

СТАТЬИ

UDC 340.132.233

The Western crescent rises — a verticality dimension in Louisiana’s mixed legal space

M. G. Puder

For citation: Puder, Markus G. 2023. The Western crescent rises — a verticality dimension in Louisiana’s mixed legal space. *Pravovedenie* 67 (1): 5–20.
<https://doi.org/10.21638/spbu25.2023.101>

The legal literature discussing mixed jurisdictions has mainly focused on horizontal law mixtures, especially those involving the Civil Law and the Common Law. Harnessing the legal questions raised by land loss in Louisiana’s landscape of waterbodies as a case study, this Article illustrates how American federal law, whether constitutional, statutory or judge-made, has interacted with the allocation of property rights under Louisiana state law. Among the various stakeholders, the legal implications of erosion and subsidence play out in two relationships: firstly, the relationship between private property owners and the State of Louisiana with regard to lakeshore, banks of rivers, bays and streams, and seashore; and secondly, the relationship between the State of Louisiana and the Federal Government with regard to their rights in the territorial sea. In the first relationship, the equal footing doctrine enunciated by the U. S. Supreme Court declares that, because the original thirteen states in the American Union owned the land under their natural navigable water bodies, subsequent entrants would likewise take ownership of such land. Based on the federal equal footing doctrine, Louisiana state law has enjoyed a margin of maneuver to make its own dispositions for the lakeshore, the bank of a river, bayou or stream, and the seashore. Also, when allocating ownership under state law, Louisiana courts have traditionally looked to the federal admiralty definition of navigability. The federal-state interface dominating the second relationship has come to be known as the “tidelands controversy” over submerged lands, along with the wealth of resources, seaward of the low-water mark on Louisiana’s coast. This led to a dance between the U. S. Supreme Court, the U. S. Congress and the State of Louisiana. Although Louisiana ultimately secured jurisdiction up to three nautical miles, its maritime belt still does not match Texas and Florida’s boundaries.

Keywords: mixed jurisdictions, federal law, state law, lakes, rivers, seashore, territorial sea, erosion, subsidence, Tidelands Controversy.

Markus G. Puder — PhD in Law, LL. M., Professor, Loyola University New Orleans College of Law 7214 St. Charles Ave., Campus Box 901, New Orleans, LA, 70118, USA; mgpuder@loyno.edu

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Introduction

The notion of mixed jurisdictions started to surface at the dawn of the 19th century. Mixed jurisdictions were understood as “legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law”¹. For more than a century, this formulation has proven a durable anchor for scholarly analysis. In addition to serving as a launch pad for exploring even broader notions of mixed law², it has facilitated investigations probing the purported dichotomy between the Civil Law and the Common Law³. Moreover, the scholarly interest in mixed jurisdictions experienced a massive renaissance in connection with efforts to harmonize the private laws of Europe⁴; and a series of projects for the uncodified mixed jurisdictions of South Africa and Scotland under the monikers of Southern Cross, Northern Cross and Double Cross⁵ has memorialized the potency of this linkage. Finally, the World Society of Mixed Jurisdiction Jurists was chartered to promote scholarly advocacy for mixed jurisdictions as a third legal family deserving of special solicitude in the comparativist discourse⁶.

Despite having successfully negotiated the convergence pressures in a polity of more than 330 million inhabitants, 49 competing sovereigns at the state level, alongside a strong federal center, Louisiana has not figured prominently on the contemporary research agendas in Central and Eastern Europe⁷. Recently, however, Louisiana’s visibility has made some inroads, with the availability of a bilingual edition (German-English) of the Louisiana

¹ *Tancelin M.* Introduction // The Scope and Interpretation of the Civil Code of Lower Canada / ed. F.P. Walton. Montreal: Wilson & Lafleur, 1907. P. 1; *Lee R. W.* The Civil Law and the Common Law — A World Survey // Michigan Law Review. 1915. Vol. 14, no. 2. P. 89. — Contemporary literature continues to refer to Walton and Lee in the mixed jurisdiction story. *Tetley W.* Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified) // Louisiana Law Review. 2000. Vol. 60, no. 3. P. 677, 679 (Walton’s “classic definition”); *Palmer V. V.* Mixed Legal Systems — The Origins of this Species // Tulane European and Civil Law Forum. 2013. Vol. 28. P. 103, 105–06 (Lee coined the locution on the legend of a world map of jurisdictions attached to the article).

² *Örücü E.* What Is a Mixed Legal System: Exclusion or Expansion? // Journal of Comparative Law. 2008. Vol. 3, no. 1. P. 34 (with maps to illustrate a wider understanding of mixity).

³ *Gordley J.* Common Law and Civil Law: Eine überholte Unterscheidung // Zeitschrift für Europäisches Privatrecht. 1993. No. 1. P. 498.

⁴ *Smits J.* Introduction: Mixed Legal Systems and European Private Law // The Contribution of Mixed Legal Systems to European Private Law / ed J. Smits. Antwerp: Intersentia, 2001. P. 1, 7 (mixed jurisdictions offer important cues for “the feasibility of a uniform private law for Europe”).

⁵ Southern Cross: Civil Law and Common Law in South Africa / eds R. Zimmermann, D. Visser. Oxford: Clarendon, 1996. P. 1 (Southern Cross); A History of Private Law in Scotland / eds K. Reid, R. Zimmermann (Oxford: Oxford University Press, 2000. P. 1 (Northern Cross); *Zimmermann R.* Double Cross: Comparing Scots and South African Law // Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa / eds R. Zimmermann, D. Visser, K. Reid. Oxford: Oxford University Press, 2004. P. 1–33 (Double Cross). — The linkage between the uncodified mixed jurisdictions and initiatives to unify European private law gained traction in the literature of the aughts: European Contract Law: Scots and South African Perspectives / eds H. MacQueen, R. Zimmermann. Edinburgh: Edinburgh University Press, 2006. P. 1; *Zimmermann R.* Common law und Ius Commune: Unkodifizierte Mischrechtsordnungen im Vergleich // Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht / eds J. Besedow, U. Drobnig, R. Ellger, K. J. Hopt, H. Kötz, R. Kulms, E.-J. Mestmäcker. Tübingen: Mohr Siebeck, 2001. P. 851–870.

⁶ *Palmer V. V.* Mixed Jurisdictions Worldwide: The Third Legal Family. Cambridge: Cambridge University Press, 2001. P. 11–16. — In this vein, Professor Palmer founded the World Society of Mixed Jurisdiction Jurists: *Lovett J. A., Leckey R.* Symposium Introduction, The Scholar, Teacher, Judge and Jurist in a Mixed Jurisdiction: Papers from the Fourth Congress of the World Society of Mixed Jurisdiction Jurists // Loyola Law Review. 2016. Vol. 62, no. 3. P. 613 (the “peripatetic journey” of the World Society of Mixed Jurisdiction Jurists thus far included stops in Louisiana in 2002, Scotland in 2007, Israel in 2011, and Quebec in 2015).

⁷ *Zweigert K., Kötz H.* Introduction to Comparative Law (transl. T. Weir). Oxford: Clarendon Press, 1987. Vol. 1. P. 119 (“The survival of Romanistic law in Louisiana... is of the greatest interest to comparative lawyers [in that] Louisiana [offers] the comparatist a rare chance to observe, as it actually occurs, the interaction of different styles of law...”).

Civil Code for the German law and language space⁸ and the rise of collaborative research projects to assess mixed law as a bridge builder for Russia⁹. This article adds to Louisiana's credentials as the "Western Crescent" among mixed jurisdictions. After recalling origins, tributaries and trajectories of horizontal legal mixtures in Louisiana, the article shifts the visor to a unique feature in Louisiana's narrative — a verticality dimension ("vertical mixity") accruing from interactions between American federal law and Louisiana state law.

1. The Confluence of Different Legal Traditions in Louisiana: Origins, Tributaries and Trajectories

Louisiana's mixed legal traditions are inexorably intertwined with a colorful history of change. In a nutshell, Louisiana was under French and Spanish rule before becoming part of the American fold. Each switch of sovereign brought new sets of laws to Louisiana's shores, while certain existing laws managed to stay around. As a unique feature among mixed jurisdictions, Louisiana has witnessed several thrusts of mixing, ultimately resulting in today's multi-dimensional tapestry. Louisiana's first law mixture was Romanist, which arrived after France had ceded Louisiana to Spain. The most prominent sources from the colonial era were offered by the Custom of Paris (Coutume de Paris)¹⁰ and the Castilian Code of the Seven Divisions (Código de las Siete Partidas)¹¹. When Louisiana was acquired by the United States, the dimensions of Common Law and Federal Law entered the political equation. Contrary to previous practice, however, the new entrant was not fully assimilated. Rather, under a political agreement (the Great Compromise) between federal actors and local property holders who insisted on keeping around the protective bulwark of laws with regard to what they considered their vested interests¹², the core areas of private law remained subject to the ambient civil laws, while procedure, public law and criminal law became American¹³. The codification process in Louisiana was initiated quickly so as to entrench the results of the Great Compromise. As Louisiana's legal space

⁸ *Puder M. G.* Das Zivilgesetzbuch von Louisiana: Zweisprachige Erstausgabe mit einer Einleitung. Tübingen: Nomos, 2017. P. 1. — See also: *Puder M. G.* Law and Language in Action: Transformative Experiences Associated with Translating the Louisiana Civil Code into German // *Rabels Zeitschrift für ausländisches und internationales Privatrecht.* 2020. Vol. 84, no. 2. P. 228; *Puder M. G.* Dynamische Rechtsvergleichung im Gravitationsfeld von Recht und Sprache: Erfahrungen und Erkenntnisse aus meiner Übersetzung des Zivilgesetzbuchs von Louisiana aus dem Englischen ins Deutsche // *Schweizer Juristen-Zeitung.* 2022. No. 8. P. 379.

⁹ For recent scholarship featuring this kind of research, see: *Puder M. G., Rudokvas A. D.* How Trust-Like is Russia's Fiduciary Management? Answers from Louisiana // *Louisiana Law Review.* 2019. Vol. 79, no. 4. P. 1071–1102.

¹⁰ *Johnson J.* La Coutume de Paris: Louisiana's First Law // *Louisiana History: The Journal of the Louisiana Historical Association.* 1989. Vol. 30, no. 2. P. 145; *Martin O.* Histoire de la Coutume de la Prévôté Vicomté de Paris. Paris: E. Leroux, 1922–1930. P. 1 (Coutume emerged from the feudal chaos and steadily took shape in the Châtelet and Parlement); *Meade J. C.* The Hunt for the 1580 Coutume de Paris: Building the French Customary Law Collection at The Jacob Burns Law Library // *GW Magazine.* 2009 (Summer). P. 43 (final revised compilation of the Coutume as an artefact of French legal history).

¹¹ The Partidas were translated from Spanish into English. See: *Moreau Lislet L., Carleton H.* The Laws of the Siete Partidas Which Are Still in Force in the State of Louisiana. New Orleans: J. M'Karher, 1820. Vol. 1&2. P. 1. Literature has discussed the legacy of the Partidas in North America: *Batiza R.* The Influence of Spanish Law in Louisiana // *Tulane Law Review.* 1958. Vol. 33, no. 1. P. 29; *Radin M., Nichols M. W.* Las Siete Partidas // *California Law Review.* 1932. Vol. 20, no. 3. P. 260.

¹² *Kilbourne R. H. Jr.* A History of the Louisiana Civil Code: The Formative Years (1803–1839). Baton Rouge: Publications Institute, Paul M. Hebert Law Center, Louisiana State University, 1987. P. 34 (there was a widespread anxiety among Louisianans living on French and Spanish land grants over the "unsettling of property rights that had seemed settled, now thrown open to expensive litigation").

¹³ *Aslakson K. R.* Making Race in the Courtroom: The Legal Construction of Three Races in Early Louisiana. New York: NYU Press, 2014. P. 55.

looked more like a jus commune ecosystem that is typically associated with pre-codal Europe, but not necessarily the New World, the drafters had at their fingertips Roman, Spanish, French and English sources to choose from¹⁴. In 1808, the Louisiana legislature enacted what they called a digest of the civil laws now in force in the territory of Orleans, with alterations and amendments to its present system of government¹⁵. The designation as “digest” and the use of the plural form “civil laws” already foreshadowed the ensuing debates as to whether those laws were French or Spanish in origin¹⁶ and whether the legislation achieved a true codification or just a first compilation of assorted materials¹⁷. In 1825, the Louisiana legislature sought to end the debates by enacting promptly the Civil Code of the State of Louisiana¹⁸, which included a sharper repeal clause but still kept the door somewhat ajar for matters outside its ambit¹⁹. The end of the American Civil War paved the way for the Revised Civil Code of the State of Louisiana²⁰ which was enacted in 1870 to rid the previous codification of its odious slavery provisions and bring it up to date, while keeping its structure and most of its contents²¹. But, in reflection of the new demographic realities in state turned anglophone, the new, monolingual codification switched its drafting language from French to English²².

The Louisiana Civil Code currently in effect still relates back to the Civil Code of 1870²³. Louisiana never came close to a fourth codification. Rather, under the aegis of the Louisiana State Law Institute, which was created in 1938 to serve as law reform agency and research body²⁴, rolling block revisions to the Louisiana Civil Code became the recipe for reform²⁵. For more than century and a half, nothing has been more constant in Louisiana’s mixed law universe than the ebb and flow of the elusive fortunes associated with careening towards the Common Law²⁶ or rebirthing the Civil Law²⁷. A more recent, but quite significant, phenomenon of mixing law in Louisiana has sprung from the undertakings of

¹⁴ Cairns J. W. The de la Vergne Volume and the Digest of 1808 // Tulane European and Civil Law Forum. 2009. Vol. 24. P.31, 49–72.

¹⁵ Acte qui pourvoit à la promulgation du digeste des lois civiles actuellement en force dans le territoire d’Orléans (1808 La. Acts 121) (“Digeste des lois civiles actuellement en force dans le territoire d’Orléans, avec des changements et améliorations adaptés à son présent système de gouvernement”).

¹⁶ Cairns J. W. Spanish Law, the Teatro de la legislación universal de España e Indias, and the Background to the Drafting of the Digest of Orleans of 1808 // Tulane European and Civil Law Forum. 2017. Vol. 31. P.79, 82 (“That the Digest is not Spanish law in French dress does not mean, however, that it is entirely French”).

¹⁷ Gruning D. W. Mapping Society Through Law: Louisiana Civil Law Recodified // Tulane European and Civil Law Forum. 2004. Vol. 19. P. 1, 5.

¹⁸ 1824 La. Acts 17.

¹⁹ Gruning D. W. Mapping Society Through Law. P.5–6.

²⁰ 1870 La. Acts 97.

²¹ Tucker J. H. Source Books of Louisiana Law // Tulane Law Review. 1932. Vol.6, no.2. P.280, 295 (“The Code of 1870 is substantially the Code of 1825 with these changes: (1) Elimination of all articles relating to slavery; (2) Incorporation of all Acts... passed since 1825...”).

²² Ward R. K. The French Language in Louisiana Law and Legal Education: A Requiem // Louisiana Law Review. 1997. Vol.57, no. 4. P. 1283.

²³ Yiannopoulos A. N. Two Critical Years in the Life of the Louisiana Civil Code // Louisiana Law Review. 1992. Vol. 53, no. 1. P. 5, 24 (a failed attempt at revision initiated in 1908, but never taken up by the Louisiana legislature in view of the resistance mounted by the Louisiana Bar Association).

²⁴ La. Rev. Stat. § 201–208 (2018), 251–256 (1993).

²⁵ Gruning D. W. Mapping Society Through Law. P.9–10.

²⁶ Ireland G. Louisiana’s Legal System Reappraised // Tulane Law Review. 1937. Vol. 11, no. 4. P.585, 596 (“Louisiana is today a common law State”); Spiller Daggett H., Dainow J., Hebert P. M., McMahon H. G. A Reappraisal Appraised: A Brief for the Civil Law of Louisiana // Tulane Law Review. 1937. Vol. 12, no. 1. P. 12 (Louisiana still is a civil law jurisdiction).

²⁷ Burnham M. A. A Renaissance of the Civilian Tradition in Louisiana // Louisiana Law Review. 1973. Vol. 33, no. 3. P.357, 389 (“the academicians, the attorneys, and the judges will together fashion and

influential academicians and redactors who succeeded in engrafting, overtly or by stealth, Anglo-American law²⁸, Argentine law²⁹ and Greco-German law³⁰. This development has resulted in a horizontal amalgamation of unusual mixtures, new vocabulary and different drafting techniques now circulating in Louisiana.

Louisiana's horizontal mix of laws has been permeated and overlain by a vertical dimension memorialized through the American prong of the Great Compromise. In the United States, vertical mixtures emerge as a consequence of the distribution of powers between the Federal Government and the various States. Under the American constitutional bargain, the U. S. Constitution and federal laws, in so far as these laws are themselves constitutional, wield primacy over conflicting state laws³¹, with judicial review to say what the law is being exercised by the U. S. Supreme Court³². Conversely, however, the States retain their reserved powers³³. Both legal spaces, however, are not hermetically sealed off. Federal-state interfaces have led to novel mixtures, with significant implications for Louisiana stakeholders. This will be further explored in the next section by way a case study of encounters between American federal law and Louisiana state law.

2. A Case Study in Federal-State Interfaces: Land Loss in Louisiana's Landscape of Waterbodies

The topic of land loss in Louisiana's landscape of waterbodies illustrates how federal law, whether constitutional, statutory or judge-made, has interacted with the allocation of property rights under the Louisiana Civil Code and the Louisiana Revised Statutes. In general, coastal Louisiana, as we know it, has been shaped through a process of lobe

preserve a civilian tradition in Louisiana which will constantly seek for justice through reason — through law”).

²⁸ *Snyder D. V.* Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction // *Arizona Journal of International and Comparative Law*. 1998. Vol. 15, no. 3. P. 695, 709 (recalling the discussions in the Council of the Louisiana State Law Institute between the late Professor Saúl Litvinoff, who served as the Committee Reporter when the law of obligations for reformed in 1984, and his fellow Council members with regard to: (1) the codal definition of the Civil Law's "cause" in counter distinction to the Common Law's "consideration;" and (2) the introduction of "detrimental reliance"— a concept typically having been associated with "consideration").

²⁹ *Yiannopoulos A. N.* Two Critical Years in the Life of the Louisiana Civil Code. P. 15, n. 60 ("By a twist of fate, the Argentine Civil Code... deeply influenced the revision of the Louisiana Civil Code in the field of Conventional Obligations"); *Herman S.* Civil Recodification in an Anglophone Mixed Jurisdiction: A Bricoleur's Playbook // *Loyola Law Review*. 2012. Vol. 58, no. 3. P. 487 (the late Professor Saúl Litvinoff was a master of "bricolage" with the unique ability to bring in foreign elements, especially from Argentine law, without making them visible).

³⁰ *Puder M. G.* Legal Transplants under the Magnifying Glass: A Bridging Study from Louisiana to Germany and Back // *Tulane European and Civil Law Forum*. 2020. Vol. 35. P. 1, 9 (the late Professor A. N. (Thanassi) Yiannopoulos, who served as the Committee Reporter when the German-inspired limited servitude of right of use was introduced in Louisiana in 1976, only identified the model provisions in the German and Greek codes, without any further documentation as to "whether court decisions or doctrinal literature from Germany were ever accessed to inform the drafting process that culminated in [the new transplant, which addresses the extent of the new servitude]").

³¹ U. S. Const. art. VI, cl. 2 (Supremacy Clause). See also: *Drahozal C. R.* The Supremacy Clause: A Reference Guide to the United States Constitution. Westport, CT: Praeger Publishers Inc., 2004. P. 1.

³² *Marbury v. Madison* (1803) 5 U. S. (1 Cranch) 137 (federal laws); *Martin v. Hunter's Lessee* (1816) 14 U. S. (1 Wheat.) 304 (decisions by state courts that interpret federal law or the Constitution). See also: *Abernathy C. F., Puder M. G.* Law in the United States: Cases and Commentaries. Eagan: West, 2021. P. 157–182.

³³ Congressional Research Service. The Constitution of the United States of America: Analysis, and Interpretation (S. Doc. 103-6). Washington DC: U. S. Government Printing Office, 1992. P. 1507–1518.

formation and degradation in the Mississippi River delta³⁴. Until the late 19th century, the region appeared to be in a condition of net gains³⁵. However, since the 1930s, a combination of natural and human forces, has led to a high rates of land losses through erosion and subsidence³⁶. Erosion describes the geological process of earthen materials being worn away and transported by natural forces such as water³⁷. Subsidence stands for the sinking of the ground because of underground material movement. These dynamics will increasingly affect private individuals and businesses, the State of Louisiana and the Federal Government in their capacity as coastal property owners³⁸. When the forces of erosion and subsidence place these stakeholders in adversarial positions, the law will then have to arbitrate against whose interest, and, conversely, in whose favor, erosion and subsidence of the land surface will work. Crucially, proprietary functions with regard to subsurface minerals under Louisiana minerals law³⁹ and the airspace above under Louisiana's general accession law⁴⁰ also hinge on a proper delineation of the rights to the surface area.

Among the various stakeholders, the legal implications of erosion and subsidence play out in two relationships⁴¹. There is, firstly, the relationship between private property owners and the State of Louisiana with regard to three types of shoreline — lakeshore, banks of rivers, bays and streams, and seashore⁴². The specific geophysical conditions prevailing in the Gulf region, however, do not permit drawing a “bright line of demarcation” between the various types of water bodies⁴³. A second relationship features the State of Louisiana and the Federal Government with regard to their rights in the territorial sea⁴⁴.

3. The Private Property Owner and the State of Louisiana

In the relationship between the State of Louisiana and private property holders, vertical law permeates the allocation of ownership in several guises. Under Louisiana property law, natural and juristic persons own property in an individual capacity⁴⁵. When the State of Louisiana owns property, it may do so in a public or private capacity⁴⁶. Certain things are necessarily owned by the State. Such public things belonging to the State include the

³⁴ *Arnold J. T.* A Disconnect between Law and Science: Louisiana's Waterbottom Ownership Laws in a Disappearing Coastline. P. 2, 13. Available at: https://jonesswanson.com/wp-content/uploads/other/Disconnect-between-Science-and-Law-Waterbottom-Law_Arnold_Submitted-as-Journal-Copy_2.13.2016-with-cover-page.pdf (accessed: 12.12.2021).

³⁵ *Ibid.* P. 13.

³⁶ *Ibid.* P. 14–17.

³⁷ National Geographic. Resource Library-Encyclopedic Entry: Erosion. Available at <https://www.nationalgeographic.org/encyclopedia/erosion/> (accessed: 12.12.2021).

³⁸ *Mestayer J.* Saving Sportsman's Paradise: Article 450 and Declaring Ownership of Submerged Lands in Louisiana // *Louisiana Law Review*. 2016. Vol. 76, no. 3. P. 889, 892 (between 1932 and 2000, Louisiana has lost over one million acres of coastal land to the ocean; more than one million acres of lands will submerge through natural processes over the next five decades — loss equivalent to the size of Delaware).

³⁹ La Min. Code, Lav. Stat. § 1, 4 et seq. (1974).

⁴⁰ La. Civ. Code art. 490 (1979).

⁴¹ *Hribernick, P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana // Proceedings of the Conference on Coastal Erosion and Wetlands Modification in Louisiana: Causes, Consequences, and Options (Baton Rouge, October 5–7, 1981) / ed. Donald F. Boesch. Washington DC: U. S. Fish and Wildlife Service, Biological Services Program, FWS/OBS-82/59, September, 1982. P. 128–139.

⁴² *Ibid.* P. 129–133.

⁴³ *Duplantis Gautreaux A.* Louisiana Water Bottoms and the Freeze Statute. June 1, 2016. Available at: <https://www.gamb.com/louisiana-water-bottoms-and-the-freeze-statute/> (accessed: 12.12.2021).

⁴⁴ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 133–134.

⁴⁵ La. Civ. Code art. 453 (1978).

⁴⁶ La. Civ. Code arts. 450(1), 453 (1978).

lands (beds or bottoms) underneath natural navigable waters⁴⁷. This allocation was preordained by a critical vertical-state interface — one that was declared by the U. S. Supreme Court⁴⁸ and became known as the equal footing doctrine⁴⁹. According to the U. S. Supreme Court, all States that entered the American Union after the original thirteen, did so with a promise made by the U. S. Constitution — “equal footing” at statehood⁵⁰. Because the original thirteen owned the land under their natural navigable water bodies, said the U. S. Supreme Court, subsequent entrants would likewise take ownership of such lands⁵¹. The U. S. Supreme Court later added that its doctrine not only covered tidewaters but also inland navigable water⁵² and that state law, not federal common law, would control the legal fate of navigable water bottoms⁵³. This is why, when Louisiana was admitted to the American Union in 1812, the State legislature had the authority not only to declare that submerged lands would generally be owned by the State itself, but also to determine the precise geographic extent of the State’s ownership of the beds and bottoms of navigable water bodies⁵⁴. The Louisiana legislature has thus used its margin of maneuver to clarify important questions⁵⁵. Where does the territorial sea end and private, littoral ownership begin?⁵⁶ What distinguishes an inland navigable water body from an inland non-navigable water body?⁵⁷ Are the banks of inland navigable water bodies under the State’s ownership, private ownership or some hybrid form of control?⁵⁸

One of the central threshold criteria for the State’s ownership of submerged lands is navigability, which is not defined by legislated law. This is where another critical federal-state interface enters the picture. When faced with the question of navigability, Louisiana courts have looked to the federal admiralty definition of navigability⁵⁹. The law of admiralty is one of those interstitial spaces for which federal common law-making is still alive and well⁶⁰. According to a classic definition offered by the U. S. Supreme Court, navigability in law arises from navigability in fact, which means that the waterbodies in question “are used, or are susceptible of being used, as highways for commerce, over which trade and travel are or maybe conducted in the customary modes”⁶¹. Louisiana courts have built on

⁴⁷ La. Civ. Code art. 450(2) (1978).

⁴⁸ *Pollard’s Lessee v. Hagan* (1845) 44 U. S. (3 How.) 212.

⁴⁹ See generally: *Kearny J. D., Merrill T. W.* Contested Shore: Property Rights in Reclaimed Land and the battle for Streeterville // *Northwestern University Law Review*. 2013. Vol. 107, no. 3. P. 1057, 1064–1066.

⁵⁰ *Pollard*, 44 U. S. (3 How.) 223 (invoking Article IV, Section 3 of the U. S. Constitution (formation of new states) and Article 1, Section 8, Clause 16 of the U. S. Constitution (no Federal control over lands other than the District of Columbia and military reservations)).

⁵¹ *Pollard*, 44 U. S. (3 How.) 224, 229.

⁵² *Hribernick, P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 129, 135 n. 8 (referring to *Shively v. Bowlby* (1893) 152 U. S. 1; *Eldridge v. Trezevant* (1895) 160 U. S. 452).

⁵³ *Ibid.* N. 9 (referring to *United States v. Chandler-Dunbar* (1913) 229 U. S. 53; *Oregon ex rel State Land Board v. Corvallis Sand and Gravel Co.* (1977) 429 U. S. 363).

⁵⁴ *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law: The Civil Code, Cases and Commentary. Durham: Carolina Academic Press, 2020. P. 135.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 129.

⁶⁰ *Abernathy C. F., Puder M. G.* Law in the United States. P. 95–104.

⁶¹ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 129, 135 n. 11 (referring to *The Daniel Ball* (1870) 77 U. S. (10 Wall.) 557, 563); *State v. Jefferson Island Salt Mining Co.* (1935) 183 La. 304, 163 So. 145 cert. denied 297 U. S. 716, 56 S. Ct. 591, 80 L. Ed. 1001, reh’g denied 297 U. S. 729, 56 S. Ct. 667, 80 L. Ed. 1011. — See also: *Alaska v. United States* (9th Cir, 1985) 754 F.2d 851 (landing and take-off of floatplanes not enough to meet traditional suitability-for-commerce test because test involves utilization as path between two points).

this definition, not always consistently⁶². In addition to clarifying that navigability is not presumed and that the burden of proof rests with the party seeking to establish navigability⁶³, the courts in Louisiana have progressively finetuned their factual inquiry through a host of questions. Does the evidence show the body of water to be suitable for commerce by its depth, width and location⁶⁴? Is the waterbody suitable for commerce in its natural state or ordinary condition regardless of subsequent human obstructions⁶⁵? Is the body of water connected with a navigable waterbody⁶⁶?

Once the navigability threshold has been cleared, the legal ramifications of erosion and subsidence under Louisiana law will hinge on where exactly it occurs⁶⁷. Even if the forces and types of erosion and subsidence may be similar, state law makes different dispositions for the lakeshore, the bank of a river, bayou or stream, and the seashore⁶⁸. The stakes for private property owners and the general public interested in access are so high because so much of largely wet coastal swamplands and marshlands that may have come to be submerged beneath navigable water bodies either after 1812 or “after state alienation”⁶⁹ are now privately owned⁷⁰. This diagnosis is based on yet another critical federal-state interface. After the Federal Government had transferred to the State of Louisiana millions of acres of swamp lands and overflowed lands” deemed unfit for cultivation⁷¹, Louisiana passed legislation that allowed the State to alienate much of these coastal swamplands and marshlands⁷².

3.1. Lakes

Louisiana state law places private property owners abutting a navigable lake in a “no win” situation vis-à-vis the State⁷³. By codal command, the bed of the lake belongs to the State⁷⁴. Likewise, the land exposed by a gradually receding water line (dereliction)⁷⁵, and the gradual buildup of sediment deposits (alluvion)⁷⁶ are allocated to the

⁶² *Mestayer J. Saving Sportsman’s Paradise*. P.900–903.

⁶³ *Johnson v. State Farm Fire and Casualty Company* (La. App. 3 Cir. 1974) 303 So.2d 779; *Burns v. Crescent Gun & Rod Club* (1906) 116 La. 1038, 41 So. 249.

⁶⁴ *Shell Oil Co. v. Pitman* (La.App. 3 Cir. 1985) 476 So.2d 1031, 1036; *Naquin v. Louisiana Power & Light Co.* (La.App. 1 Cir. 2000) 768 So.2d 605, writ denied, 769 So.2d 546 (2000).

⁶⁵ *State ex rel. Guste v. Two O’Clock Bayou Land Co., Inc.* (La.App. 3 Cir. 1978) 365 So.2d 1174 (presence of obstacles over a period of time does not stand in the way of navigability).

⁶⁶ *Walker Lands, Inc. v. East Carroll Parish Police Jury* (La.App. 2 Cir. 2004) 871 So.2d 1258, 1265–1266.

⁶⁷ *Hribernick P., Wascom M. Legal Implications of Coastal Erosion in Louisiana*. P. 129.

⁶⁸ *Ibid.*

⁶⁹ *Mestayer J. Saving Sportsman’s Paradise*. P.907–913 (“Louisiana owns all submerged lands fittings under Article 450 as public things regardless of when that land submerged”).

⁷⁰ *Ibid.* P.890.

⁷¹ Act of March 2, 1849, c.87, 9 Stat. 352 (“That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein the whole of these swamp and overflowed lands which may be or are found unfit for cultivation shall be, and the same are hereby, granted to that State”).

⁷² Act No. 247, 1855 La. Acts 306; Act No. 306, 1855 La. Acts 37; Act No. 75, § 11, 1880 La. Acts 87. — See also: *Mestayer J. Saving Sportsman’s Paradise*. P.896–897 (observing that, while the federal act contemplated “swamp and overflowed lands,” Louisiana’s legislation spoke of “sea, marsh or prairie, subject to tidal overflow,” with the consequence of permitting private ownership of vast areas of land highly susceptible to submersion).

⁷³ *Hribernick P., Wascom M. Legal Implications of Coastal Erosion in Louisiana*. P. 130.

⁷⁴ La. Civ. Code arts. 450(2), 452 (1978). See also: La. Rev. Stat. §9:1101 (1910, amended 1954).

⁷⁵ La. Civ. Code art. 499(2)(cl.1) (1979).

⁷⁶ La. Civ. Code art. 499(1)(cl.1) (1979). See also: *Walker Lands, Inc. v. E. Carroll Par. Police Jury* (La. App. 2 Cir. 2004) 871 So.2d 1258, 1264 n.13 (accretion as the act and alluvion as the deposit).

State⁷⁷. If the lake shrinks due to imperceptible natural causes, then the abutting landowner's property will find itself separated from the water by a strip of land under the State's ownership⁷⁸. If the lake expands because the shoreline erodes or the abutting property owner's land subsides, the State will take ownership of the land that is now inundated by water⁷⁹. The equal footing doctrine and the presence of navigability combine to explain these disadvantageous outcomes for the private landowner, because Louisiana opted to not to relinquish the high-water mark as an "immutable line"⁸⁰ for lakes that were navigable in 1812⁸¹. Therefore, the State will own in perpetuity what was navigable in 1812, regardless of the present state of navigability in 2023⁸².

Lakes that were not navigable in 1812 are governed by different rules⁸³. Their bottoms are private things susceptible of private ownership⁸⁴. If subsidence creates a lake on private property after 1812 or changes the size of an extant, but not navigable lake the private owner will not incur a loss of title to the land⁸⁵. The scenario of when a lake that was non-navigable in 1812 becomes navigable in subsequent, has been the subject of much debate⁸⁶. Under the plain codal command that the beds of navigable waterbodies are public things, ownership would go to the State independent of whether the lake has always been navigable or turned navigable⁸⁷. Literature, however, has offered such a literal read of the law may amount to an unconstitutional taking without due process⁸⁸. Others have countered that any person who acquires land in Louisiana, especially in the coastal wetlands, is on notice with regard to the applicable state law⁸⁹. Independently, it has been observed that the debate is limited to changes that are induced by the forces of nature and that changes resulting from artificial works should be analyzed under the rubric of delictual liability⁹⁰.

3.2. Rivers, Bayous and Streams

Compared to the legal regime for navigable lakes, Louisiana law places private property owners adjacent to navigable rivers, bayous, and streams in a somewhat "better" situation vis-à-vis the State. This is because Louisiana has elected to use its margin of maneuver under the equal footing doctrine to depart from the concept of the immutable line and limit the space owned by the State in its public capacity. If a river, bayou or stream is navigable, the public bed or bottom extends only to the mean low water mark as measured on both banks⁹¹. In contrast, the bottom or bed of a non-navigable river, bayou, or stream belongs to the riparian owners, generally along a line drawn in the middle of the bed⁹².

⁷⁷ La. Civ. Code art. 500 (1979).

⁷⁸ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 130.

⁷⁹ *Miami Corp. v. State* (La. 1936) 173 So. 315 (submerged property becomes property of the State "by virtue of its inherent sovereignty, as a matter of law").

⁸⁰ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 131.

⁸¹ *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 346.

⁸² *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 130.

⁸³ *Ibid.*

⁸⁴ La. Rev. Stat. § 9:1115.2(B) (1992).

⁸⁵ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 130.

⁸⁶ *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 148.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 131.

⁹² La. Civ. Code art. 506 (1979).

The bank of a navigable, bayou or stream is a hybrid space in that it is a private thing subject to a public use servitude⁹³. Louisiana property law defines the bank as the land situated between the ordinary low-water mark and the ordinary high-water mark, but if there is a levee in proximity to the water the levee forms the landward boundary of the bank⁹⁴. For riverbank erosion the inquiry under Louisiana law bifurcates into whether the change is gradual and imperceptible or sudden and avulsive⁹⁵. If erosion and subsidence create a new riverbed, the State will own the bottom in its public capacity⁹⁶. But newly gained land (by accretion) and newly exposed land (by dereliction) are assigned to the riparian owner of the bank⁹⁷, albeit subject to public use⁹⁸. Newly formed islands and sandbar arising independently in the channel go to the State⁹⁹. When a river changes course thereby abandoning its old bed and creating a new bed, Louisiana law provides for a swap in that the State will take the new bed and the landowner whose land is overflowed by the new river takes the original, now abandoned bed¹⁰⁰. Louisiana courts have declared that even if the old channel may be navigable, it will nonetheless morph into private ownership¹⁰¹. If avulsive action results in a cutoff of riparian land thereby creating an island, the island's ownership will not change¹⁰².

Since the legal regimes under Louisiana law are so different for navigable lakes and navigable rivers, bayous, and streams, Louisiana courts have had to develop a methodology for assessing whether a body of water is a lake or a river¹⁰³. But neither the jurisprudential factors nor the rationales offered for the disparate treatment are self-evident¹⁰⁴.

3.3. Seashore

In similarity to the legal regime for lakeshores, Louisiana state law places private property owners abutting the seashore in a “no win” situation vis-à-vis the State¹⁰⁵. If their land erodes to become sea bottom, the State will take ownership¹⁰⁶. If their land is accreting, a

⁹³ La. Civ. Code art. 456 (1) (1978).

⁹⁴ La. Civ. Code art. 456 (2) (1978).

⁹⁵ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 131.

⁹⁶ *Ibid.* P. 131, 137 n. 30 (referring to *State ex rel Atchafalaya Basin Levee District v. Capdeville* (1919) 146 La. 89, 83, So. 421 and *Miami Corp. v. State* (La. 1936) 173 So. 315).

⁹⁷ La. Civ. Code arts. 499 (1) (cl.2) (alluvion), 499 (2) (cl.2) La. Civ. Code (dereliction) (1979).

⁹⁸ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 131.

⁹⁹ La. Civ. Code art. 505 (1979).

¹⁰⁰ La. Civ. Code art. 504 (1979). — See also: *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 132 (referring to a classic rationale — justice and fairness — given by the Louisiana's Second Circuit in *Fitzsimmons v. Cassity* (La. App. 2 Cir. 1937) 172 So. 824).

¹⁰¹ Cf. *State v. Bourdon* (La. App. 2 Cir. 1986) 535 So. 2d 1091 (the forced ownership exchange covers navigable oxbow lake formed in old river bed): *Hamel's Farm, L. L. C. v. Muslow* (La. App. 2 Cir. 2008) 988 So. 2d 882, 885 (Article 504 inapplicable due to absence of proof as to land lost by plaintiff and identity of disputed property with abandoned bed).

¹⁰² La. Civ. Code art. 502 (1979).

¹⁰³ *State v. Placid Oil Co.* (La. 1973) 300 So.2d (On Rehearing) (Ch. J. Sanders, writing for the majority: multiple factors such as the water body's size, depth, banks, channel, current, and historical designation; and J. Summers, writing for the dissent: focus on water body's “capacity for change”, especially the capacity to generate alluvion or dereliction). See also: *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 346–357.

¹⁰⁴ *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 346 (“Why should the owners of land adjacent to rivers and streams own the banks of these water bodies... while owners of land adjacent to lakes have no rights in the lakeshore...? Why should... a lakeside landowner [not] be able to claim new land that permanently rises above the lake bed?”).

¹⁰⁵ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 132–133.

¹⁰⁶ *Ibid.*

strip of land that is owned by the State will separate them from the sea¹⁰⁷. Property owners may take some comfort in that Louisiana courts have somewhat limited the geographic reach of the seashore, which is defined in legislated law as “the space of land over which the waters of the sea spread in the highest tide during the winter season”¹⁰⁸, to “the space of land in the open coast that is directly overflowed by the tides” and “arms of the sea”¹⁰⁹.

3.4. Reclamation and Freeze

In recognition of the ‘no win’ situations potentially faced by private property owners vis-à-vis the State and the eventual losses of future royalty incomes suffered by those owners, the Louisiana legislature has used its constitutional authority to enact a process by which property owners could recover lands lost to the State¹¹⁰. Moreover, Louisiana’s “freeze statute” maintains mineral rights on formerly private lands that become State property through erosion, subsidence, sea level rise, and other action¹¹¹.

3.5. Interim Diagnosis

Literature has criticized that Louisiana’s legal framework relative to the ownership of water bottoms bestows a “windfall” upon the State — one, at least in part, created by the State itself¹¹². Moreover, allowing acquisitive prescription to run in favor of the State¹¹³ may further tilt the pendulum towards the State. Proponents in this vein have argued that acquisitive prescription serves a useful public policy purpose, as it resolves murky questions of ownership in a landscape where swaths of land are, at least seasonably, under water and where water bodies change their course over time¹¹⁴. Finally, the law, which largely dates from the 19th century¹¹⁵, has never been amended to respond, in line with modern science, to the large-scale and accelerating land losses caused by “the transformation of a marsh dominated landscape into an open water environment”¹¹⁶. This failure, say these

¹⁰⁷ Ibid.

¹⁰⁸ La. Civ. Code art. 451 (1978).

¹⁰⁹ *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 127, 131–32.

¹¹⁰ La. Const. art. 9, sec. 3; La. Rev. Stat. § 41:1702 (1978, last amended 2008). See also: Hargrave L. “Statutory” and “Hortatory” Provisions of the Louisiana Constitution of 1974 // Louisiana Law Review. 1983. Vol. 43, no. 3. P. 647, 660–663 (Constitution does not require that ownership of reclaimed land be transferred to a riparian landowner but only allows such a transfer; when such a reclamation does occur, it must be for some “substitute public use”); *Hibernic P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 133 (describing the application and agency processes).

¹¹¹ La. Rev. Stat. 9:1151 (1952, amended 2001) (“Freeze Statute”). — See also: *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 148–150 (observing that; (1) the statute broadly envelops not only water bottoms of formerly non-navigable water bodies but also formerly dry lands subsequently inundated; and (2) the statute requires a valid mineral lease to be in effect, but does not require mineral production from the leased land).

¹¹² *Arnold J. T.* A Disconnect between Law and Science. P. 20.

¹¹³ Cf. *Crooks v. Dep’t of Nat. Res.* (La.App 3 Cir. 2018) 263 So.3d 540 (holding by a majority of judges that acquisitive prescription cannot run in favor of the State, because it would amount to an unconstitutional taking without just compensation, with the dissent declaring that acquisitive prescription can run in favor of the State because it is a general rule of law operating as a constitutionally permitted and fully reasonable statutory restriction on property rights).

¹¹⁴ *Schimpf M.* The State is No Crook After 30 Years (Nov. 19, 2019). Available at: <https://lawreview.law.lsu.edu/2019/11/19/the-state-is-no-crook-after-30-years/> (accessed: 12.12.2021) ((1) “acquisitive prescription...in favor of the State would clarify ownership over some of the questionably navigable water bodies”; and (2) “the State could then allow public access to the water bodies for the benefit of Louisiana sportsmen and the economy”).

¹¹⁵ *Arnold J. T.* A Disconnect between Law and Science. P. 18.

¹¹⁶ Ibid. P. 19.

voices, may lead to a “mass conversion of property from the private realm to the public trust”¹¹⁷ with major economic and social implications. Of course, others have countered that State ownership and greater public access may also translate into enhanced opportunities for sports, hunting and fishing¹¹⁸.

4. The State of Louisiana and the Federal Government

Against the backdrop of Louisiana’s coastline being continuously pushed landwards by erosion and subsidence, the adversarial position between the State of Louisiana and the Federal Government with regard to the marginal sea below the low-water mark and the lucrative oil and gas reservoirs discovered on the outer continental shelf has evolved considerably over the past seven decades¹¹⁹. The federal-state interface dominating this relationship has come to be known as the “tidelands controversy”¹²⁰.

Until the later 1940s, the coastal States assumed that they had entered the American Union with a right under the equal footing doctrine to control the offshore lands beneath a three-mile belt of territorial sea¹²¹. Louisiana legislation had actually claimed a much wider band¹²². In 1950, the U. S. Supreme Court decided the first tidelands lawsuit between the United States and Louisiana, giving the Federal Government sole jurisdiction over submerged lands seaward of the low-water mark on Louisiana’s coast¹²³. Under much pressure from the coastal States, the U. S. Congress responded with the Submerged Lands Act of 1953¹²⁴. Through this legislation, the United States quitclaimed the title to the seabed, as measured from the mean ordinary low tideline to the territorial limit of three nautical miles, to the adjacent coastal State. Further lawsuits were filed to ascertain the exact nature of the legislative grant as well as the precise location of the coastline¹²⁵. In 1969, the U. S. Supreme Court declared that the Louisiana’s coastline was to be determined under international law and that Louisiana’s coastline was ambulatory¹²⁶. This meant firstly that Louisiana could not take advantage of certain islands as a measuring baseline to push its territorial belt and its offshore claims further seaward¹²⁷. Even more significantly, Louisiana’s measuring baseline itself could legally move landward, as the coast continued to erode and subside¹²⁸. Such a dynamic would then affect the revenue from offshore minerals previously, but no longer, in the three-mile ambit. In other words, the State of Louisiana would stand to lose and the Federal Government would stand to gain¹²⁹. But in 1985, the U. S. Congress intervened again to immobilize the maritime boundary coordinates previously established for Louisiana by the U. S. Supreme Court¹³⁰. This of course has been good news for Louisiana in that it will keep its lucrative leases. Nevertheless, Louisiana

¹¹⁷ *Arnold J. T.* A Disconnect between Law and Science. P. 23.

¹¹⁸ *Mestayer J.* Saving Sportsman’s Paradise. P. 890–893, 893–895.

¹¹⁹ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 133–134.

¹²⁰ *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 124.

¹²¹ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 132–133.

¹²² *Puder M. G., Lovett J. A., Wilson E. L.* Louisiana Property Law. P. 123 (twenty-seven marine miles — nine times more than the ancient canon shot rule).

¹²³ *United States v. Louisiana* (1950) 339 U. S. 699.

¹²⁴ Submerged Lands Act, Pub. L. 31–35, title 1, § 2, May 22, 1953 67 Stat. 29.

¹²⁵ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 134, 138 n. 58 (listing the Louisiana series of decisions handed down by the U. S. Supreme Court).

¹²⁶ *United States v. Louisiana* (1969) 369 U. S. 11.

¹²⁷ *Hribernick P., Wascom M.* Legal Implications of Coastal Erosion in Louisiana. P. 134.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99–272, title VIII, § 8005, Apr. 7, 1986, 100 Stat. 151.

officials have not met with success regarding the expansion of Louisiana's jurisdiction beyond three nautical miles. Therefore, Louisiana legislation continues to urge the U. S. Congress to extend the maritime belt for Louisiana so as to match Texas and Florida's boundaries, which have been set at three marine leagues¹³¹.

Final Words

Our case study of relationships under the rubric of land loss through erosion, subsidence and other action in Louisiana's landscape of water bodies yields important insights. Firstly, the case study shows how federal-state verticality dynamics inform and shape the horizontal mixtures of law in Louisiana. As foreseen by the American prong of the Great Compromise, federal constitutional law, federal statutory law and federal common law have shaped the margin of maneuver available to the legislature and the courts for allocating rights under Louisiana state law. Secondly and relatedly, the case study illustrates that in Louisiana, the line between private law and public law appears less categorical than in more purist civil law jurisdictions. Unlike Germany's Civil Code¹³², for example, the Louisiana Civil Code and the Louisiana Revised Statutes (Civil Code Ancillaries) do not shrink from tackling the relationships between the State and private persons. Louisiana's code-based law has therefore not been "cordoned off within the field of private law"¹³³. Thirdly and finally, the various federal-state interfaces have not operated as legal disruptors or irritants in Louisiana's political space¹³⁴. They have added a feature that differentiates Louisiana from other mixed jurisdictions — vertical mixity. It is this vertical mixity within America's vibrant legal and political culture of federalism that promises to fuel the Western Crescent's continued rise on the star-studded firmament of mixed jurisdictions¹³⁵. *Sis felix!*

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¹³¹ La. Rev. Stat. § 49:1, 3, 34.1 (1954, amended 2011).

¹³² *Grüneberg C.* Einleitung // Palandt: Bürgerliches Gesetzbuch / eds J. Ellenberger, I. Götz, C. Grüneberg, S. Herrler, R.v. Pückler, B. Retzlaff, W. Siede, H. Sprau, K. Thorn, W. Weidenkaff, D. Weidlich, H. Wicke. München: C. H. Beck, 80 Aufl. 2021. P. 1, para. 2; *Mohnhaupt H.* Historische Konkurrenzen und Beeinflussungen zwischen Privatrecht und Öffentlichem Recht // *Rechtsgeschichte: Zeitschrift des Max-Planck-Instituts für Europäische Rechtsgeschichte*. 2011. Vol. 19. P. 239 (historical perspectives).

¹³³ *Palmer V. V.* Mixed Jurisdictions Worldwide... P. 9 (the distinction between private continental law and public Anglo-American law is a characteristic of mixed jurisdictions).

¹³⁴ *Teubner G.* Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences // *Modern Law Review*. 1998. Vol. 61, no. 1. P. 11, 12 (metaphor of legal irritant describes the situation when alien law that is not amenable to domestication comes into contact with indigenous social sectors in the recipient system and triggers a whole series of new and unexpected events).

¹³⁵ The beloved German lullaby entitled "The Moon Has Been Arising" was written by the poet Matthias Claudius and set to music by Johann Abraham Peter Schulz (in a widely known version) and by Franz Peter Schubert (in a lesser known, but equally beautiful version): *Drennan I., Pakendorf G., Viljoen N.* From Claudius to Schubert: Some Thoughts on the Transformation of Words into Music // *International Review of the Aesthetics and Sociology of Music*. 2019. Vol. 50, no. 1/2. P. 143, 151, 156, 161–163.

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Received: August 31, 2022
Accepted: November 21, 2022

Западный полумесяц встает — вертикальное измерение смешанной правовой системы Луизианы

М. Дж. Пудер

Для цитирования: Puder M. G. The Western crescent rises — a verticality dimension in Louisiana's mixed legal space // Правоведение. 2023. Т. 67, № 1. С. 5–20.
<https://doi.org/10.21638/spbu25.2023.101>

В юридической литературе, обсуждающей смешанные юрисдикции, основное внимание уделяется правовому смешению по горизонтали, особенно в работах, посвященных тем из них, в которых «континентальное» право смешивается с «общим правом». В рамках юридического исследования, посвященного изучению правовых вопросов, связанных с потерей земель в ландшафте водоемов штата Луизиана, на примере анализа отдельных кейсов эта статья показывает, как американское федеральное право, будь то конституционное, статутное или судебное, взаимодействует с распределением прав собственности в соответствии с правом штата Луизиана. Среди различных заинтересованных сторон юридические последствия эрозии и оседания проявляются в двух отношениях: во-первых, речь идет о правоотношениях между обладателями частной собственности и штатом Луизиана в отношении берегов озер, берегов рек, заливов и ручьев, а также морского побережья; и, во-вторых, об отношениях между штатом Луизиана и федеральным правительством по поводу их прав в территориальном море. В первом случае доктрина равноправия, провозглашенная Верховным судом США, гласит, что, поскольку первоначальные 30 штатов владели землей под своими естественными судоходными водными объектами, последующие участники Федерации также вступят во владение такой землей. Основываясь на федеральной доктрине равноправия, закон штата Луизиана воспользовался свободой маневра, чтобы самостоятельно определить расположение побережья озера, берегов реки, протоки или ручья и морского берега. Кроме того, при распределении собственности в соответствии с законодательством штата суды Луизианы традиционно опирались на определение судоходства, данное федеральным адмиралтейством. Способ взаимодействия между Федерацией и штатом, доминирующий во втором случае, приобрел известность как «спор о приливных землях» из-за богатых ресурсами затопленных морем земель, прилегающих к отметке самого низкого уровня воды на побережье Луизианы. Он привел к динамичному противостоянию между Верховным судом США, Конгрессом США и штатом Луизиана. Хотя Луизиана в конечном счете обеспечила себе юрисдикцию на ширину до трех морских миль, ее морской пояс все еще не соответствует ширине морских границ Техаса и Флориды.

Ключевые слова: системы смешанной юрисдикции, Федеральный закон, закон штата, озера, реки, берег моря, территориальное море, эрозия, оседание, споры по поводу приливо-отливных зон.

Статья поступила в редакцию 31 августа 2022 г.
Рекомендована к печати 21 ноября 2022 г.

Пудер Маркус Дж. — PhD, проф., Университет Лойолы, Соединенные Штаты Америки, Луизиана, 70118, Новый Орлеан, ул. Сент-Чарльз, 7214, Университетский городок № 901; mgpuder@loyno.edu