, Louisiana Revised Statutes section 49:3 states that the State owns all seawater and sea bottom of the Gulf of Mexico and its arms within Louisiana's territorial boundary.¹⁸⁵ Though this statute does not directly address sea bottoms and seashores that natural forces created after state alienation, its spirit dictates that no sea bottom or seashore is susceptible to private ownership.

The proposed statute, meshing the clear language found in those constitutional and statutory provisions with new language reflecting Louisiana's public policy, reads as follows:

When, due to natural forces including but not limited to erosion, subsidence, and sea-level rise, land becomes so submerged that it forms the bottom or bed of a navigable water body, or the bottoms or shores of the sea, including the bottoms and shores of arms of the sea, then that land becomes a public thing insusceptible of private

181. For an example of a venue statute specially drafted to deal with claims against the State, see Louisiana Revised Statutes section 13:5104(A) (Supp. 2005) (providing that all lawsuits brought against the State or a state agency "shall be instituted before the district court of the judicial district in which the state capitol is located or in the district court having jurisdiction in the parish in which the cause of action arises").

182. See *supra* note 130.

183. The logic applying to eroded land that becomes navigable water bottom would apply *a pari* to land that becomes navigable water bottom via other natural processes like subsidence and sea-level rise.

184. See LA. CONST. art. IX, § 3.

185. LA. REV. STAT. ANN. § 49:3 (2012).

ownership. This provision applies regardless of whether land became submerged after State alienation.¹⁸⁶

By following the spirit and the letter of Louisiana's existing law, this new statute puts an end to much of the uncertainty regarding submerged land ownership and provides courts with a definite rule to address a problem that will arise with increasing frequency in the coming years.

CONCLUSION

Alluding to legal systems' propensity to rely on outdated principles of law, Justice McLean of the United States Supreme Court noted, "[a]ntiquity has its charms . . . but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs . . ." ¹⁸⁷ Though he delivered this message as a warning regarding outdated admiralty laws,¹⁸⁸ his words aptly fit the situation currently confronting Louisiana's coastal property law. Either the legislature can do nothing and allow the complete confusion regarding the ownership and use of submerged lands to continue, or the legislature can revise the law governing the ownership of submerged lands to reflect the dynamic nature of Louisiana's coastal environment. Because coastal lands are rapidly sinking, the legislature must adopt a statute capable of dealing with land submersion. This Comment proposes adopting a statute that will bring the law in the right direction.¹⁸⁹ This statute will provide clarity regarding submerged-land ownership and use while placing these lands in the hands of their rightful owner, the people of Louisiana. The legislature is aware of the issues that our current, static law creates with respect to Louisiana's ever-changing coastal environment. Before millions

186. This statute should not be interpreted to abdicate, in any way, Louisiana's affirmative duty to conserve and preserve its natural resources under the Public Trust Doctrine.

187. *Jackson v. Steamboat Magnolia*, 61 U.S. (20 How.) 296, 307 (1857) (McLean, J., concurring).

188. *See id.* (warning that the United States' admiralty laws improperly relied on old, misconstrued statutes instead of relying more heavily on progressive civil law rules).

189. The proposed statute will not mend this entire area of law. Even so, this Comment will hopefully prompt scholarly discussion and debate regarding significant issues that are confronting Louisiana.

more acres of Louisiana's coastal land give way to Mother Nature's will, the legislature must mend Louisiana's outdated land classification regime.

*Jacques Mestayer**

* J.D./D.C.L., 2016, Paul M. Hebert Law Center, Louisiana State University. For their priceless guidance, suggestions, and knowledge that they have shared throughout the writing and editing process, the Author thanks Professors John Randall Trahan, Blake Hudson, and Ed Richards. The Author also thanks Ryan Seidemann and Kelly Haggar for the wealth of practical knowledge they so willingly shared. Additional thanks go out to the Author's family and friends who continue to support him in all of his endeavors. Lastly, this work is dedicated to the loving memory of the Author's late grandparents, Jack Wormser, Ray Mestayer, and Louise Mestayer; their brilliance inspires his intellectual pursuits.