

COMMENTS

CLARIFYING AND IMPROVING THE LAW OF ENCLOSED ESTATES IN MODERN DAY LAND-SCARCE LOUISIANA

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I. INTRODUCTION

Andrew is a fisherman and a lifetime resident of Plaquemines Parish, which borders the Gulf of Mexico. Andrew, like many residents of Plaquemines Parish, relies on the day-to-day earnings of his catch with only two significant assets in his patrimony: his boat and his land. Despite being the vital source that many Plaquemines’ fishermen rely upon

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to earn a living, the Gulf of Mexico now threatens many homes in the area as coastal erosion eats away at property lines with the landowners powerless to stop it. Andrew has always entered his property—which has been in his family for four generations—through a beach road that runs from his estate along the Gulf of Mexico to the nearest public road. In more recent years, the beach road has provided utilities such as electricity poles and gas and water pipes to Andrew's estate. The recent advancements of coastal erosion, however, have made the continued use of the utility constructions and access to his estate through the beach road impossible. Through no fault of his own, Andrew's estate is now enclosed.

Bill, Andrew's neighbor to the northeast, owns an estate which has direct access to a public road and public utility constructions. Relations between the two neighbors have always been strained, and their relationship has only worsened since Andrew started to demand a passage through Bill's estate in order to access his own.

As an owner of an enclosed estate, Andrew may legally demand, and thus judicially compel, Bill to allow the requested access across his land to the nearest public road and utilities. However, recent amendments made in 2012 to the governing articles, specifically the addition of a provision requiring compensation for the "right of passage" acquired, may create unfair, if not hopeless, scenarios for both landowners.¹

As before the recent amendments, Andrew must pay to build and maintain a road to facilitate his passage—if none previously exists on Bill's property. In light of the recent amendments, however, Andrew may also now have to pay Bill the market value of the land used for his passage. He will likely incur this obligation even though rights of passage are considered inherent burdens on Bill's land; Andrew will only be in periodic possession of the land; and, Andrew will not gain ownership of the land. If Andrew cannot afford the payment, his estate will remain enclosed. The land will be effectively removed from commerce because continued use by Andrew will be impractical, and other potential purchasers will likely be deterred by the additional burden of bargaining with the neighboring landowner in order to acquire access to a road.

1. *See* LA. CIV. CODE ANN. arts. 689-696.1 (2013).

However, as to the effects on Bill, because the newly added compensation provision only refers broadly to “rights of passage,” Bill may have to allow the construction of utility accessories without compensation. Bill would relinquish permanent possession of parts of his land due to the physical occupation by the constructions but would not receive payment in return for his loss.

As the population grows, construction and real estate development expands, and events such as coastal erosion and expropriation occur more frequently, land in Louisiana becomes an increasingly scarce resource.² Because of this increasing scarcity, developing and cultivating existing land to the fullest extent possible is vital. Any hindrance to the productive use of land will exacerbate Louisiana’s current problem of land loss. One such example occurs when an estate does not have access to a public road or common utilities, rendering it enclosed. Enclosed estates must be made accessible in order to maximize their value and preserve remaining land resources. The recent addition of the compensation provision to Article 689 works against this goal, threatening to worsen land loss in Louisiana by obstructing access to enclosed estates.

Notwithstanding its modern pressing pertinence, providing access to enclosed estates has been an important objective since Louisiana’s early history. Although the origin of Louisiana law is truly a melting pot, with especially significant contributions from the French and Spanish legal systems, French law provides the main source of Louisiana’s law for providing access to enclosed estates.³ The drafters of Louisiana’s first civil code created

2. For example, Louisiana loses 16.6 square miles each year from coastal erosion. Susan Buchanan, *La. adapts to natural and manmade climate change*, LOUISIANA WEEKLY (Oct. 24, 2011), <http://www.louisianaweekly.com/la-adapts-to-natural-and-manmade-climate-change/>. One of the projected consequences in the next sixty years will be one out of four homes being lost within 500 feet of the shoreline. Greg Northcutt, *Defending the Coast from Attack*, EROSION CONTROL (Oct. 31, 2001), <http://www.mswmanagement.com/EC/articles/4844.aspx>. Logically, this will include partial loss of land that provided access to property. See *Coastal Crisis*, COASTAL PROTECTION & RESTORATION AUTHORITY, <http://coastal.la.gov/whats-at-stake/coastal-crisis/> (last visited Mar. 6, 2014). Additionally, not only in the coastal region but all over Louisiana, land is lost because of subsidence, sinking of land, and rise in sea level. Rebecca Jacobson, *Why Louisiana is Sinking*, PBS (May 30, 2012, 4:13 PM), <http://www.pbs.org/newshour/rundown/2012/05/why-louisiana-is-sinking.html> (providing an interview with coastal geoscientist, Torbjörn Törnqvist).

3. See generally A.N. Yiannopoulos, *The Legal Servitude of Passage*, 71 TUL. L. REV. 1 (1996) (providing discussions on the French roots of the Louisiana Civil Code’s

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articles to provide passages through a neighbor's land to enclosed estates based on the French Civil Code. Even before the modern problems of land loss, preserving land as a resource stood as an important objective in the development of Louisiana law.

The critical importance of providing access to enclosed estates justifies limiting ownership of the land by recognizing servitude rights. Although a property owner has the sole authority to "use, enjoy, and dispose of [the owner's estate]," the law can limit ownership when necessary.⁴ Predial servitudes are an example of a limit on the rights of ownership established by law. Predial servitudes impose a charge, or obligation, on one estate for the benefit of another estate.⁵ The estate burdened with the charge is called the servient estate; the estate receiving the benefit is referred to as the dominant estate.⁶ The charge and the benefit are attached to the estates rather than to the owners.⁷ For a valid predial servitude to exist, it is essential that there be: (1) two separate estates with separate owners;⁸ (2) a benefit or future advantage granted to the dominant estate;⁹ (3) close enough proximity between the two estates to be able to discern the benefit to the dominant estate;¹⁰ (4) the potential for permanency of the burden and benefit;¹¹ (5) no affirmative obligations on the owner of the servient estate other than to allow the servitude to exist;¹² and (6) indivisibility between the burden and benefit of the respective estates.¹³ If these requirements are met, one of three types of servitude may exist depending on the circumstances: natural, legal, or conventional.¹⁴

Natural servitudes are those that naturally exist because of the locations of the estates in relation to one another.¹⁵ Legal

articles governing enclosed estates); Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775 (2005).

4. LA. CIV. CODE ANN. art. 477 (2013).

5. LA. CIV. CODE ANN. art. 646.

6. *Id.*

7. *See* LA. CIV. CODE ANN. art. 650.

8. LA. CIV. CODE ANN. art. 646.

9. LA. CIV. CODE ANN. art. 647.

10. LA. CIV. CODE ANN. art. 648.

11. *See* LA. CIV. CODE ANN. art. 650.

12. LA. CIV. CODE ANN. art. 651.

13. LA. CIV. CODE ANN. art. 652.

14. LA. CIV. CODE ANN. art. 654.

15. LA. CIV. CODE ANN. art. 654 (2013).

servitudes are limitations on ownership imposed as a matter of law for the benefit of an individual or society.¹⁶ Conventional servitudes are those predial servitudes created by the landowner for the landowner's benefit or that of the neighbor's.¹⁷ Although legal and conventional servitudes may have the same effect, they differ primarily in whether, in the case of the former, they are imposed automatically by law or, as to the latter, created consensually between parties. The rights of passage associated with enclosed estates reside in the Louisiana Civil Code's chapter on legal servitudes and are thus classified as legal servitudes and governed according to the corresponding rules and policies.¹⁸

The evolution of the articles governing enclosed estates have always followed in the footsteps of their French roots—embracing the underlying principles of legal servitudes—until recently. This Comment explores the area of law in Louisiana governing enclosed estates in light of the 2012 amendments to the Civil Code. Section II will explore the background of this area of law's history and nature, including case law that has helped develop the articles' application, as well as the code articles that were recently amended. Section III will discuss both the pertinent case law and how the recent amendments have resolved, created, and ignored problems associated with providing passage to enclosed estates. Finally, although a variety of issues in the law of enclosed estates persists, Section IV will specifically address the newly created “compensation provision” and will propose its deletion, as well as more practical solutions in the alternative.

II. THE EVOLUTION OF ENCLOSED ESTATES AND SERVITUDES

Before the 2012 amendments, the articles regarding enclosed estates remained virtually unchanged since revisions made in 1977.¹⁹ Case law interpreting the application of the articles has slightly fluctuated at times, but reliance on public policy and the French legal tradition has remained constant. Although a comparison between the previous articles and the recently amended articles seems also to show no radical changes—merely the addition of a few words and phrases—the effect of the

16. LA. CIV. CODE ANN. art. 659.

17. LA. CIV. CODE ANN. art. 697.

18. *See* LA. CIV. CODE ANN. bk. II, tit. IV, ch. 3, § 3.

19. *See* Yiannopoulos, *supra* note 3, at 44.

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amendments could be significant. First, Subsection A will present a brief explanation of the French law providing the foundation for Louisiana's law concerning enclosed estates. Next, Subsection B will examine the pre-amendment version of the articles and corresponding jurisprudence, with Louisiana's public policy governing these articles discussed throughout. Finally, Subsection C will introduce the 2012 amendments.

A. THE FRENCH ORIGIN AND INFLUENCES OF THE LAW REGARDING RIGHTS OF PASSAGE FOR ENCLOSED ESTATES IN LOUISIANA

Interpreting law in Louisiana is a delicate art due to its unique background. Although the Louisiana legal system is founded upon and primarily concerned with codal law, there exists a "strong respect for precedent, especially for the decisions of the Louisiana Supreme Court, but also a responsibility to independently examine the interpretation of enacted law and the power to reject precedent when it is erroneous."²⁰ Louisiana law is heavily influenced by French law and scholars; both have been repeatedly relied upon throughout history and modern case decisions. The Code Napoleon provided an "excellent model" for the drafters who created Louisiana's first Civil Code.²¹ Due to Louisiana's civilian tradition, "scholars and judges often look beyond the borders of the United States in developing and interpreting Louisiana law."²² Past and present versions of the articles regarding enclosed estates are based upon Article 682 of the Code Napoleon.²³ The Supreme Court of Louisiana has noted that "the interpretation that French jurisprudence and doctrine gave the corresponding provision of the Code Napoleon [for enclosed estates] has been followed in Louisiana and continues to be pertinent."²⁴ Specifically, the French scholar Planiol's interpretation of the Code Napoleon's articles for enclosed estates has been relied upon in Louisiana jurisprudence when interpreting the state's own articles.²⁵

20. Algero, *supra* note 3, at 778.

21. *Id.* at 777.

22. *Id.* Because Louisiana is the only American state with a civil law tradition, courts in Louisiana often look to French, Spanish, and Roman sources to preserve the civil law tradition and correctly interpret law rooted in these sources. *Id.* at 776-79.

23. *Rockholt v. Keaty*, 237 So. 2d 663, 666 (La. 1970).

24. Yiannopoulos, *supra* note 3, at 10.

25. *See Rockholt*, 237 So. 2d at 666.

French law defines an enclosed estate as one that has no access to a public road or one that is insufficient for the estate's cultivation and use.²⁶ The French Civil Code Article 682²⁷ provides a right of passage when there is no access or when there is access but it is insufficient for any use of the estate.²⁸ Insufficient access includes access to a public road that would require additional works and significant costs out of proportion with the value of an estate.²⁹ French law has a liberal policy towards providing passages for enclosed estates and strongly disfavors any outcome that would prohibit active use of an estate.³⁰ For example, because the owner is free to use and change the use of his estate he may "increase the scale of his industrial operations and demand a new passage if the original one has become insufficient."³¹

Louisiana law regarding enclosed estates closely resembles the corresponding French law, with a few notable differences. Both the Louisiana and the French Civil Codes classify a right of passage for an enclosed estate as a legal servitude, recognize the limitations it imposes on the ownership of the neighboring land providing the passage, and view public policy as a significant component of this right.³² However, in France, although the location of the passage and the amount of indemnity owed is fixed by a court, the servitude exists before any judicial decree is made.³³ If the owner of an enclosed estate were to pass across the servient estate before any judicial decision or agreement between the two landowners, he would not be considered a trespasser.³⁴ Conversely, Louisiana would draw the opposite conclusion.³⁵

26. Yiannopoulos, *supra* note 3, at 14.

27. "An owner whose tenements are enclaved and who has no way out to the public highway, or only one which is insufficient either for an agricultural, industrial or commercial working of his property, or for carrying out operations of building or development, is entitled to claim on his neighbours' tenements a way sufficient for the complete servicing of his own tenements, provided he pays a compensation in proportion to the damage he may cause." CODE CIVIL [C. CIV.] art. 682 (Fr.) (Georges Rouhette trans., 2006), available at http://sopheaksrey.files.wordpress.com/2012/05/french-civil-code_en_2006.pdf.

28. *Id.*; Yiannopoulos, *supra* note 3, at 5, 14.

29. Yiannopoulos, *supra* note 3, at 14.

30. *See id.* at 6

31. *Id.* at 5.

32. *Id.* at 4.

33. *Id.* at 16-17.

34. Yiannopoulos, *supra* note 3, at 17.

35. *See id.*

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Louisiana jurisprudence views the legal servitude as merely establishing the right to demand passage across the neighbor's estate.³⁶ France also continues to require indemnity for damage caused to the servient estate as the only payment required by the dominant estate owner, while the recent amendments in Louisiana might require quite a bit more.³⁷ Finally, the action for indemnity may prescribe in both, but the prescriptive period differs: thirty years in France and ten in Louisiana.³⁸

B. THE HISTORY AND CASE LAW OF ENCLOSED ESTATES IN LOUISIANA

An estate having no access to a public road is considered enclosed.³⁹ As a matter of law, an owner whose estate is enclosed has a right to claim passage across the neighboring estate, subject to the obligation to indemnify the neighbor for any damage the enclosed estate's owner causes in utilizing the right of passage.⁴⁰ This granting of one right, and simultaneous limitation of another, is accomplished through the legal servitude designation to promote the public policy of encouraging continued cultivation and use of land. Louisiana jurisprudence and doctrine has struggled with the meaning, scope, and application of this servitude because of the limited amount of articles governing this topic and their broad nature.⁴¹ Articles 689–696.1 are the applicable articles and govern an estate's status as enclosed, the location and extent of the passage, any compensation owed, and exceptions to the general rules. Each of these topics is discussed below.

36. Yiannopoulos, *supra* note 3, at 17. Although the Civil Code grants the owner of an enclosed estate a right to “demand the designation of a right of way,” the servitude is not established until it is fixed by an agreement between the neighbors or confirmed by a court before a passage may be used. *Id.*

37. *See id.* at 23.

38. *Id.* at 23-24.

39. LA. CIV. CODE ANN. art. 689 (2013).

40. *Id.*

41. *See* Yiannopoulos, *supra* note 3, at 3-4 (seeking to “harmonize” the articles governing enclosed estates with the struggle Louisiana jurisprudence has experienced in its interpretation); C. Sherburne Sentell III, Comment, *Fixing the Right of Passage from an Enclosed Estate: Deciding Where to Break Out Using Louisiana Civil Code Article 692*, 54 LA. L. REV. 1659, 1660 (1994) (explaining the area of law for enclosed estates and noting “[t]here are only eight Louisiana Civil Code articles that specifically address the right of passage” and courts issue “questionable” decisions by misinterpreting certain exceptions).

**1. WHEN AN ESTATE IS SUFFICIENTLY ENCLOSED
THAT A RIGHT OF PASSAGE MAY BE DEMANDED—
ARTICLE 689**

According to the Louisiana Civil Code, an enclosed estate is defined as one that does not have its own access to a public road.⁴² Having no access to a public road is interpreted broadly based on Planiol's explanation that an estate is enclosed "not only when it has no issue upon the public road, but if it has merely an insufficient issue."⁴³ Insufficient is not to be construed as inconvenient; for an estate to be considered truly enclosed, the right of passage across neighboring land must be necessary.⁴⁴ Planiol also indicated that the meaning of enclosed estate should be interpreted in accordance with changing circumstances by further noting that the old law, which was created when the only conceivable use of land was agricultural, should equally apply to industrial use of land.⁴⁵ The Supreme Court of Louisiana agrees and has adopted Planiol's broad interpretations.⁴⁶

The type of access granted to an enclosed estate must be a passage capable of handling vehicular traffic in all seasons and weather from the enclosed estate to the public road.⁴⁷ If an estate only has access to a public road that does not support vehicular traffic, or supports it but only during certain seasons or absent inclement weather, the estate is considered enclosed.⁴⁸ A road

42. LA. CIV. CODE ANN. art. 689 (2013).

43. *Rockholt v. Keaty*, 237 So. 2d 663, 666 (La. 1970) (quoting 1 PLANIOL, *TRAITE E LE MENTAIRE DE DROIT CIVIL* pt. 2, § 2920 (La. State Law Inst. trans., 1959) (12th ed. 1938)).

44. *Martin v. Patin* 16 La. 55, 57 (1840) (denying a demand for passage across neighboring lands because the requested passage was simply more convenient and not necessary to the estate); *see also* Yiannopoulos, *supra* note 3, at 10.

45. *Rockholt*, 237 So. 2d at 666 (quoting 1 PLANIOL, *TRAITE E LE MENTAIRE DE DROIT CIVIL* pt. 2, § 2920 (La. State Law Inst. trans., 1959) (12th ed. 1938)).

46. *Id.* at 666-67 (granting a right of passage to a landowner whose estate had access to a public highway, but the access was insufficient as no ingress or egress could be given from the highway).

47. Yiannopoulos, *supra* note 3, at 9.

48. *See, e.g., Watson v. Scott*, 324 So. 2d 508, 510 (La. Ct. App. 2d Cir. 1975) (finding roads leading to the plaintiff's property were either no longer passable, or impassable during inclement weather, rendering the estate enclosed); *Patin v. Richard*, 291 So. 2d 879, 880 (La. Ct. App. 3d Cir. 1974) (finding an estate was considered enclosed because the only access to a public road was through the estate's "beach road," which ran along the Gulf of Mexico and thus was often underwater); *Bourg v. Audubon Park Comm'n*, 89 So. 2d 676 (La. Ct. App. Orl. 1955) (finding an estate which fronted a public park and thus had pedestrian access was considered

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though that is less developed, practical, or desirable than a passage across neighboring lands does not render an estate enclosed.⁴⁹ Likewise, a road providing access to a public road that is much longer than one passing through a neighboring estate is merely inconvenient and does not rise to the level of necessity justifying a legal servitude of a right of passage.⁵⁰ An estate is not enclosed so long as it has access to a public road over which travel is feasible, regardless of the potential difficulties associated with such travel.⁵¹

If access to a public road through one's own estate would cost a disproportionate amount compared to a right of passage granted through a neighboring estate, an exception may apply. The Supreme Court of Louisiana once endorsed this possibility where the situation could be considered extreme.⁵² However, the viability⁵³ of this exception is questionable given that the Court has yet to find sufficiently extreme circumstances to warrant its application since its apparent recognition in 1851.⁵⁴ When an

enclosed because the access could not support automobiles).

49. See *Robinson v. Herring*, 20 So. 2d 811, 813 (La. App. 2d Cir. 1944) (“[T]he test is not whether the right of way sought is more serviceable, more convenient or more practical, than any other route available, but is whether it is absolutely necessary, all things considered, for the needs and used of the enclosed estate.”); Yiannopoulos, *supra* note 3, at 10.

50. See *Martin v. Patin* 16 La. 55, 57 (1840); Yiannopoulos, *supra* note 3, at 10.

51. See *Breaux v. Bienvenue*, 25 So. 321, 323 (1899) (refusing the plaintiff's request for a right of passage and stating “[t]he law does not take into account the inconveniences of the situation, nor the greater or less cost of reaching the railroads, refineries, or the public centers of business and trade, but contemplates an absolute inability of doing so without the right of way sought to be expropriated”); see also Yiannopoulos, *supra* note 3, at 11.

52. *Pousson v. Porche*, 6 La. Ann. 118, 119 (1851) (“A case might occur in which the expense and inconvenience of making a passage over one's own land, would be so great, compared with the inconvenience to a neighbor of a passage over his, as to induce the courts to except it from the principles inculcated by Toullier and the Court of Appeals of Lyons.”).

53. A possible misinterpretation of *Pousson* but nevertheless a heightened standard or an exclusion of the extreme situation exception: “As this court stated in the *Pousson* case, even an extreme inconvenience in passing over contiguous property acquired by the owner of the formerly enclosed estate does not warrant forcing a neighbor to yield a passage over his land.” *Dallas v. Farrington*, 490 So. 2d 265, 271 (La. 1986). Although *Dallas* has been criticized, it has not been overruled. See *Hardisty v. Young*, 98-607 (La. App. 3 Cir. 10/28/98); 720 So. 2d 811, 814 (citing 4 A.N. YIANNOPOULOS, CIVIL LAW TREATISE: PREDIAL SERVITUDES § 103, at 300 (1983)).

54. The Louisiana Second Circuit granted a legal servitude for passage over neighboring lands despite the estate's access to a public road due to its difficult terrain and cost if a road were to be built as compared to the neighbor's

estate is sufficiently enclosed, it is the dominant estate with a right as a matter of law to demand passage across the servient estate.

2. THE LOCATION OF THE RIGHT OF PASSAGE— ARTICLE 692

Choosing the location of the right of passage involves two determinations by a court: (1) which neighboring land is the servient estate owing the right of passage and (2) precisely where on the servient estate the passage should be located.⁵⁵ Article 692 does not allow the enclosed estate owner to choose the location of the passage; the article dictates that “[t]he passage generally shall be taken along the shortest route from the enclosed estate to the public road at the location least injurious to the intervening lands.”⁵⁶ Much dispute has concerned issues of predominance between the directives of the shortest route and the least injurious location. Currently, the shortest route predominates over the least injurious location, which is only used to choose the precise location within the area of the shortest route.⁵⁷ Both Louisiana jurisprudence and French doctrine agree that an exception to the shortest route may only be granted in light of “weighty considerations.”⁵⁸

In order to determine which surrounding land is the servient estate, courts generally choose the estate that provides the

inconvenience. However, the opposing parties were lessor/lessees; the legal servitude was granted under Article 694 rather than 689; and, a pre-existing passage was in place and used by the previous lessees. *See* *Blanchard v. Pan-OK Prod. Co.*, 32,764, p. 18-19 (La. App. 2 Cir. 4/5/00); 755 So. 2d 376, 387.

55. *Sentell*, *supra* note 41, at 1660.

56. LA. CIV. CODE ANN. art. 692 (2011). Before the recent amendments, Article 692 of the Louisiana Civil Code, titled “Location of Passage,” provided: “The owner of the enclosed estate may not demand the right of passage anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road at the location least injurious to the intervening lands.” *Id.*

57. *See Dickerson v. Coon*, 46,423 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135 (affirming the trial court’s location of the right of passage along the shortest route as reasonable).

58. *Miller v. Thompson*, 3 La. Ann. 567, 568 (1848) (“*Toullier*, commenting upon the corresponding article [sic] of the Napoléon Code, says, the rule which grants the shortest road ought only to be departed from for weighty considerations.”); *see also Dickerson*, 71 So. 3d at 1139 (quoting 4 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PREDIAL SERVITUDES § 97, at 285 (3d ed. 2004) (“[D]eparture from the general rule requiring location of the right of passage along the shortest route ‘must be supported by weighty considerations.’”)).

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shortest straight-line distance from the boundary of the enclosed estate to the nearest public road.⁵⁹ This selection process by the court is consistent with the approaches of the Louisiana Civil Code and Louisiana jurisprudence.⁶⁰ A legal servitude is an inherent limitation of ownership and an inherent burden on the servient estate and thus cannot be imposed by will of man.⁶¹ If more than one surrounding estate provides equal distance to the nearest public road, then “cost, convenience, and practicality [are] appropriate factors for a court to balance in deciding which estate owes the servitude.”⁶²

After identifying the servient estate, the shortest route is again used to set the precise location of the passage, regardless of the parties’ wishes.⁶³ In *Dickerson v. Coon*, the plaintiff, Dickerson, suggested two alternatives for a right of passage across the servient estate owned by the defendant, Coon.⁶⁴ Dickerson’s first choice was for the passage to be located at an existing logging road because it was “comparable to the shortest route, would require limited work to make passable, and no timber would have to be cleared.”⁶⁵ He did not, however, object to locating the passage at the shortest route—his second choice—because it was located in the same general area and (despite requiring more work and expense than the former) involved less work and expense than the alternative proposed by Coon.⁶⁶ Coon objected to the two routes proposed by Dickerson, alleging that either would divide his land, negatively affect his hunting club, and interfere with plans to possibly build a home in the area.⁶⁷ Coon requested that the passage be set along the northern boundary of his estate, a location that would provide Dickerson with his needed access without injuring Coon’s property interests.⁶⁸ The Louisiana Second Circuit affirmed the trial

59. Sentell, *supra* note 41, at 1682.

60. Such a result follows from the principles of legal servitudes, which inherently forbid the owner of the enclosed estate from personally selecting the location of the passage. LA. CIV. CODE ANN. art. 692 (2013).

61. See LA CIV. CODE ANN. arts. 654, 650.

62. Sentell, *supra* note 41, at 1683 (discussing the shortcomings of cases that have diverted from Article 692).

63. See *Dickerson v. Coon*, 46,423 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135.

64. *Id.* at 1137.

65. *Id.* at 1140.

66. *Id.*

67. *Id.* at 1138-39.

68. *Dickerson v. Coon*, 46,423, p. 2 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135, 1138.

court's selection of the shortest route notwithstanding Coon's wishes and Dickerson's preference. The court mentioned that it would have allowed the passage to be set along the existing logging road in considering the cost and practicability, but with appropriate deference, the court refused to substitute its judgment and affirmed the shortest route because the trial court acted reasonably and neither party provided valid objections.⁶⁹

The Second Circuit noted that the use of the word "generally" in Article 692 has allowed for exceptions to selecting the shortest route.⁷⁰ These exceptions turn on the individual circumstances of each case used in a balancing test to determine the precise location of the passage on the servient estate.⁷¹ The court noted, however, that application of such an exception required the support of "weighty considerations" as a prerequisite.⁷² The Third Circuit faced a case involving appropriately weighty considerations where the shortest route "was covered by water and the costs associated with it would [have been] so exceptional that from a practical standpoint, the crossing would be economically unfeasible to build."⁷³ The court thus affirmed the trial court's conclusion that the route was unacceptable and decision to select an alternate route.⁷⁴

The *Dickerson* opinion above also demonstrates that while the language of Article 692 specifically forbids the dominant estate owner from choosing the location of the passage, the servient estate owner is likewise prohibited from selecting his preferred route.⁷⁵ The only reprieve servient estate owners have is to request relocation of the servitude as provided for in Article 695.⁷⁶ The right of a servient estate owner to relocate the

69. *Dickerson v. Coon*, 46,423, p. 2 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135, 1141.

70. *Id.* at 1139. For examples of exceptions to the shortest route, see *Mitcham v. Birdsong*, 573 So. 2d 1294, 1298 (La. Ct. App. 2d Cir. 1991) (finding the shortest route "would be completely unfeasible as it is underwater during parts of the year and is impassable"); *Anderton v. Akin*, 493 So. 2d 795, 799-00 (La. Ct. App. 2d Cir. 1986) (granting an alternate route, because it was more appropriate for the proposed use and would take less time and money to prepare than the shortest passage).

71. See, e.g., *Dickerson*, 71 So. 3d at 1139; *Mitcham*, 573 So. 2d 1294; *Anderton*, 493 So. 2d at 800; see also *Sentell*, *supra* note 41, at 1670, 1683.

72. *Dickerson*, 71 So. 3d at 1139.

73. *May v. Miller*, 2004-418, p. 7 (La. App. 3 Cir. 10/11/06); 941 So. 2d 661, 667.

74. *Id.* at 667, 670.

75. See *Dickerson v. Coon*, 46,423 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135.

76. LA. CIV. CODE ANN. art. 695 (2013) ("The owner of the enclosed estate has no right to the relocation of this servitude after it is fixed. The owner of the servient

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servitude is not absolute, even if the proposed relocation affords the same facility to the dominant estate owner.⁷⁷ The servient estate owner must first show that the relocation would provide more convenience.⁷⁸ If successful in doing so, the owner must then show that the proposed relocation will afford the same facility to the dominant estate owner, which will be decided on a case-by-case basis.⁷⁹ Courts examine the location, elevation, and configuration of the existing servitude and proposed relocation in making this determination.⁸⁰

3. THE EXTENT OF THE RIGHT OF PASSAGE—ARTICLE 690 AND 691

Regardless of the location of the passage, it must have the capacity to facilitate the type of access needed for the particular use of the estate.⁸¹ Article 690 establishes the extent of the right of passage: for “the kind of traffic that is reasonably necessary for the use of that estate.”⁸² Further, Article 691 allows the owner of the enclosed estate to construct “the type of road or railroad reasonably necessary for the exercise of the servitude.”⁸³ The Supreme Court of Louisiana recently interpreted these articles very narrowly in *Perdue v. Cruse*, as strictly limited to roads and railroads according to the plain language of the Article, without consideration of its current context.

In *Perdue*, the Louisiana Third Circuit affirmed a right of passage for an enclosed estate, but refused to allow the defendants (owners of the enclosed estate) to continue to run electrical, telephone, and water utilities on the passage or through the servient estate.⁸⁴ The previous owners of the dominant and servient estates had allowed the utility accessories to be constructed along the passage, and therefore, the defendants (purchasers of the enclosed estate) were provided no

estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate.”).

77. See *Fuselier v. Hebert*, 526 So. 2d 1169, 1171 (La. Ct. App. 3d Cir. 1988).

78. *Id.*

79. See *id.*; *Brian v. Bowlus*, 399 So. 2d 545, 547 (1980).

80. See *Brian*, 399 So. 2d at 547.

81. See *Yiannopoulos*, *supra* note 3, at 5-9.

82. LA. CIV. CODE ANN. art. 690 (2011).

83. LA. CIV. CODE ANN. art. 691.

84. *Perdue v. Cruse*, 09-1446 (La. App. 3 Cir. 6/2/10); 38 So. 3d 1235.

notice that they would have to live without modern conveniences and necessities.⁸⁵ Despite the fact that these utilities were “reasonably necessary for the use of that estate”⁸⁶ as contemplated by Article 690, the court stated that the use of the words “road” and “railroad” in Article 691 “instructs us that the right of passage is for the physical transport of people, animals, and goods.”⁸⁷

4. INDEMNITY PROVIDED TO THE SERVIENT ESTATE

An owner of an enclosed estate who is granted a right of passage is bound to indemnify the owner of the servient estate for any damage caused.⁸⁸ However, the servient estate owner’s right for indemnity can be lost by the accrual of a ten-year liberative prescription period.⁸⁹ Yet, the dominant estate owner’s right to demand passage can never be lost by prescription.⁹⁰ The amount of compensation owed is for damages actually sustained by the servient estate owner, but the trial court has wide discretion to determine what amount is reasonable.⁹¹ A legitimate claim for

85. See *Perdue v. Cruse*, 09-1446 (La. App. 3 Cir. 6/2/10); 38 So. 3d 1235, 1237-38.

86. LA. CIV. CODE ANN. art. 690.

87. *Perdue*, 38 So. 3d at 1240; see LA. CIV. CODE ANN. art. 691.

88. LA. CIV. CODE ANN. art. 689 (2011) (“He is bound to indemnify his neighbor for any damage he may occasion.”).

89. LA. CIV. CODE ANN. art. 696 (2013); see LA CIV. CODE ANN. art. 3499; Yiannopoulos, *supra* note 3, at 24.

90. See LA. CIV. CODE ANN. art. 696; Yiannopoulos, *supra* note 3, at 42.

91. Although older opinions seem to issue conflicting holdings on what is owed, in recent years it has been uncontested that trial courts enjoy great discretion in setting indemnity for damages at a reasonable amount. See, e.g., *Griffith v. Cathey*, 99-923, p. 12 (La. App. 3 Cir. 2/2/00); 762 So. 2d 29, 37 (stating “the trial court properly refused to award an amount for unproven damages”); *Braxton v. Guillory*, 98-379 (La. App. 3 Cir. 10/28/98); 721 So. 2d 114, 125-26 (refusing to disturb the trial court’s award of damages after finding the award to be “more than adequate”); *Bouser v. Morgan*, 520 So. 2d 937, 941 (La. Ct. App. 3d Cir. 1987) (declining to review the award for damages because the trial court is given much discretion in its determination and finding the number did not seem to be an abuse of that discretion); *Collins v. Reed*, 316 So. 2d 134, 138 (La. Ct. App. 3d Cir. 1975) (affirming the trial court’s award of \$1,000 even though the servient estate owner had requested \$11,500) (“The trial judge has wide discretion in determining the amount of damages occasioned by the party on whose estate the right of passage is fixed. . . . [W]e cannot say that the award is an abuse of that discretion.”); see also *Breaux v. Bienvenu*, 25 So. 321, 322 (1899) (holding the enclosed estate owner owed no less and no more “than three times the assessed value of the land traversed”). However, in *Breaux*, the governing article at the time contained language unfamiliar to the recent articles and this has never been cited in support of a holding providing compensation to a servient estate owner.

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damages does not include an increase in value of the enclosed estate; it must be limited to the servient estate's "diminished value."⁹²

Interpreting Article 689's indemnity provision to include only actual, physical damages to the servient estate has been recently confirmed by the Louisiana Second Circuit.⁹³ The court in *Greenway v. Wailes* held the indemnity provision to be only for actual, physical damages caused to the land and not for compensation for the market value of the servitude imposed and land taken.⁹⁴ In 2011, the Second Circuit in *Dickerson v. Coon* again upheld this as a proper understanding of the indemnity provision because rights of passage for enclosed estates are legal servitudes imposing a limitation of ownership to benefit a particular person or the public and are created by law.⁹⁵ The *Dickerson* court noted the importance of limiting ownership in this way because it is "for the 'common utility' of adjacent properties and has been part of this state's policy regarding ownership of land since statehood . . . [and] 'our earliest civil code.'"⁹⁶ *Dickerson*, who was granted the right of passage across Coon's estate, was only required to pay Coon for value of the loss of timber sustained from the clearing of the land to construct a road.⁹⁷

Before the recent amendments, the provision providing compensation to the servient estate owner differed from another type of legal servitude recognized by the Civil Code—one for encroaching buildings.⁹⁸ A legal servitude is created in favor of a

92. See *Bailey v. McNeely*, 05-629, p. 10 (La. App. 3 Cir. 12/30/05); 918 So. 2d 1124, 1131 (affirming the trial court's denial of the defendant's, the servient estate owner, claim for indemnification for damages when the only evidence was an increase in value of the plaintiff's estate).

93. *Dickerson v. Coon*, 46,423, p. 9-11 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135, 1141-42; *Greenway v. Wailes*, 41,412, p. 11-12 (La. App. 2 Cir. 8/1/06); 936 So. 2d 296, 303.

94. *Greenway*, 936 So. 2d at 303.

95. *Dickerson*, 71 So. 3d at 1141.

96. *Id.* at 1141 (quoting *Greenway*, 936 So. 2d at 303).

97. *Id.* at 1141-42.

98. Compare LA. CIV. CODE ANN. art. 689 (2011), with LA. CIV. CODE ANN. art. 670 (2013) ("When a landowner constructs in good faith a building that encroaches on an adjacent estate and the owner of that estate does not complain within a reasonable time after he knew or should have known of the encroachment, or in any event complains only after the construction is substantially completed the court may allow the building to remain. The owner of the building acquires a predial servitude on the land occupied by the building upon payment of compensation for the value of

landowner whose building encroaches upon the neighboring estate if the landowner is in good faith and the neighbor does not complain within a reasonable time or only after the building is substantially completed.⁹⁹ In return, the neighbor is given compensation for the value of the servitude plus any damages he has suffered.¹⁰⁰ The damages provisions in Articles 670 and 689 differed greatly: Article 689 required only indemnity while Article 670 afforded both indemnity and compensation for the value of the servitude.¹⁰¹ The articles also differed in regard to the use of the servitudes. An encroaching building occupies the neighbor's land permanently; servitudes of rights of passages do not require continuous occupation of the land.

Perhaps most importantly, a servitude granted under Article 670 involves some fault on behalf of the landowner despite his good faith. Although the landowner might not have intended to build or encroach on the neighboring property, because of those actions the neighbor must accept the legal servitude and effectively lose some land. A servitude granted under Article 689 does not involve any fault of the enclosed estate owner, arising instead from the relation of the estates to each other. In fact, if an estate becomes enclosed due to the fault of the landowner, because of a voluntary act or omission of the landowner, Article 693 creates an exception to the general rules for providing passages to enclosed estates and prohibits the granting of a legal servitude. Another exception provided in Article 694 allows passage but prohibits any compensation or indemnity to the servient estate.

5. EXCEPTIONS TO THE GENERAL RULES FOR ENCLOSED ESTATES AND THEIR RIGHTS OF PASSAGE—ARTICLES 693 AND 694

Although an estate might, by definition, be enclosed, its owner may not demand an ordinary right of passage in two situations contemplated by Articles 693 and 694. These articles provide exceptions to the general rules or to the existence of the

the servitude taken and for any other damage that the neighbor has suffered.”).

99. LA. CIV. CODE ANN. art. 670 (2013).

100. *Id.*

101. *Compare id.* (“[U]pon payment of compensation for the value of the servitude taken and for any other damage that the neighbor has suffered.”), *with* LA. CIV. CODE ANN. art. 689 (2011) (“He is bound to indemnify his neighbor for the damage he may occasion.”).

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legal servitude as discussed above. Articles 689 and 694, discussed *infra*, grant access to public roads (albeit in different ways), while Article 693 prevents it.¹⁰²

Article 693 prevents passages given to enclosed estates as a legal servitude if the estate became enclosed because of the landowner's voluntary action or omission; this prohibition extends to the landowner's "successors."¹⁰³ If the owner of the estate caused it to become enclosed through a voluntary act or omission, then the owner may only gain passage through the neighboring lands with the neighbor's consent.¹⁰⁴ Gaining passage may be accomplished by establishing a conventional servitude, which allows the neighboring landowner to ask for any price desired.

Although the language "voluntary act or omission" appears broad, the Supreme Court of Louisiana has interpreted it narrowly.¹⁰⁵ In *Leblanc v. Thibodeaux*, the owner whose estate had become enclosed when his conventional servitude of passage prescribed after ten years of non-use was not prevented by Article 693 from demanding an indemnified right of passage to the nearest public road as allowed by Article 689.¹⁰⁶ Because passages for enclosed estates are legal servitudes, his right to demand one did not prescribe and establishing a conventional servitude of passage did not displace the legal servitude, which is an inherent burden that runs with land.¹⁰⁷ Article 693 was interpreted as preventing legal servitudes of passage only when the owner enclosed himself by selling off property that gave him access to a public road, and it does not include partitions of property or loss of property due to expropriation.¹⁰⁸

Despite the strict application in *Leblanc*, which favors access

102. Scott D. Huffstetler, Note, *Don't Fence Me In: Louisiana's Fourth Circuit Expands "Voluntariness" under Louisiana Civil Code Article 693*, 63 LA. L. REV. 111, 113 (2002); see LA. CIV. CODE ANN. arts. 689, 694, 693. Article 693 provides: "If an estate becomes enclosed as a result of a voluntary act or omission of its owner, the neighbors are not bound to furnish a passage to him or his successors." LA CIV. CODE ANN. art. 693 (2013).

103. LA CIV. CODE ANN. art. 693.

104. Yiannopoulos, *supra* note 3, at 24-25.

105. See *Leblanc v. Thibodeaux*, 615 So. 2d 295 (La. 1993); see also Huffstetler, *supra* note 102, at 117.

106. *Leblanc*, 615 So. 2d at 296-97, 299-00.

107. See *id.* at 296-97.

108. *Id.* at 299; Yiannopoulos, *supra* note 3, at 26.

to enclosed estates according to public policy,¹⁰⁹ the Louisiana Fourth Circuit issued a novel decision that departed from previous holdings and has yet to be challenged.¹¹⁰ The Fourth Circuit held Article 693 to prohibit a right of passage to a landowner whose estate became enclosed due to part of its loss to a creditor in a sheriff's sale.¹¹¹ The court determined this to be a voluntary act or omission, stating: "Petrovich lost the land with access to the highway as a result of the Sheriff's sale . . . , the result of Petrovich's failure to pay his creditors; it was by his own cause."¹¹² Nevertheless, the majority view continues to narrowly interpret a voluntary act or omission that would prevent a right of passage.¹¹³

When part of an estate is voluntarily alienated, causing some parcel to be enclosed, a legal servitude of passage may still be granted if the owner of the enclosed parcel is not the one who enclosed the estate; however, an Article 689 indemnified right of passage will not be available.¹¹⁴ Article 694 provides a special right of passage to those who acquire estates that have become enclosed due to the previous owners' voluntary alienation or partition, regardless of a preexisting passage.¹¹⁵ This article differs from Article 689 in that the enclosed estate owner is not responsible for any indemnity; the passage is given gratuitously.¹¹⁶ The servient estate is already identified without any consideration of the shortest route; the precise spot on the

109. See *Leblanc v. Thibodeaux*, 615 So. 2d 295, 299 (La. 1993); see also *Rockholt v. Keaty*, 237 So. 2d 663, 668 (La. 1970).

110. See *Petrovich v. Trabeau*, 1998-2897 (La. App. 4 Cir. 3/7/01); 780 So. 2d 1258.

111. *Id.* at 1259.

112. *Id.* at 1260.

113. See *Yiannopoulos*, *supra* note 3, at 25-27.

114. See LA. CIV. CODE ANN. art. 694 (2011); see also *Yiannopoulos*, *supra* note 3, at 30-31. Article 694 provided: "When in the case of partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road, and even if the act of alienation or partition does not mention a servitude of passage." LA. CIV. CODE ANN. art. 694.

115. See LA. CIV. CODE ANN. art. 694 (2011); *Spotsville v. Herbert & Murrell, Inc.*, 97-188, p. 3 (La. App. 3 Cir. 6/18/97); 698 So. 2d 31, 33-34; *Yiannopoulos*, *supra* note 3, at 30-31; see also *Sceroler v. Rancher*, 1999-2859 (La. App. 1 Cir. 2/15/02); 808 So. 2d 803 (denying plaintiff's claim for a passage across defendant's estate to the nearest public road because the estate had become enclosed by the previous owner of the plaintiff's estate selling that parcel; thus an article 694 passage was available).

116. See LA. CIV. CODE ANN. arts. 689, 694.

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servient estate for the passage is located along the road previously used to access the now enclosed estate, if available.¹¹⁷

Courts prefer Article 694 rights of passage to those arising under Article 689.¹¹⁸ Commentators regard the provisions of Article 694 “as founded on the intent of the parties to an agreement or on the idea that a landowner should not be allowed to impose by his own volitional acts the burden of a forced passage on neighboring lands.”¹¹⁹ Although this is the general rule, a 689 right of passage can be granted in lieu of a 694 gratuitous one; albeit in rare situations involving extreme circumstances.¹²⁰ If a legitimate argument is put forth that based on the particular circumstances a 689 passage is more appropriate than a 694 passage, a cost-benefit analysis is employed: allowing a 689 right of passage is only justified if a 694 gratuitous passage would be impossible or highly impractical.¹²¹ Yet, one seeking this result should note that success may require compensation to the servient estate owner, based on the recent amendments, whereas a 694 gratuitous passage includes no attendant burden of payment.

C. THE RECENT AMENDMENTS TO THE ARTICLES GOVERNING ENCLOSED ESTATES

In 2012, the Louisiana Legislature amended Articles 689, 690, 691, 692, 694 and enacted Article 696.1 in order to provide for “the right of passage for utilities . . . limitations and locations of a servitude of passage . . . definitions . . . [and] related matters.”¹²² The dominant characteristic of the recent

117. See LA. CIV. CODE ANN. art. 694 (2011).

118. See, e.g., *Sceroler*, 808 So. 2d at 808.

119. Yiannopoulos, *supra* note 3, at 27-28.

120. See *Stuckey v. Collins*, 464 So. 2d 346, 348 (La. Ct. App. 2d Cir. 1985) (granting a 689 passage over a 694 one because “the evidence shows that passage across that land is impractical if not impossible”). *But see Sceroler v. Rancher*, 1999-2859, p. 9 (La. App. 1 Cir. 2/15/02); 808 So. 2d 803, 809 (restating the trial court’s reasoning that the “facts [did] not support the *Stuckey* exception” because there was no evidence that a passage across the vendor’s land would be highly impossible or impractical, despite the land being vacant and unimproved).

121. *Stuckey*, 464 So. 2d at 348. The Louisiana Second Circuit allowed a 689 passage over a 694 one because “the evidence shows that passage across that land is impractical if not impossible. The passage would have to cross an area that holds water, is boggy and swampy, and the construction of a road would ‘cost a fortune.’” *Id.*

122. H.B. 468, 2012 Leg., 38th Reg. Sess. (La. 2012).

amendments is the addition of “utility” to all of the aforementioned amended articles, which now impose a legal servitude and allow one to demand a right of passage across a neighbor’s land to access utilities.¹²³ Even an owner who already has access to a public road may nevertheless demand a right of passage to access utilities.¹²⁴ Newly enacted Article 696.1 defines utility as “a service such as electricity, water, sewer, gas, telephone, cable television, and other commonly used power and communication networks required for the operation of an ordinary household or business.”¹²⁵ Articles 690 and 694 were only amended insofar as the word “utility” was inserted into these existing articles.¹²⁶

Articles 689, 691, and 692 have had substantive material added in addition to the word “utility.”¹²⁷ As amended, Article 689’s new substantive texts create two obligations.¹²⁸ First, an obligation to compensate the servient estate owner for the “right of passage” has been added to the pre-existing responsibility to indemnify the neighbor for any damage caused.¹²⁹ Second, the enclosed estate owner is responsible for the maintenance of the utility servitude, including the land it occupies and any associated costs.¹³⁰ “Utility” was also added to Article 691 in addition to certain substantive text; the article now reads:

The owner of the enclosed estate may construct on the right-of-way the type of road, utility, or railroad reasonably necessary for the exercise of the servitude.

The utility crossing shall be constructed in compliance with all appropriate and applicable federal and state standards so as to mitigate all hazards posed by the passage and the particular conditions of the servient estate and intervening

123. 4 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE, PREDIAL SERVITUDES § 92 (3d ed. 2004 & Supp. 2012-2013).

124. *Id.*

125. LA. CIV. CODE ANN. art. 696.1 (2013).

126. 4 YIANNOPOULOS, *supra* note 123.

127. *Id.*

128. *See* LA. CIV. CODE ANN. art. 689.

129. *Id.* (“He is bound to compensate his neighbor for the right of passage acquired and to indemnify his neighbor for the damage he may occasion.”).

130. *Id.* (“New or additional maintenance burdens imposed upon the servient estate or intervening lands resulting from the utility servitude shall be the responsibility of the owner of the dominant estate.”).

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lands.¹³¹

Although the definition of “utility” in Article 696.1 only refers to the type of permitted services, the actual construction and implementation of the utility servitude under Article 691 implicitly provides “[t]he owner of the enclosed estate has the right to construct *accessories*, such as electricity transmission lines, water and sewerage pipes, telephone and television lines and cables, but not a *service network*.”¹³² Likewise, the amendment to Article 692 added both the word utility and substantive text. Article 692 now reads:

The owner of the enclosed estate may not demand the right of passage or the right-of-way for the utility anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road or utility at the location least injurious to the intervening lands.

The location of the utility right-of-way shall coincide with the location of the servitude of passage unless an alternate location providing access to the nearest utility is least injurious to the servient estate and intervening lands.

The court shall evaluate and determine that the location of the servitude of passage or utility shall not affect the safety of the operations or significantly interfere with the operations of the owner of the servient estate or intervening lands prior to the granting of the servitude of passage or utility.¹³³

Although the recent amendments to the articles regarding enclosed estates resolved many issues in this area of law that arose through faulty judicial interpretation, other issues persist, and the amendments present a novel issue of their own.

III. THE RECENT AMENDMENTS: AN EVALUATION

Given how recently the articles were amended, courts have not yet had the opportunity to interpret them. Most likely, the majority of the sound policy and precedent set by well-reasoned opinions will continue to be viable and instructive as the amendments correct mistakes and overrule cases that created

131. LA. CIV. CODE ANN. art. 691 (2013).

132. 4 YIANNOPOULOS, *supra* note 123.

133. LA. CIV. CODE ANN. art. 692.

them. However, it is also likely that some sound opinions will be overruled and problems allowed to persist because of flaws created or left untouched by the amendments. All of these topics will be addressed in this Section. Initially, sound policy and precedent that should continue to be respected will be analyzed, followed by a discussion of the value the amendments provide in resolving issues created through flawed judicial interpretations. Lastly, the amendments will be critiqued for the problems they potentially create and issues they fail to address.

A. HARMONY WITH SOUND POLICY AND PRECEDENT REGARDING ENCLOSED ESTATES AND THEIR RIGHT OF PASSAGE

Much of the well-reasoned judicial interpretations and applications of the pre-revision articles for enclosed estates will continue to have significant influence on future decisions. In serving the interests of society, it is the policy of Louisiana that land should not be taken out of commerce and denied utilization.¹³⁴ In *Rockholt v. Keaty*, the Supreme Court of Louisiana favored this public policy in spite of competing interests that opposed granting a right of passage because the landowner had received compensation in connection with his estate becoming enclosed.¹³⁵ The Court acknowledged the increased importance and need for the articles for enclosed estates, highlighting that “open country and estates then in existence [in Louisiana] have rapidly disappeared, and the problems of access to estates for full utilization of them have become more complex.”¹³⁶ With the passage of more than forty years since the *Rockholt* opinion, open land has only continued to rapidly disappear, creating more enclosed estates. Enclosed estates have been created because of projects serving other public interests, such as constructing a system of highways and interstates by expropriating land.¹³⁷ The societal interest in accessing estates in order to fully utilize and enjoy them should not be sacrificed for a countervailing interest in building highways to better connect people and places. Both must be served. As Louisiana’s landscape continues to change with time, public policy favoring granting passages to enclosed estates is

134. *See* *Rockholt v. Keaty*, 237 So. 2d 663, 668 (1970).

135. *Id.* at 667-68.

136. *Id.* at 667.

137. *See, e.g., id.*

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more important than ever and must continue to be recognized as such.

The classification of rights of passage for enclosed estates as a legal servitude preserves the public policy of liberally granting passages to enclosed estates. The Louisiana Second Circuit's *Dickerson* opinion articulated a holding that properly reflected characteristics of legal servitudes.¹³⁸ The opinion provided useful guidelines for discerning between the shortest and the least injurious route in choosing the location of the servitude.¹³⁹ It also held that the only compensation owed to the servient estate owner are those damages actually sustained,¹⁴⁰ which embodies the principle that legal servitudes impose limitations on ownership and are inherent burdens that run with the land regardless of the identity of the current owner.¹⁴¹ The ownership for these types of servient estates is automatically limited by the obligation to provide for these rights of passage; it is an obligation that is bound to the land and therefore never within the current owner's control. To grant the servient estate owner compensation for something more than actual damages, such as the market value of the portion of land used to exercise the servitude, would run contrary to the definition and essence of a legal servitude. Furthermore, allowing servient estate owners additional compensation would frustrate public policy. Dominant estate owners should not have to bear costs similar in amount to a conventional servitude (one that is contracted for) in order to access their estates for use and cultivation when they have become enclosed through no fault of their own. A notable potential consequence is that some enclosed estate owners may not be able to afford additional costs, causing these estates to remain enclosed. Public policy aims to promote access to these estates, not hinder it. The *Dickerson* court appropriately promoted public policy and conformed to the rules of legal servitudes in its opinion.¹⁴² Despite its positive attributes, the recent amendment to Article 689 may call the opinions continued influence into question.¹⁴³

138. *See generally* *Dickerson v. Coon*, 46,423 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135.

139. *See id.* at 1139.

140. *See id.* at 1141.

141. *See* LA. CIV. CODE ANN. arts. 646-654 (2013).

142. *See generally* *Dickerson*, 71 So. 3d 1135.

143. *See* Section IV *infra* for a discussion of how the recent amendment to Article

The logistics of Articles 693 and 694 are left virtually untouched by the recent amendments.¹⁴⁴ Article 693 was not changed while Article 694 merely received the additional word “utility.”¹⁴⁵ Adding the word utility to Article 694 will only provide for a gratuitous right of passage to those with no access to utilities. Because no changes were made to Article 693 and no passage for utilities was ever contested in a 694 context, the related precedent will remain applicable. This includes the debate regarding the correct interpretation of each article’s use of the word successors. Specifically for Article 693, the seemingly opposing understandings of the scope of a voluntary act or omission that would bar any right to demand passage will both continue to survive.

The Supreme Court of Louisiana’s decision in *Leblanc v. Thibodeaux* is the most appropriate and well-reasoned opinion on the scope of a voluntary act or omission because the state’s highest court adhered to public policy.¹⁴⁶ Because public policy favors granting access to enclosed estates, it warrants a narrow interpretation of any exception that would bar access. The *Leblanc* Court indicated that Article 693’s prohibition should only be applied in one situation: when a landowner has enclosed himself by voluntarily selling his land.¹⁴⁷ All other cases, such as enclosure due to partition, expropriation, or a sheriff’s partial seizure and sale, should not result in a complete ban for any passage, whether of the type contemplated in Article 689 or 694.¹⁴⁸

B. THE VALUE OF THE RECENT AMENDMENTS

The addition of the word utility and almost all of the corresponding substantive additions accurately reflect the principles of legal servitudes, uphold Louisiana’s public policy, and respect the state’s civil law tradition. Mostly, the recent amendments are extremely valuable and allow the law to adjust

689 may call the *Dickerson* opinion into question, specifically the *Dickerson* court’s treatment of indemnity owed.

144. Compare LA. CIV. CODE ANN. arts. 693, 694 (2011), with LA. CIV. CODE ANN. arts. 693, 694 (2013).

145. See *supra* note 144.

146. See generally *Leblanc v. Thibodeaux*, 615 So. 2d 295 (1993).

147. *Id.* at 299.

148. See *id.* *Contra* *Petrovich v. Trabeau*, 1998-2897 (La. App. 4 Cir. 3/7/01); 780 So. 2d 1258.

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to changed circumstances over time—progress that was temporarily halted by a faulty decision.¹⁴⁹ By affirmatively including access to utilities within the legal servitude for enclosed estates, land will be kept in commerce and cultivated due to the current exigencies for any meaningful use of an estate. This inclusion will duly overrule precedent that frustrated Louisiana’s public policy, which has never been more pertinent.

1. THE ADDITION OF THE WORD UTILITY

Adding the word utility to Articles 689, 691, 692, and 694 clearly establishes a legal servitude in favor of estates that have become enclosed due to lack of access to a public road, common utilities, or both. Presumably, the Louisiana legislature’s motive was to overrule the highly problematic *Perdue v. Cruse* opinion. In an effort to adhere strictly to the codal provisions, the Supreme Court of Louisiana ignored the public policy of this state and the French origins of law for legal servitudes established for enclosed estates.¹⁵⁰ The extremely narrow interpretation resulted in improper precedent and dangerous consequences for enclosed estates during this modern age of reliance on technology.

French law and Louisiana’s public policy regarding enclosed estates both aim to promote the cultivation and use of land and strongly disfavor parcels of land being removed from commerce.¹⁵¹ In today’s society, any meaningful use of an estate will require access to utilities. Without access to common modern necessities such as water, gas, and electricity, land would be effectively be taken out of commerce, notwithstanding a passage for physical access. The Louisiana legislature’s quick response in amending these articles to provide for a right of access to utilities will prevent these consequences from permeating beyond the

149. The faulty decision, *Perdue v. Cruse*, almost halted necessary progress, as it refused to allow access to common utilities reasonably necessary for any modern, productive use of land. See *Perdue v. Cruse*, 09-1446 (La. App. 3 Cir. 6/2/10); 38 So. 3d 1235.

150. See *id.* at 1240 (“We, therefore, must look to the Civil Code . . . [E]xamine the language to determine whether the right of passage allows for the installation of utilities . . . [T]he legislature’s employment of the words that imply means of physical transport, ‘road’ and ‘railroad,’ instructs us that the right of passage is for the physical transport of people, animals, and goods.”). Although Louisiana’s civil law tradition is primarily concerned with enacted law, the Civil Code, it also enjoys a long accepted tradition of relying on policy and French doctrine in analyzing articles, a tradition ignored in the *Perdue* decision. See Algero, *supra* note 3, at 777-78.

151. See *supra* Sections II(A), III(A).

fateful *Perdue*.

2. THE RIGHT OF PASSAGE FOR UTILITIES AND PROTECTION OF THE SERVIENT ESTATE

Servient estate owners faced with providing access to utilities for enclosed estates will not be overly burdened due to the amendments. Beyond the addition of the word utility, the amendments include substantive provisions in anticipation of possible issues. The servitude for utilities is not unlimited. The amendments providing for access to utilities were carefully crafted in order to protect both the servient and dominant estate owners' interests. The definition of allowable utilities in newly enacted Article 696.1 ensures that any right of access claimed will be reasonable as only those utilities required for the use of an "ordinary" house or business will be permitted.¹⁵² All constructions needed to maintain access to utilities must comply with applicable federal and state standards to reduce any possible dangers to the servient estate.¹⁵³ Furthermore, if any extra maintenance is needed for the upkeep of a newly created legal utility servitude, the cost and burden will be borne by the dominant estate owner.¹⁵⁴ Withholding any additional burdens for the servient estate owners properly complies with the right of passages' continued classification as a legal servitude, especially the requirement of servitudes that servient estate owners are not required to take any affirmative action.¹⁵⁵ The servient estate owner simply must allow the servitude to exist in the same manner that such ownership has always been limited.

Likewise, the specifications for the location of the servitude for utilities will not create new and excessive burdens on the servient estate. Any constructions needed to access utilities generally must be located within the right of passage already established.¹⁵⁶ Any deviation from the passage granting physical access will only be allowed in furtherance of the servient estate's best interests. The location of the servitude may be different from the right of passage if the alternate route is least injurious

152. LA. CIV. CODE ANN. art. 696.1 (2013).

153. LA. CIV. CODE ANN. art. 691.

154. LA. CIV. CODE ANN. art. 689.

155. LA. CIV. CODE ANN. art. 651 ("The owner of the servient estate is not required to do anything. His obligation is to abstain from doing something on his estate or to permit something to be done on it.").

156. LA. CIV. CODE ANN. art. 692.

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to the servient estate, which is a courtesy servient estate owners are not given when courts choose the location for the right of passage.¹⁵⁷ The location of the right of passage must be along the shortest route, and courts do not consider the least injurious route without the presence of weighty considerations.¹⁵⁸ Although the new provision concluding Article 692 requires courts to assure that both the utility servitude and right of passage's location do not significantly interfere with or risk the safety of the servient estate's operations, this appears to be more akin to "weighty considerations" and does not undermine the "least injurious" guideline.¹⁵⁹ Because of the concern shown for the servient estate and the difference of the language used in choosing the utility servitude's location, the servient estate owner will likely be permitted to choose the most desirable route whether or not a right of passage previously existed.¹⁶⁰

C. THE SHORTCOMINGS OF THE RECENT AMENDMENTS

Overall, the recent amendments to Articles 689, 690–692, 694, and the addition of Article 696.1 are in line with the nature of legal servitudes, the public policy of this state, and the original French tradition. However, problems with these articles still exist, and at least one new problem was arguably created by a substantive textual addition to Article 689. The problematic provision in Article 689—the "compensation provision"—was unnecessary and is not appropriate for this type of legal servitude. Besides this newly created issue, past issues with the treatment of the word "successors" in Articles 693 and 694 will continue to persist, because the 2012 amendments failed to address them.

1. THE COMPENSATION PROVISION IN ARTICLE 689

Before the recent amendments, Article 689 recognized an enclosed estate's legal right of passage in return for indemnity to

157. LA. CIV. CODE ANN. art. 692.

158. *See supra* note 58 and accompanying text.

159. *See* LA. CIV. CODE ANN. art. 692 (2013).

160. The location for a right of passage must be "taken along the shortest route from the enclosed estate to the public road or utility at the location least injurious" to the servient estate, whereas the right of way for the utility has an extra provision specifying the location to be the same as the right of passage "unless an alternate location providing access to the nearest utility is least injurious to the servient estate and intervening land." LA. CIV. CODE ANN. art. 692.

the servient estate owner for any damage that *may* have been created.¹⁶¹ The use of “may” includes situations in which the servient estate owner could receive no compensation where no damage had been created.¹⁶² After the amendments, an enclosed estate owner is now “bound to compensate his neighbor for the right of passage acquired and to indemnify” him for possible damages.¹⁶³ The plain language of the compensation provision indicates that regardless of the amount of damage caused, the enclosed estate owner will also have to compensate the servient estate owner with some other, additional amount.

This new compensation provision contradicts the nature of legal servitudes. An enclosed estate owner should not be required to pay a flat fee plus indemnity for damages to exercise a right he is given by law. This right is a legal servitude and legal servitudes impose limitations on ownership.¹⁶⁴ A servient estate owner should not be entitled to compensation for something never owned, for something over which there was no discretion to grant or deny. In an attempt to correct a decision that defied the nature of legal servitudes and the public policy of this state, the legislature simultaneously compounded the mistakes it was trying to correct.

The compensation provision also thwarts Louisiana’s public policy of cultivating and efficiently using land and favoring granting access to enclosed estates. How the compensation provision will be interpreted and applied is unknown, but possible unfortunate scenarios directly contrary to public policy could result. Potential buyers of enclosed estates, having yet to claim a right of passage, may refrain with the knowledge that they would have to incur the financial cost of paying for the price of the estate, a road, and a utility passage to access it. A prudent enclosed estate owner who may otherwise have been able to avoid causing damage, and thus payment, may not be able to afford the additional cost of upfront compensation. Both scenarios would keep an estate enclosed and out of commerce. Keeping an estate out of commerce is in direct opposition to the main motivating

161. LA. CIV. CODE ANN. art. 689 (2011); *see* *Dickerson v. Coon*, 46,423, p. 9 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135, 1141.

162. *See Dickerson*, 71 So. 2d at 1141; *see also* *Greenway v. Wailes*, 41,412, p. 11-12 (La. App. 2 Cir. 8/1/06); 936 So. 2d 296, 303.

163. LA. CIV. CODE ANN. art. 689 (2013).

164. LA. CIV. CODE ANN. art. 659.

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force behind Articles 689–696; indeed, passages are granted as legal servitudes to enclosed estates to prevent this very consequence.¹⁶⁵ As time goes on and land becomes an increasingly scarce resource, more estates become enclosed and new and developing uses of estates emerge, public policy favoring access to these estates and their development will only become more important.

Although Louisiana has repeatedly relied upon French law and doctrine in the development of its law relating to enclosed estates, the compensation provision departs from this tradition. French law, which is extremely favorable to enclosed estates, does not provide any payment to the servient estate owner other than indemnity.¹⁶⁶ Because Article 689 and the history of its development all derive from French influences,¹⁶⁷ significant departures such as this provision should be avoided. Changes to the law for enclosed estates, such as the addition of “utility,” usually happen in response to tension created by gaps in the law and follow French principles.¹⁶⁸ Not only did the addition of the compensation provision conflict with French principles, there was no tension or dispute regarding the nature or amount of compensation due in these situations.¹⁶⁹ This is an inappropriate change that will create rather than fix problems, while still others remain unaddressed.

2. PROBLEMS LEFT UNADDRESSED

The recent amendments did not address the debate concerning the treatment of successors in Articles 693’s denial and 694’s grant of right of passages in special circumstances discussed earlier. Article 693 includes reference to “successors” but fails to specify whether that general term includes universal,

165. See *Rockholt v. Keaty*, 237 So. 2d 663 (1970).

166. Article 682 in the French Civil Code is the corresponding article to the Louisiana Civil Code’s Article 689. It only requires the enclosed estate owner to pay a “compensation in proportion to the damage he may cause.” CODE CIVIL [C. CIV.] art. 682 (Fr.) (Georges Rouhette trans., 2006), available at http://sopheaksrey.files.wordpress.com/2012/05/french-civil-code_en_2006.pdf.

167. See *Rockholt*, 237 So. 2d at 666; Yiannopoulos, *supra* note 3, at 10.

168. For example, before the revisions in 1977, the language of Article 699 of the 1870 Code “indicated that an estate was not enclosed if it had access to ‘a railroad, tramroad or a water course.’” See Yiannopoulos, *supra* note 3, at 9. The 1977 revisions clarified that estates are enclosed when there is insufficient access, a standard that had been codified in the French Code Civil since 1881. See *id.* at 14.

169. See *supra* note 91.

particular, or both types of successors.¹⁷⁰ Additionally, the recent amendments did not add the word utility to Article 693.¹⁷¹ Although Article 694 does not use the word successor,¹⁷² whether particular successors of an owner who alienated an enclosed parcel of land while retaining access to a public road or utilities must provide a gratuitous right of passage to the enclosed estate owner is also, arguably, an unresolved issue.

A landowner who alienates the parcel of his land that provided him access to his estate cannot demand an Article 689 or 694 right of passage.¹⁷³ The prohibition provided for in Article 693 is understandable because rights of passage are inherent burdens on servient estates, and these burdens should not be allowed to be created through a landowner's voluntary acts. If a landowner is prevented from claiming a right of passage due to his voluntary act or omission, Article 693 prevents his successors from doing so as well.¹⁷⁴ If both types of successors are allowed to be included, these enclosed estates could potentially remain permanently enclosed, uncultivated, and removed from commerce. Imagine the scenario in which a landowner accidentally, yet through a voluntary act or omission, encloses his estate. Suppose further that the landowner's neighbors refuse to grant him a right of passage. The fate of the estate is to remain enclosed and kept out of commerce forever as the landowner cannot obtain access and would not be able to sell the land if particular successors were also prohibited from demanding a right of passage. It has already been suggested that Article 693's "successors" should only apply to universal heirs as they "occupy the same positions as their ancestor," allowing particular successors, who occupy their own, new position, to claim an Article 689 indemnified right of passage.¹⁷⁵

Whether particular successors of the previous landowner (the owner owing the gratuitous passage due to his voluntary alienation or partition) are also bound to furnish a gratuitous

170. See LA. CIV. CODE ANN. art. 693 (2013). A universal successor is a person's heirs. Yiannopoulos, *supra* note 3, at 26-27. A particular successor is a vendee or donee; a person to whom one transfers title. *Id.* at 27.

171. See LA. CIV. CODE ANN. art. 693.

172. See LA. CIV. CODE ANN. art. 694.

173. See LA. CIV. CODE ANN. art. 693.

174. *Id.*

175. Yiannopoulos, *supra* note 3, at 26-27.

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passage is debated.¹⁷⁶ The Louisiana First Circuit observed that changes in ownership of an estate do not affect servitudes on the estate; anyone purchasing an estate after a legal servitude has been established “takes such tract subject to the servitude already established.”¹⁷⁷ The Louisiana Third Circuit also supported granting a gratuitous right of passage despite the change in ownership from who originally owed the gratuitous passage.¹⁷⁸ Despite the agreement between the First and Third Circuits, the Supreme Court of Louisiana strongly disagreed.¹⁷⁹ The Court ruled that a particular successor need not furnish a gratuitous passage unless the public records reflect that he would be bound to do so.¹⁸⁰ This controversial decision has produced the majority of the debate on this subject. In a subsequent decision, the Third Circuit begrudgingly followed the Supreme Court’s rule, while making sure to voice its criticism.¹⁸¹

The Louisiana Supreme Court has been criticized as misunderstanding and misapplying both the public records doctrine and Article 694.¹⁸² Article 694 is a legal obligation meant to prevent Article 689 claims of passage, and particular successors should not be able to shift this obligation to their neighbors.¹⁸³ Although both Articles 693 and 694 are in need of attention, suggested changes are beyond the scope of this Comment.

IV. PROPOSED CHANGES CONCERNING THE COMPENSATION PROVISION

Because of the conflict created in Article 689 by the addition of the compensation provision and lingering issues over how Articles 693 and 694 apply to successors, the area of law for enclosed estates must continue to develop. However, the focus of

176. Yiannopoulos, *supra* note 3, at 33-35.

177. *Id.* at 33 (quoting *Brown v. Terry*, 103 So. 2d 541, 547 (La. Ct. App. 1st Cir. 1958)).

178. *See Patin v. Richard*, 291 So. 2d 879, 883-84 (La. Ct. App. 3d Cir. 1974) (referring to *Brown*, 103 So. 2d 451).

179. *See Dallas v. Farrington*, 490 So. 2d 265 (La. 1986).

180. *See id.* at 270-71.

181. *See Hardisty v. Young*, 98-607 (La. App. 3 Cir. 10/28/98); 720 So. 2d 811, 814 (“While *Dallas* has been criticized it is the latest expression of the Louisiana Supreme Court on the subject, and we are bound to follow it.” (citations omitted)).

182. *See Yiannopoulos, supra* note 3, at 34-35. The critic, A.N. Yiannopoulos, is a respected civil law scholar.

183. *Id.* at 35.

this Comment's proposal is limited to the compensation provision of Article 689.

Article 689 should be amended to clarify that the obligation of compensation only applies to the utility servitude and not to rights of passage. Because Louisiana predominantly relies upon its codal law¹⁸⁴ and a quick amendment, or an amendment at all, is unlikely, a more realistic proposal to cure the problems of the compensation provision is for specific interpretations and methods of application to be used and applied by courts to prevent outcomes contrary to the purpose of a legal servitude. Ideally, in the absence of an amendment, Louisiana courts should interpret the compensation provision as strictly applying to the utility servitude.

However, if the compensation provision is to be applied to rights of passage, at the very least, the provision should be interpreted as finally clarifying the different categories of damages available through the indemnity provision and through the compensation provision.¹⁸⁵ Both the compensation and the indemnity provisions would provide more specific categories of damages depending on the circumstances. The compensation provision should apply when evidence establishes that the servitude will decrease the value of the servient estate, or that the servitude causes some interference, dependent on proof of economic loss to the servient estate owner. This application could rectify situations in which the servient estate owner's preferred route, the location least injurious to him, is denied in favor of the shortest route, provided there is a showing of actual injury. The indemnity provision on the other hand would only allow for compensation for actual physical damage to the land. This includes damage that may occur over time¹⁸⁶ or through the initial building of the passage, its constructions, etc.¹⁸⁷

The view of separated damages could also be applied to the

184. See Algero, *supra* note 3, at 778.

185. Awards to servient estate owners have varied, arguably due to the large discretion afforded to the trial court. See *supra* notes 91–93.

186. Examples: While going across the passage in a car, valuable game belonging to the servient estate is hit and killed; a larger than usual trailer is towed across, exceeding the boundaries of the passage and killing plant life or destroying the land; any actual, physical damages causes while exercising the right of passage.

187. Examples: Compensation for the value of timber that must be removed to build a road, *e.g.*, *Dickerson v. Coon*, 46,423 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135; any damages to a river which a bridge must be built over.

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utility servitude. If the utility servitude and its constructions impair the value of the servient estate or cause an interference with resulting injury to the land, the compensation provision would apply. If any additional damages are sustained by the servient estate, then the landowner may bring a claim for indemnity.¹⁸⁸

While the preferred proposal is a strict application of the compensation provision only to the utility servitudes (through either a statutory amendment or judicial interpretation), all three suggestions achieve the same goal of disconnecting market value compensation from legal rights of passage. This disconnection is necessary because a plain reading of the new compensation provision can easily be construed as requiring an enclosed estate owner to pay the servient estate owner for the market value of the land, the servitudes, or both.¹⁸⁹ Equally plausible would be a reading that this market value compensation is only required for a servitude of passage and not the newly recognized utility servitude, as the enclosed estate owner is only bound to compensate for “the right of passage acquired.”¹⁹⁰ Applying that reading to servitudes of passage is inappropriate and, if adopted, would contradict the rules and nature of the articles regarding enclosed estates. Furthermore, the Supreme Court of the United States would disapprove of a strict application to only servitudes of passages, as the provision seems to require.¹⁹¹ The preferred proposals both comport with Louisiana’s governing legal principles and satisfy precedent set by the Supreme Court of the United States.¹⁹²

**A. PROVIDING MARKET VALUE COMPENSATION FOR
RIGHTS OF PASSAGE IS INCONSISTENT WITH
LOUISIANA’S GOVERNING LEGAL PRINCIPLES, PUBLIC
POLICY, AND CIVIL LAW TRADITION**

The compensation provision added to Article 689 produces confusion as to its purpose and method of application because of its improper wording and placement. No compensation for a right

188. Examples: A waterline bursts, flooding the servient estate owner’s crops; valuable game is harmed by a downed electrical line; faulty wires cause a fire on the servient estate, etc.

189. *See supra* Section III(C)(1); *infra* Section IV(A).

190. LA. CIV. CODE ANN. art. 689 (2013).

191. *See infra* Section IV(B)(1).

192. *See infra* Section IV(B).

of passage should exist other than for indemnity, as was previously the case. Including this provision was not necessary, nor was it helpful. Providing only indemnity for damages to the servient estate for a passage was generally uncontroversial and rarely contested.¹⁹³ Consequently, including this provision will cause future disputes that will be difficult to solve because the provision does not comport with traditional principles governing enclosed estates.

As discussed earlier, the principles of legal servitudes, the state's public policy, and the French legal tradition do not support providing compensation in return for a passage given to an enclosed estate. Requiring compensation other than actual damages for a servitude of passage would negate the inherent burden and limitation of ownership characteristics of legal servitudes. This requirement would render the classification as a legal servitude, and subsequent guidelines for interpretation and application, void. Furthermore, this requirement will impede access to enclosed estates and frustrate Louisiana's public policy favoring granting access for the important social interest of keeping land in commerce. Public policy has always played a leading role in the jurisprudence governing enclosed estates, but such policy will now be frustrated in cases demanding market value compensation for rights of passage. Reliance on French sources, as has repeatedly been done in the past, will also no longer be possible; the French continue to favor enclosed estates and only require indemnity for damages in return.¹⁹⁴ Because of these conflicts created by its language,¹⁹⁵ the compensation provision needs to be amended or interpreted appropriately.

Perhaps the Louisiana legislature was concerned that granting these servitudes of passage were negatively affecting the servient estate; however, the indemnity provision adequately provided for that. In the rare event that the servient estate decreased in value from the burden of providing passage, the indemnity provision would afford compensation in the form of actual damages.¹⁹⁶ In fact, however, the development of passages

193. See *supra* Section II(B)(4).

194. See CODE CIVIL [C. CIV.] art. 682 (Fr.) (Georges Rouhette trans., 2006), available at http://sopheaksrey.files.wordpress.com/2012/05/french-civil-code_en_2006.pdf; see also Yiannopoulos, *supra* note 3.

195. The article binds the landowner to compensate only for a "right of *passage*." LA. CIV. CODE ANN. art. 689 (2013) (emphasis added).

196. See *Bailey v. McNeely*, 05-629, p. 10 (La. App. 3 Cir. 12/30/05); 918 So. 2d

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on servient estates may often benefit both the servient and enclosed estates,¹⁹⁷ emphasizing the provision's unsuitability and need for repeal or amendment. Likewise, if the legislature aimed to provide more relief to the servient estate owner, then the article could have been amended in the image of French law by including an extended liberative prescription period of thirty years, instead of the current ten.¹⁹⁸ This would benefit servient estate owners by extending the period of time in which the servient estate owner could instigate an action to recover damages from the dominant estate owner.

Regardless of whether handling the compensation provision as it concerns the right of passage is better approached through amendment or careful interpretation, both will undoubtedly be subject to criticism. The following Subsections address potential criticisms of refusing to apply the compensation provision to rights of passage.

1. CLASSIFICATION AS BOTH A LEGAL SERVITUDE AND A CONVENTIONAL SERVITUDE DOES NOT WARRANT MARKET VALUE COMPENSATION

Some might take the view that the right to demand a passage for an enclosed estate is a legal servitude while the actual physical passageway is a conventional servitude.¹⁹⁹ As Professor A.N. Yiannopoulos²⁰⁰ concludes, although the claim for a right of passage is imprescriptible, the physical passage that has been fixed by the court could be lost after ten years without use.²⁰¹ Based on this view, critics might argue that because the actual setting of a location of the servitude constitutes a conventional servitude, providing compensation for the market value of the land or servitude is proper. Considering this possible distinction between classifications still does not justify

1124, 1130-31.

197. For example, although Coon complained about providing a right of passage, ultimately, it will benefit his estate by providing passage to any future constructions at that site, which is unaffected by the given servitude. *See Dickerson v. Coon*, 46,423, p. 6-8, 11-12 (La. App. 2 Cir. 8/10/11); 71 So. 3d 1135, 1140, 1142.

198. Yiannopoulos, *supra* note 3, at 24.

199. *See id.* at 5 ("The burden of the forced passage is the legal servitude, and the fixing of the passageway creates a conventional servitude of right of way.").

200. Professor A.N. Yiannopoulos is a prominent civil law scholar with a highly regarded specialty in civil law property; his work has been cited often throughout this Comment.

201. Yiannopoulos, *supra* note 3, at 19.

compensation for a right of passage.

Acceptance of this argument blurs the distinctions between legal and conventional servitudes; both can establish servitudes of passage yet with very different principles governing each. Specifically, legal servitudes limit ownership of servient estates and recognize servitudes as inherent burdens pre-existing on the land.²⁰² Conventional servitudes are bargained for because the servient estate owner has no duty to bear the burden.²⁰³ The rights of passage for enclosed estates are contained in the Louisiana Civil Code within the chapter of legal servitudes and thus governed by the rules and policies of legal servitudes.²⁰⁴ Should the physical passage actually be lost after a period of ten years of non-use, because of the legal, rather than conventional, nature of these servitudes, the dominant estate owner could simply reclaim this right, as the claim is imprescriptible. Whether or not the precise location of the servitude can be considered conventional does not destroy the original classification as a legal servitude.

2. COMMON LAW INFLUENCE IS NOT A VALID EXPLANATION

Critics of this proposal may also suggest that the Louisiana legislature was influenced by the common law's corollary to rights of passage, easements by necessity. Generally, within the common law, owners of enclosed estates are extremely limited in receiving access across neighboring land in comparison to Louisiana; "[o]nly if the cause of the landlocking can be traced back to a particular conveyance does the common law provide a solution."²⁰⁵ In other words, unless the two properties had a common owner who enclosed the estate through partition or conveyance of part of the property, access will not be granted.²⁰⁶ If this situation does not exist, then the enclosed estate owner's only option is to obtain consent from the neighbor to pass across the neighbor's estate, and in that scenario, the neighbor could charge any price, similar to a conventional servitude.²⁰⁷ While this influence would explain and possibly even validate the

202. See LA. CIV. CODE ANN. art. 659 (2013).

203. See *infra* Section(I).

204. See *generally* LA. CIV. CODE ANN. bk. II, tit. IV, ch. 3, § 3 (2013).

205. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.15 cmt. a (2000).

206. Yiannopoulos, *supra* note 3, at 8.

207. *Id.*

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presence of the compensation provision, it is unlikely.

Although Louisiana has occasionally borrowed common law concepts, common law property concepts, particularly in this area, have actually experienced a trend bringing them more in line with those of the civil law tradition. “Many common-law writers have termed the civil-law right to a forced passage ‘the better solution’ and have expressed dissatisfaction with the inability of common-law courts to compel . . . the ‘easement as is provided in the civil law codes.’”²⁰⁸ Presently, this civilian trend in property is evidenced by the *Restatement (Third) of Property*, which now refers to easements as “servitudes” and suggests the adoption of civil law principles.²⁰⁹ Regardless, Louisiana law has always differed from the common law, especially concerning property. Historically, Louisiana courts and the state legislature refer to French law as the source for changes in property, not common law principles; accordingly, justifying the application of the compensation provision to rights of passage as an effort to resemble the strict and more stringent approach of the common law is doubtful.

**B. THE COMPENSATION PROVISION IS ONLY
COMPATIBLE WITH THE UTILITY SERVITUDE**

Generally, two reasons support the proposal that the compensation provision should be exclusively applied to utility servitudes, whether that is accomplished through amendment or interpretation. First, because all of the other amendments focused on the utility servitude and its scope, a logical conclusion is that the compensation provision is meant to accompany those inclusions, and thus should only apply to utilities, despite the ostensibly broader language. Second, to access utilities, certain constructions will be necessary, such as water pipes, electricity poles, cable lines, etc. All of these accessories would permanently occupy the servient estate, effectively removing the land from the owner’s possession and use. This result justifies market value compensation, unlike a servitude of passage which only incurs occasional possession by the enclosed estate owner as he passes through the servient estate. Additionally, unlike a utility servitude and its corresponding accessories, a servitude of passage would not prevent the servient estate owner’s use and

208. Yiannopoulos, *supra* note 3, at 8-9.

209. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000).

possession of the portion of land where the servitude is physically placed.

This proposal would not offend the Louisiana Civil Code or the common law. In actuality, the Supreme Court of the United States mandates some variation of this interpretation, which could have been the motivation for the addition of the compensation provision. First, this Comment will explain how the proposal for the exclusivity of the utility servitude to the compensation provisions complies with precedent of the Supreme Court of the United States. Then, this Comment will support its proposal with Louisiana law, specifically a comparison to the similar legal servitude for encroaching buildings.

1. PERMANENT ACCESSORIES ON ANOTHER'S PROPERTY, USED TO ACCESS UTILITIES DEPSITE BENEFITS TO THE PUBLIC, IS DEFINED BY THE SUPREME COURT OF THE UNITED STATES AS A COMPENSABLE TAKING

Since the late 1800s, when technology of modern utilities first began to emerge, the Supreme Court of the United States distinguished between taking land for use of passage versus taking land for technological accessories.²¹⁰ The Court stated that a person or a car's "use and occupation thereof are temporary and shifting But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive."²¹¹ The Supreme Court of the United States continually mandates compensation for a permanent, physical occupation of another's land.²¹² A utility servitude will create a physical occupation of the servient estate. Creating a utility servitude without compensation provisions would be unconstitutional under United States Supreme Court precedent set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, among others; the utility servitude may very well have been declared invalid if the compensation provision had not also been provided.²¹³

210. See *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92 (1893).

211. *Id.* at 98-99.

212. See, e.g., *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. Lynah*, 188 U.S. 445 (1903).

213. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

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In *Loretto*, a New York state statute authorized cable companies to install equipment (very small receivers on top of large skyscrapers) without the owners' consent or interference, under the auspices of serving the public interest in developing rapid communication.²¹⁴ The cable companies were to bear the cost of the installation and indemnify the owners for any damages caused—the sole compensation received.²¹⁵ Despite the different contexts, the effects of the statute were very similar to the effects of the pre-2012 amendment to Louisiana Civil Code Article 689. The Supreme Court of the United States held the action the statute authorized represented an unconstitutional “taking” that demanded adequate compensation to the owners, despite the public interest being pursued through valid police powers of the state.²¹⁶ Throughout the opinion, the Court repeatedly focused on the issue of physical occupation, which has been a consistent focus in cases addressing similar issues.²¹⁷

If compensation for a utility servitude is indeed mandated by the United States Constitution, Louisiana's legislature or its courts may still lawfully grant servitudes of passage with only indemnity for damages available. The Court has been careful in the articulation of its holdings not to require compensation for every instance where land may be burdened for another's use and has consistently confirmed the power of the state to place limitations on ownership.²¹⁸ The Court has defined a “taking” which is not constitutional without providing compensation: “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²¹⁹ Distinguishing between physical occupations and regulations that “merely restricted the use of private property” is highly important for determining whether a

214. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423-25 (1982).

215. *Id.* at 423.

216. *Id.* at 426.

217. *See Loretto*, 458 U.S. 419.

218. *See id.* (“Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. . . . We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property.”).

219. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citations omitted).

taking has occurred and thus, compensation is due.²²⁰

Rights of passage are merely regulations imposed by the Louisiana Civil Code that restrict the use of the servient estate owner's private property—occasional passage must be allowed over some portion of the property. Passing across another's land is at best a temporary invasion and occupation. Louisiana may act within its police power to pursue the public interest of keeping land in commerce by imposing these servitudes without market value compensation, as these do not constitute an unconstitutional taking. In contrast, utility servitudes and their corresponding accessories would physically occupy a part of the servient estate owner's land and thus constitutes a taking—which entitles them to compensation, similar to the legal servitude of an encroaching building.

2. UTILITY SERVITUDES ARE SIMILAR TO LEGAL SERVITUDES OF ENCROACHING BUILDINGS

Unlike the legal servitude for rights of passage, the utility servitude is similar in effect to the legal servitude of encroaching buildings, which has a similar compensation provision plus the obligation of indemnity for damages.²²¹ The constructions needed to exercise the utility servitude, like a building that encroaches upon neighboring property, permanently and physically occupy the land. A right of passage for access involves the occasional possession that ends after the enclosed estate owner passes through the estate. The effects produced by servitudes of passage

220. *Loretto*, 458 U.S. at 427-28; *see also* *United States v. Causby*, 328 U.S. 256 (1946) (holding overflights of aircrafts above the plaintiff's property constituted a taking because the overflights interfered with the plaintiff's sleep and the normal use of the property as a farm); *United States v. Cress*, 243 U.S. 316 (1917) (finding a taking of property after the government's improvements on a navigable waterway flooded the landowner's property); *United States v. Lynah*, 188 U.S. 445 (1903) (finding a taking occurred because the government's constructions rendered the plaintiff's property "deprived of all value"); *N. Transp. Co. v. Chicago*, 99 U.S. 635 (1878) (holding the city's construction of a temporary dam which prevented the plaintiff's from accessing their properties was not a taking); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871) (holding defendant's construction of a dam which permanently flooded the plaintiff's property constituted an unconstitutional taking). In 2012, the Court affirmed the bright line rule "that a permanent physical occupation of property authorized by government is a taking," while temporary physical invasions do not necessarily require compensation. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (citing *Loretto*, 458 U.S. at 426 (1982)); *see also id.* at 522 (citing *Loretto*, 458 U.S. at 435).

221. *See supra* Section II(B)(4).

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and encroaching buildings are incongruent, yet due to the 2012 amendments affecting the articles for enclosed estates, Articles 689 and 670 have compensation provisions that closely resemble one another.²²²

Before the utility servitude was recognized by the Civil Code, Article 689 only included an indemnity provision, and Article 670, concerning the legal servitude for encroaching buildings, had compensation provisions for both the servitude and indemnity for damages.²²³ Because the amendment of Article 689 officially recognizing legal utility servitudes would produce essentially indistinguishable effects on the servient estate, the simultaneous addition of the compensation provision should be read as pertaining to the utility servitude alone.

3. ANY CONSTRUCTIONS NEEDED TO EXERCISE RIGHTS OF PASSAGE WILL NOT BE ANALOGOUS TO UTILITY ACCESSORIES

Although true that a right of passage might require the construction of a road or possibly a bridge over difficult terrain, an argument that this constitutes a permanent occupation, and thus a taking entitled to compensation, is without merit. Rights of passage may occasionally entail some sort of construction; however, any necessary construction would not rise to level of intrusion contemplated by the Supreme Court of the United States or seen with encroaching buildings. The types of constructions needed for utility and encroaching building servitudes will foreclose any possibility of the servient estate owner to use that area of his land; these constructions permanently prohibit any type of possession other than their presence, unlike constructions needed to facilitate passage. With the construction of a road or even a bridge, the servient estate owner would still be able to use and occupy this area of land. The owner may also physically possess and use the area for passage which would be blocked from this possibility by the permanent presence of utility construction or of an encroaching building.

222. LA. CIV. CODE ANN. art. 670 (2013) (“[P]ayment of compensation for the value of the servitude taken and for any other damage that the neighbor has suffered.”); LA. CIV. CODE ANN. art. 689 (“[C]ompensate his neighbor for the right of passage acquired and to indemnify his neighbor for the damage he may occasion.”).

223. Compare LA. CIV. CODE ANN. art. 689 (2011), with LA. CIV. CODE ANN. art. 670 (2013).

V. CONCLUSION

Land is a vital resource, one which is quickly disappearing in Louisiana. Regardless of whether the depletion is due to population increase, expropriation, or coastal erosion, the economic ability of enclosed estate owners should not be added to that list. Requiring market value compensation for a right of passage, a passage to which an enclosed estate owner is legally entitled, not only has the potential to keep estates enclosed but contradicts legal principles and policy inherent in Louisiana's legal system. Providing indemnity for damages to the servient estate is all that is needed in order to protect ownership interests; any adverse effect directly caused by a servitude of passage can be rectified through indemnity. A per se rule of market value compensation is inappropriate as the servient estate owner does not lose this portion of land nor the possibility of its possession. The utility servitude however, would produce these results and seriously impinge on ownership interests. While the official recognition of the utility servitude is an extremely beneficial stride in the law for enclosed estates, the placement of the phrase "for rights of passage" within the newly added compensation provision is a simultaneous setback, a setback that must be rectified to keep land in commerce and respect the legal tradition of this state.

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