Louisiana Law Review

Volume 83
Number 3 *Spring 2023*

Article 6

4-28-2023

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Isabel Englehart, *The Levee Disservitude: How and Why Louisiana Should Stop Undermining One of Its Most Essential Powers*, 83 La. L. Rev. (2023)
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The Levee Disservitude: How and Why Louisiana Should Stop Undermining One of Its Most Essential Powers

Isabel Englehart[*]

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INTRODUCTION

Natural disasters are increasing in frequency and severity.[1] Louisiana is sinking, and its coast is disappearing beneath rising waters.[2] If Hurricanes Katrina and Ida bore any lessons, it is that the strength of a storm does not determine its impact—the strength of infrastructure does.[3] The importance of an adequate flood protection system has perhaps never been as vital as it is today. Yet, the fact is that there are not sufficient funds or time to complete all of the projects that need building.[4] And thus, the impossible question becomes: what communities will be protected? The answer hinges on several other questions, including: Where can the State build? For what purpose? How much will it cost? How long will it take?

Fortunately, Louisiana has a unique tool at its disposal to combat the unparalleled natural risks confronting the state and its residents; unfortunately, Louisiana is completely misusing it. Louisiana's power to appropriate lands for levee construction under the levee servitudes of Civil Code article 665 has been instrumental in the historical development of the state and will be critical in this new era of natural challenges.[5] The

1. J.K. Summers et al., *Observed Changes in the Frequency, Intensity, and Spatial Patterns of Nine Natural Hazards in the United States from 2000 to 2019*, 14 SUSTAINABILITY 4158, 4159 (2022).

2. Mike Blum et al., *Land loss in the Mississippi River Delta: Role of subsidence, global sea-level rise, and coupled atmospheric and oceanographic processes*, 222 GLOB. & PLANETARY CHANGE 1, 12 (2023).

3. Eric Levenson, *How Hurricane Ida Compares to Hurricane Katrina*, CNN (Aug. 30, 2021, 3:37 PM), https://www.cnn.com/2021/08/30/us/hurricane-ida-katrina-new-orleans/index.html [https://perma.cc/K34G-EKRL].

4. MARK S. DAVIS & N. DEAN BOYER, FINANCING THE FUTURE III: FINANCING OPTIONS FOR COASTAL PROTECTION AND RESTORATION IN LOUISIANA (2017) (an issue paper of the Tulane Institute on Water Resources Law and Policy).

5. The author uses *levee servitudes* to generally refer to both the traditional riparian servitude of Louisiana Civil Code article 665, which allows for levee construction on riparian lands, as well as the hurricane-protection servitude added

riparian servitude in particular has a long, storied history[6] and has garnered the attention of many legal scholars over the years.[7] In 1966, Richard P. Wolfe published an article in the Tulane Law Review, stating with conviction:

> There is simply no such legal concept as a general power of appropriation unrelated to riparian lands.[8] If there were, the legislature or the electorate could certainly lower the cost of new highways and other public improvements simply by decreeing that all lands necessary for these projects shall henceforth be "appropriated" at their assessed value.[9]

Yet, since this statement was made, Louisiana has both expanded the reach and increased the cost of appropriations for levees.[10] How is such an evolution in the best interest of public policy? Changes in the conception and application of appropriations over the years have rested not on legal developments, but efforts to protect property owners from an invented injustice that is still often alleged in courts today.[11] But the Louisiana Constitution has always guaranteed all the same protections to private property owners as those that exist throughout the rest of the United

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by constitutional amendment in 2006. *See* LA. CIV. CODE art. 665 (2023); LA. CONST. art. I, § 4(E); *id.* art. VI, § 42.

6. For illustration, consider all the drama and intrigue of the batture cases of the early ninetieth century. RICHARD CAMPANELLA, TIME AND PLACE IN NEW ORLEANS: PAST GEOGRAPHIES IN THE PRESENT DAY 62–64 (2002).

7. *See, e.g.*, Anais M. Jaccard, *South Lafourche Levee District v. Jarreau: Reconsidering Gratuitous Compensation Under Louisiana's Riparian Servitude*, 92 TUL. L. REV. 931 (2018); John C. Christian, *Servitudes – Nature and Limits of the Servitude of Roads Along Navigable Rivers – Article 665, Louisiana Civil Code of 1870*, 29 TUL. L. REV. 799 (1955); *Levees and Battures in the Law of Louisiana*, 21 TUL. L. REV. 649, 651 (1947).

8. This Article will challenge this assertion. See Part V.B for a discussion on how appropriations can extend beyond the boundaries of the riparian servitude.

9. Richard P. Wolfe, *Appropriation of Property for Levees: A Louisiana Study in Taking without Just Compensation*, 40 TUL. L. REV. 233, 283 (1966).

10. *See* LA. CIV. CODE art. 665 (2023) (expanding the civil code servitude that forms the basis for appropriation beyond riparian lands to "property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees"); LA. REV. STAT. § 38:301 (2023) (requiring payment upon appropriations in the amount of "fair market value to the full extent of the loss").

11. *See* discussion *infra* Parts I.B & II.

States.[12] The narrative that appropriations under Louisiana's levee servitudes are exceptions to constitutional protections against government acquisitions misconstrues the power and threatens the integral purpose of the mechanism that is as important today—if not more so—as it was at its inception.[13]

Evolutions in the application of appropriations under the riparian servitude have conflated the power with expropriations to the detriment of landowners and the State. The result is a prolonged and costly process for constructing and repairing integral flood and hurricane protection. The State should capitalize on the full benefits of its power of appropriation, or at the very least, the State must understand and clarify its powers so that critical projects are not delayed by procedural inefficiencies.

I. OVERVIEW OF LOUISIANA'S LEVEE SERVITUDES

A. Black Letter Law

In Louisiana, legally riparian lands are burdened with a predial servitude under article 665 of the Civil Code for the construction and maintenance of levees, roads, and other public or common works.[14] Predial servitudes are either affirmative, wherein the dominant estate possesses the right to do a certain thing on the servient estate, or negative, wherein the servient estate has a duty to abstain from doing something on his or her estate.[15] The modern conception of the levee servitudes resembles an affirmative servitude, with the government as the dominant estate allowed to enter the servient estate to build a levee. However, the levee servitudes are actually negative predial servitudes. This is evident first from the text of article 665 which states, "Servitudes imposed for the public or common utility relate to the space *which is to be left* for the public use by the

12. LA. CONST. art. I, § 4.

13. *See* Dickson v. Bd. of Comm'rs of Caddo Levee Dist., 26 So. 2d 474, 479 (La. 1946):

> Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal Constitutions that no one can be deprived of his inalienable rights of property without due process of law, it has been consistently held by this court and by the Supreme Court of the United States that such constitutional requirements relate to the right of expropriation and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for construction of levees, roads, and other such public works have always been reserved.

14. LA. CIV. CODE art. 665 (2023).

15. *Id.* art. 706.

adjacent proprietors . . . ."[16] Furthermore, construction of levees under the riparian servitude was originally a landowner's duty.[17] The Louisiana Civil Code does not allow for a predial servitude that permits a dominant estate to require that a servient estate do something on his or her estate.[18] Therefore, beyond the plain text of article 665, one can deduce that the riparian servitude[19] must be negative, simply requiring landowners to leave space for public use, and that the government's authority to order construction or enter property to perform construction itself is derived from a power wholly distinct from the existence of the levee servitudes: namely, the power of appropriation.

Appropriation refers to the State's exercise of the levee servitudes.[20] Where the construction of levees, roads, and other public or common works is necessary but the servitudes do not apply (i.e., historically, all non-riparian lands), the State must instead acquire property through expropriation before it can enter or develop the land. Expropriations, on the one hand, are an exercise of the State's eminent domain power and are thus subject to specific limitations contained in the Fifth Amendment of the U.S. Constitution and applicable to the states via the Fourteenth Amendment.[21] Appropriations, on the other hand, are an exercise of the State's police power and therefore are not subject to the laws governing eminent domain like expropriations.[22]

While expropriations may occur anywhere so long as the purpose and process requirements are satisfied, appropriations only apply to land burdened with servitudes—in other words, riparian lands (for the riparian servitude) and alignments approved by the U.S. Army Corps of Engineers (for the hurricane-protection servitude).[23] "Riparian lands" burdened by the riparian servitude only include lands that were part of tracts which

16. *Id.* art. 665 (emphasis added).

17. *See* discussion *infra* Part II.B.2.

18. LA. CIV. CODE art. 706 (2023).

19. And by extension, likely the hurricane-protection servitude. Although, as is discussed *infra* Part IV.B, one generally should not assume that both servitudes carry all the same attributes.

20. David A. Peterson, Deputy General Counsel: Coastal Protection and Restoration Authority, Association of Levee Boards of Louisiana 74th Annual Meeting: Appropriation of Levee Servitudes in Louisiana, at 7 (Dec. 3, 2014) ("The act of appropriation is simply notice to the riparian landowner that the state, through the levee district, intends to exercise its right to use the levee servitude, a property right the public, i.e. the State of Louisiana, already owns in perpetuity.").

21. Joseph G. Hebert, *Expropriation—A Survey of Louisiana Law*, 18 LA. L. REV. 509, 510 (1958).

22. Peart v. Meeker, 12 So. 490 (La. 1893).

23. LA. CIV. CODE art. 665 (2023).

fronted navigable rivers at the time the property was severed from the public domain.[24] For purposes of the riparian servitude, it is inconsequential whether the land is riparian-in-fact at the time of the appropriation. In other words, lands that were once riparian but are no longer are nonetheless burdened, and lands that have become riparian since the time of severance from the sovereign are not burdened.[25]

Appropriations also differ from expropriations because they are not subject to the same procedural requirements necessary to initiate eminent domain proceedings.[26] With the exception of *quick takings*,[27] expropriations require that the State complete several actions prior to any acquisition or construction including appraising the property, establishing just compensation, providing payment, and transferring title of the property.[28] Conversely, appropriations simply require the adoption of a formal levee board resolution.[29] Notice of the appropriation is delivered to the landowner, and while the landowner may challenge the basis or terms of the appropriation, the state agency may nonetheless move forward with the planned construction.[30]

The effect of appropriations under the levee servitudes differs from that of expropriations primarily in that appropriations do not transfer title of the property to the State.[31] The State is merely permitted to use the land to construct and subsequently maintain the levee.[32] Furthermore, the public may be permitted to utilize the levee for recreational purposes, although the private landowner is immune from liability for personal injury, property damage, or other loss that occurs in the course of these

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24. DeSambourg v. Bd. of Comm'rs for Grand Prairie Levee Dist., 621 So. 2d 602, 607 (La. 1993) (The riparian servitude "applies to those lands that were riparian when separated from the public domain, and when the levee is necessary for the control of flood waters from the river to which the land taken is riparian.").

25. A.N. YIANNOPOULOS & RONALD J. SCALISE, JR., PROPERTY, *in* 2 LOUISIANA CIVIL LAW TREATISE § 5:8 (5th ed. 2022).

26. Peterson, *supra* note 20, at 3, 6–7.

27. *See* LA. REV. STAT. § 38:354 (2023).

28. Peterson, *supra* note 20, at 7.

29. *Id.* at 3. Notably, even if the project will be constructed by the federal government (e.g., the U.S. Army Corps of Engineers), levee boards are responsible for all appropriations. This is reflective of the fact that the federal government does not possess police power.

30. *Id.* at 7.

31. Richardson & Bass v. Bd. of Levee Comm'rs of Orleans Levee Dist., 77 So. 2d 32, 36 (La. 1954) ("[A]ppropriation of such land by a Levee Board for levee purposes neither conveys a title to the Board nor does the payment of the assessed value to the owner operate as a transfer of title.").

32. Peterson, *supra* note 20, at 2.

activities.[33] Despite these restrictions on ownership, the landowner retains title for purposes of, for example, mineral servitudes and future accretion of land along the riverbank.[34] Further, when the State expropriates property, it may acquire land in excess of what is actually necessary for the public purpose—*surplus property*.[35] The law does not mention appropriations of surplus land because it is not possible by nature of the power. In contrast to expropriations, which, because they require a transfer of title prior to government action, can result in an overestimation of necessary land and consequently the expropriation of excess property, appropriations are in essence simply the use of land which has been set aside for a specific public purpose. Therefore, it is logically impossible to appropriate excess land which is not used.

Finally, appropriations and expropriations have historically differed in the compensation required for the action. Today, the compensation frameworks are largely the same, with an exception that appropriations of batture may occur free of payment.[36] This Article will examine the way that appropriations under the levee servitudes have changed over the years, despite the consistency of—and often contrary to—the black letter law of appropriations.

B. History

1. Origins

With the Louisiana Civil Code's origins in Justinian law,[37] it may come as no surprise that the riparian servitude is in some ways older than the state of Louisiana. The state's riparian servitude has roots in both

33. LA. REV. STAT. § 38:301(E)(1) (2023).

34. *Id.* § 31:21; LA. CIV. CODE art. 499 (2023).

35. LA. CONST. art. I, § IV(H)(2).

36. The Louisiana Constitution maintains an exemption from appropriation compensation requirements for land classified as *batture*. *Id.* art. VI, § 42. Neither the state Constitution nor statutes define *batture*, but the prevailing judicial definition is "alluvial accretions annually covered by 'ordinary high water . . . .'" DeSambourg v. Bd. of Comm'rs for Grand Prairie Levee Dist., 621 So. 2d 602, 604 (1993). This Article will discuss the compensation of expropriations and especially appropriations, with little attention paid to the batture exemption because it is distinct under Louisiana law. There are several existing sources that better cover the legal aspects of appropriations of batture and capture its fascinating cultural dimensions. *See, e.g.*, John A. Lovett, *Batture, Ordinary High Water, and the Louisiana Levee Servitude*, 69 TUL. L. REV. 561 (1994).

37. Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 281 (1995)

French and Spanish law and was therefore applied in Louisiana in some fashion or another prior to statehood.[38] It may actually be more surprising that the "ancient"[39] servitude is not in *all ways* older than the state—the first codified form following the Louisiana Purchase was distinct from both its predecessors.[40] Its differences can perhaps be attributed to Louisiana's unique ecological demands, which are vastly different from those of its legal ancestors.[41] In France, the public servitude along riverbanks was primarily for footpath and road construction.[42] In contrast, when Louisiana first established its own Civil Code in 1808, it specifically enumerated levees as a public use for which the space adjacent to navigable rivers bore a servitude.[43] This reflects the imperative of the Code's drafters, to use this tool to respond to Louisiana's particular ecological challenges, namely flooding.

2. Early Days

In the earliest days of statehood, the construction and maintenance of levees in Louisiana on servitude-burdened lands were the responsibility of the riparian landowner, not the government.[44] Failure to adequately carry out this duty could result in heavy consequences imposed upon landowners from both the government and neighboring landowners whose property was impacted by such failure.[45] Further, at the time, construction

38. Wolfe, *supra* note 9, at 246–48.

39. This terminology is used throughout Louisiana jurisprudence. *See, e.g.*, W. Baton Rouge Par. Council v. Tullier, 317 So. 3d 782, 792 (La. Ct. App. 1st Cir. 2021); Deltic Farm and Timber Co. v. Bd. of Comm'rs for Fifth La. Levee Dist., 368 So. 2d 1109, 1111–12 (La. Ct. App. 2d Cir. 1979); Mayer v. Bd. of Comm'rs for Caddo Levee Dist., 150 So. 295, 296 (La. 1933). *Ancient* can be a subjective term, and it is true that the servitude has existed as long as Louisiana's statehood; however, this phrase should not be interpreted to suggest the oft-held misconception that the riparian servitude is directly derived from Louisiana's sovereign ancestors.

40. Wolfe, *supra* note 9, at 246–48.

41. *See* Zenor v. Par. of Concordia, 7 La. Ann. 150, 150 (La. 1852) (citing LA. CIV. CODE art. 661) ("In this State, so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi river, to the use of the space of ground necessary for the making and repairing of the public levees and roads.").

42. Code Civil [C. civ.] [Civil Code] art. 650 (Fr. 1804).

43. LA. CIV. DIG. OF 1808, bk. II, tit. IV, ch. III, art. 13.

44. Wolfe, *supra* note 9, at 234.

45. *Id.* at 235 ("The 1816 act also created a personal right of action for damages in favor of any riparian proprietor whose property was damaged by

was considered to be at the landowner's expense.[46] This was true, in that no funding was provided for construction and no compensation or damages were awarded for losses.[47] However, this statement fails to convey that the labor which was not funded or reimbursed by the State was carried out by enslaved people, which typically meant people that worked on the land in question; although, the State also had the authority to demand that a landowner lend slave labor for the construction of a levee on another's property.[48] As Wolfe notes, "The availability of a large captive labor force attached to the land was a most important ingredient of the capacity of the ante-bellum riparian landowner to discharge the obligation imposed on him by law to build and maintain levees in front of his property largely at his own expense."[49] It is critical that this fact not be lost to history because to do so would omit the people without whom Southern Louisiana settlements would have long ago washed away, support the exaggerated narrative that plantation owners were suffering a dire unfairness due to the uncompensated riparian servitude, and dismiss key evidence that appropriations are an exercise of the State's police power—a power intimately linked with the nation's history of slavery.

Despite appropriations' ties with slavery, the power's first practical evolution was unrelated to the diminishing availability of slave labor. Fifteen years before the onset of the Civil War, the State began implementing new policies that relieved some of the burden that the riparian servitude placed on riparian landowners.[50] This was first accomplished through parish-by-parish taxes that provided funds for landowners to pay for construction.[51] These funds were intended only to reimburse landowners for the cost of building materials and actual construction, not provide payment for property acquired or damaged.[52]

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floods caused by the failure of a fellow proprietor to maintain the required levees in front of his property.").

46. *Id.* at 234.

47. *Id.* at 234–36.

48. John Dean Davis, *Levees, Slavery, and Maintenance*, TECH.'S STORIES, Aug. 20, 2018.

49. Wolfe, *supra* note 9, at 236.

50. *Id.*

51. *Id.*

52. Notably, the landowners themselves could satisfy their tax obligations with enslaved labor. Davis, *supra* note 48, at 9. This means that, although the tax succeeded in dispersing the financial burdens of levees across the *estates* of the parish, the *landowners* (who were undoubtedly also the lawmakers) were receiving a windfall of sorts as they were neither paying the tax nor paying for or carrying out the labor themselves. *Id.* This speaks to the fact that evolutions in the

Next, the responsibility for construction shifted from landowners to the Louisiana Levee Company and then finally to levee districts in 1879.[53] With the State in control of construction, landowners were back to receiving no money upon levee construction; funds for construction were available for the levee districts, and any damage or injury to the landowner was considered *damnum absque injuria*[54] to which the landowner consented to by nature of owning riparian land.[55] The transfer of responsibility from the landowner to the State was necessary because the levee system had increased in complexity and required experienced contractors.[56] In sum, the first evolutions of the implementation of the riparian servitude were in its practical application, not in its legal refinement. Nonetheless, with the State in charge of construction, exercise of the riparian servitude began to more closely resemble an exercise of eminent domain, and the sentiment grew that appropriations are unfair to landowners and are a government loophole around due process protections.[57]

Another important shift during this time was the types of properties burdened. In the beginning, deep plantations with relatively narrow waterfronts lined the rivers.[58] Accordingly, sacrificing the small portion of

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laws relevant to appropriations largely occurred in response to cultural aspects, not legal developments.

53. Wolfe, *supra* note 9, at 237–38.

54. "Loss or harm that is incurred from something other than a wrongful act and occasions no legal remedy." *Damnum absque injuria*, BLACK'S LAW DICTIONARY (11th ed. 2019).

55. Bass v. State, 34 La. Ann. 494, 496 (La. 1882) ("It is the *police power* which is inherent to every government under its organic law, and which is exercised without making compensation. What damage or injury is occasioned by the exercise of such power is *damnum absque injuria*.").

56. Wolfe, *supra* note 9, at 236. At this point, construction became the responsibility of the U.S. Army Corps of Engineers, but land "acquisition" responsibility remained with regional levee boards. *See* Davis, *supra* note 48. The U.S. Army Corps of Engineers could not have taken on this role because the federal government possesses no police power with which to carry out appropriations.

57. *See* Dickson v. Bd. of Comm'rs of Caddo Levee Dist., 26 So. 2d 474, 479 (La. 1946) ("And however unfair it may seem to the owners of this type of land they are without right to complain because their acquisition of such land was subject by law to this ancient servitude and the private mischief must be endured rather than the public inconvenience or calamity.").

58. *Levees and Battures in the Law of Louisiana*, *supra* note 7, at 651; *see also* 70 CONG. REC. 5651 (La. 1928) (Brief Submitted by Governor Simpson of La.) ("Originally in Louisiana the rural sections of the State were composed of

land necessary for a levee was not particularly damaging to the property as a whole.[59] However, over time, properties transformed to become shallower with larger river fronts.[60] Therefore, much larger portions of the property were burdened. This perceived unfairness by and to landowners led to multiple changes in the application of the riparian servitude.[61]

First, the legislature introduced payment to landowners upon the exercise of the riparian servitude (not for construction costs, which were still covered by the State), beginning with an 1892 ordinance authorizing the Orleans Levee Board to pay landowners the assessed value of lands that were appropriated for levees.[62] It is worth noting however that drafters of the initial provisions relating to compensation from the Orleans Levee Board might have been a bit confused. To expound, in 1898, two provisions were passed that (1) required that suits for compensation instituted against the levee board be governed by the law applicable to expropriation suits; and (2) prohibited payment of compensation until the owner of the appropriated property transferred his or her title to the city of New Orleans.[63] Given that the provisions explicitly referenced the law of expropriations and that appropriations do not transfer title, it appears that this was actually just an act to require expropriation for levee construction and not to require compensation for appropriations. However, the ultimate effect was not to require more expropriations but to change the application of appropriations. With the Louisiana Constitution of 1921, the rest of the

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vast plantations fronting on navigable streams. This was in the day of sugar barons and the indigo . . . when countless hordes of African slave labor, man, woman, and child, toiled unceasingly from daybreak until sundown. During that epoch, the principle of riparian servitude was equitable and just.").

59. Wolfe, *supra* note 9, at 245; *see also* Eldridge v. Trezevant, 160 U.S. 452, 464 (1896) ("It was the condition of the ancient grants of land on the Mississippi River, and sufficient depth was always given to each tract, to prevent the exercise of the public rights from proving ruinous to the individual.").

60. Wolfe, *supra* note 9, at 245.

61. *Levees and Battures in the Law of Louisiana*, *supra* note 7, at 653–54. ("The codal concept of the servitude owed by the riparian landowners still persists, but the old large riparian plantations of great depth in many instances have been divided and sold in small lots so that one proprietor may own only a small lot on the river, and when the levee servitude is exercised he may be forced to sacrifice all of his land and the improvements thereon for the protection of others. The unfairness of this situation prompted the enactment of Article 312 of the Louisiana Constitution of 1898 which provided that anyone whose property in Orleans Parish was taken for levee purposes would have a right of action against the levee board to recover the 'value' of the property so taken.").

62. Act No. 41, 1892 La. Acts 46; Act No. 25, 1894 La. Acts 28.

63. Act No. 79, 1898 La. Acts 102, §§ 6–7.

state followed suit in requiring payment not to exceed the assessed value for the preceding year for lands and improvements used or destroyed for levees.[64] This payment was repeatedly referred to by courts as a mere gratuity[65] and as such did not in any way resemble the *just compensation* required for exercises of eminent domain.[66] However, this still represented a move by the legislature to provide "fairer" monetary benefits for the landowner of property burdened by the riparian servitude.

While the compensation framework for appropriations inched towards something more closely resembling expropriation protections, the courts were limiting the scope of the State's powers of appropriation. The state's earliest laws had set up the riparian servitude but did not specifically define its application. This task was taken up judicially and largely focused on the proposed levees' location and purpose. In *Delaune v. Board of Commissioners for the Pontchartrain Levee District*, the Louisiana Supreme Court held that the property must have been riparian property when it was severed from the sovereign and be "within range of the reasonable necessities of the situation, as produced by the forces of nature, unaided by artificial causes."[67] This remains the controlling law for appropriations under the riparian servitude.

For the first prong of the *Delaune* test, the determinative question is whether the tract fronted a navigable river at the time it was severed from the public domain.[68] If a property fits this criterion, there are no geographical limits as to how near the land actually used for levee construction must be to the river. For example, in *Wolfe v. Hurley*, the land was 4 miles from the Mississippi River,[69] and in *Board of Commissioners of Tensas Basin Levee District v. Franklin*, the land was a whole 17 miles

64. LA. CONST. art. XVI, § 6 (1921).

65. *See, e.g.*, Richardson & Bass v. Bd. of Comm'rs of the Orleans Levee Dist., 77 So. 2d 32, 35 (La. 1954); Mayer v. Bd. of Comm'rs for Caddo Levee Dist., 150 So. 295, 296 (La. 1933); Boyce Cottonseed Oil Mfg. Co. v. Bd. of Comm'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 107 So. 506, 510 (La. 1925).

66. U.S. CONST. amend. V.

67. Delaune v. Bd. of Commr's for the Pontchartrain Levee Dist., 87 So. 2d 749, 753 (La. 1956).

68. *Id.*

69. Wolfe v. Hurley, 46 F.2d 515 (W.D. La. 1930), *aff'd*, 283 U.S. 801 (1931).

from the nearest navigable stream.[70] In both cases, the court found that the appropriation was proper because the property as a whole was "riparian."[71]

Exercises of police power, such as appropriations, are not generally geographically limited.[72] Therefore, this judicially imposed limitation is not the product of appropriations as an exercise of police power, but based on the "reserved right" or "nonsurrender-of-title" theories attached to the riparian servitude.[73] These theories essentially hold that riparian properties were burdened before statehood by the French and Spanish and have remained so.[74] Some have suggested that this is the exclusive legal basis for the riparian servitude and appropriations in general; however, this argument has several flaws.[75] First, sovereign title was not passed directly from the French and Spanish crowns to the State of Louisiana, but first to the United States.[76] There is little to suggest that these transfers reserved a civil law servitude in favor of the United States and no more to suggest that such a servitude was passed from the federal government to the State of Louisiana before private land patents were then granted.[77] Furthermore, a reserved right on its own would not necessarily exempt the State from the requirement for just compensation under the U.S. Constitution's Fifth Amendment either historically or presently in the case of batture.[78] That fact is only logical if appropriations are understood as acts of the State's police power.[79] Thus, the police power must be accepted as at least one part of the legal basis for appropriations under the levee servitudes. Nonetheless, the state's historical ties to France and Spain are important because the fact that the riparian servitude does not burden properties that were not riparian at the time of severance from the sovereign, which the police power alone does not explain, is now axiomatic in Louisiana's legal regime.

Courts have interpreted the second prong of the *Delaune* test as meaning that a proper appropriation under the riparian servitude may only occur where the proposed levee is "necessary for the control of flood

70. Bd. of Comm'rs of Tensas Basin Levee Dist. v. Franklin, 54 So. 2d 125 (La. 1951).

71. *Delaune*, 87 So. 2d at 754.

72. See discussion *infra* Part III.B for a discussion on elements of lawful exercises of police powers.

73. *See* Wolfe, *supra* note 9, at 241–42, 268–69.

74. *Id.*

75. *See id.* at 268–69.

76. *Id.*

77. *Id.*

78. *Id.* at 270–72.

79. *Id.* at 265.

waters from the river to which the land taken is riparian."[80] For example, in *A. K. Roy v. Board of Commissioners for the Pontchartrain Levee District*, an appropriation was invalidated where the property was riparian to the Mississippi River but the proposed levee was intended to protect against flood waters from Lake Pontchartrain.[81] This test also means that the State may only appropriate or use land that is actually necessary for levee construction and nothing in excess of that purpose.[82] Although, this limitation would apply regardless of legal indoctrination due to the practical operation of appropriations.[83]

It is noteworthy that for a brief period in history, the state legislature and courts united in allowing appropriations that would constitute an exception to both prongs of the test. In 1890, a statute created the Orleans Levee Board and granted it jurisdiction over levees in the area of Lake Pontchartrain, a body of water that is decidedly not a navigable river or stream.[84] The Louisiana Constitution of 1921 expressly granted the Orleans Levee Board the authority to appropriate lands along the lakeshore.[85] Then, in 1930, the Louisiana Supreme Court held that the State's appropriation power extended to land along Lake Pontchartrain,[86] a view that was echoed a year later by a federal district court.[87] Both courts' decisions were largely based on the Louisiana constitutional amendment granting the Orleans Levee Board the authority to appropriate land for levees along Lake Pontchartrain, not on an examination of the scope of the State's appropriation power.[88] The Louisiana Supreme Court's decision was never officially overruled; nevertheless, beginning

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80. Stevenson v. Bd. of Levee Comm'rs of Tensas Basin Levee Dist., 353 So. 2d 459, 461 (La. Ct. App. 3d Cir. 1977).

81. A. K. Roy v. Bd. of Comm'rs for the Pontchartrain Levee Dist., 111 So. 2d 765 (La. 1959).

82. La. Soc. For Prevention of Cruelty to Child. v. Bd. Of Levee Comm'rs of Orleans Levee Dist., 78 So. 249, 250 (La. 1917) ("The servitude which the defendant board is exercising entitles it to nothing more than sufficient space for the construction of the levee. It can take no more than this, for, if it did, it would be taking land not needed for levee purposes . . . .").

83. *See* discussion *supra* Part II.A.

84. Act No. 93, 1890 La. Acts 95, § 6.

85. Wolfe, *supra* note 9, at 280. This authority from article XVI, section 7 of the Louisiana Constitution of 1921 was not included in the Louisiana Constitution of 1974.

86. New Orleans Land Co. v. Bd. of Levee Comm'rs. of Orleans Levee Dist., 132 So. 121 (La. 1930), *aff'd per curiam*, 283 U.S. 809 (1931).

87. Dalche v. Bd. of Comm'rs of Orleans Levee Dist., 49 F.2d 374 (E.D. La. 1931).

88. *New Orleans Land Co.*, 132 So. at 122; *Dalche*, 49 F.2d at 381.

with a string of cases in the mid-1950s, courts eschewed this use of appropriation in favor of the view that appropriation only extends to those lands burdened with a riparian servitude from the time they were severed from the public domain, which would not include properties fronting Lake Pontchartrain.[89] This remains the law today, but it is nevertheless notable that for at least a time, the State seemed united in the belief that appropriations are not necessarily limited, either in geography or purpose, to the bounds of riparian properties.

To summarize, throughout the twentieth century, appropriations and the riparian servitude were more restricted in application than in the past and more so than the power of expropriation. So, although the historical ability to appropriate without compensation no longer applied, the power still provided the state an expedited and more affordable option than expropriation to construct levees for flood control along navigable rivers. Such was the scene when the 1974 Constitutional Convention rolled around.

3. Modern Developments

Except for a series of judicial opinions interpreting the 1921 constitutional provision requiring payment not to exceed the assessed value for the preceding year,[90] payment associated with appropriations under the riparian servitude remained relatively static for more than half a century. The 1974 Constitution is often cited as requiring fair market value for appropriations,[91] although that is not entirely accurate. The 1974 Constitution does provide for fair market compensation and compensation to the full extent of loss—which can amount to more than the federal "just compensation" requirements—but only with regard to "expropriation[s] or action[s] to take property pursuant to the provisions of this Section."[92]

89. Delaune v. Bd. of Comm'rs for Pontchartrain Levee Dist., 87 So. 2d 749 (La. 1956); Bd. of Comm'rs for Pontchartrain Levee Dist. v. Baron, 109 So. 2d 441 (La. 1959); A. K. Roy, Inc. v. Bd. of Comm'rs, 111 So. 2d 765 (La. 1959).

90. *See* Wolfe v. Hurley, 46 F.2d 515 (W.D. La. 1930); Boyce Cottonseed Oil Mfg. Co. v. Bd. of Comm'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 107 So. 506 (La. 1926); Lacour v. Red River, Atchafalaya and Bayou Boeuf Levee Dist., 104 So. 636 (La. 1925).

91. *See, e.g.*, DeSambourg v. Bd. of Comm'rs for Grand Prairie Levee Dist., 621 So. 2d 602, 608 (1993); Jaccard, *supra* note 7, at 935.

92. LA. CONST. art. I, § 4(B)(5). As will be discussed *infra* Part III, a "taking" is not an accurate description of an appropriation. Therefore, the phrase "expropriation or action to take property" is best interpreted as listing two synonyms for the same action (an exercise of eminent domain). However, even

Regarding compensation for appropriations, the 1974 Constitution merely stated: "Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law."[93] Said law came in 1985 and requires that "[a]ll lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss."[94] What the 1974 Constitution did do—which was subsequently echoed in 1985—was indicate that compensation, not just a *gratuity*, was required for use of the land, not simply in response to an injury.[95] This is a critically important development as it diverges from the typical exercise of police power where payment is only owed for injury, if at all.[96]

The most recent evolution in Louisiana's law of appropriations came in the aftermath of Hurricane Katrina. In 2006, the legislature modified article 665 by constitutional amendment to include a right of appropriation where levees are necessary for hurricane protection.[97] Taken in isolation, this amendment generally comports with the State's police power. But does it comport with the limitations of the riparian servitude, and should it have to?

It would be difficult to argue that hurricane protection is not essential to the public's health, safety, and welfare.[98] The history of Louisiana's power of appropriation—especially its origins—emphasizes its purpose as a tool of protection to mitigate the unique risks posed by Louisiana's challenging natural environment.[99] However, the hurricane-protection servitude is also clearly contrary to the *Delaune* test limiting the scope of article 665—or at least the riparian servitude—by geography and purpose. It is yet to be seen how the court will view the constitutionality of the hurricane-protection amendment and servitude, and its decision will significantly impact the state's future.[100] How appropriation and its

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conceding that "taking" sometimes is used to refer to appropriations, the same section also states: "This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes." *Id.* art. I, § 4(E).

93. *Id.* art. VI, § 42(A).

94. LA. REV. STAT. § 38:301(C)(1)(a) (2023).

95. LA. CONST. art. VI, § 42(A).

96. *See* discussion *infra* Part III.

97. Act No. 776, 2006 La. Acts.

98. These are the factors most commonly applied to determine lawful uses of police powers. *See* discussion *infra* Part III.

99. *See* discussion *infra* Part I.B.1.

100. *See* discussion *infra* Part II.

important purpose in Louisiana's toolbox is understood will determine if the state will have the capability to protect its most vulnerable communities from catastrophe, or if the hurricane-protection amendment will simply go down in the Louisiana history books with the case of levees along the shore of Lake Pontchartrain.

II. WHERE ARE WE NOW? CASE STUDY: *NATURE LAND V. BOARD OF COMMISSIONERS*

In *Nature Land Co. v. Board of Commissioners for the Pontchartrain Levee District*, the 40th Judicial District Court confronted the constitutionality of appropriations exercised pursuant to the 2006 hurricane-protection amendment to article 665.[101] Although this case specifically addressed the hurricane-protection amendment and servitude, it aptly illustrates how appropriations in general are misconstrued to the public and applied by the legislature and courts in a manner that has all but extinguished the power's primary benefits.

A. Facts of the Case

In August 2021, on the 16th anniversary of Hurricane Katrina, Hurricane Ida slammed into the coast of Southeast Louisiana. Ida made landfall with maximum wind speeds of 25 miles per hour stronger than Katrina.[102] Yet, while Katrina claimed the lives of nearly 1,200 Louisianans, Hurricane Ida caused just 26 deaths—only 2 of which were due to flooding.[103] The key difference was the $14 billion post-Katrina improvement to New Orleans's flood risk reduction system.[104]

However, human casualties are not the sole metric to assess a storm's impact, and not every community was equally protected when Hurricane Ida hit. Thirty miles up the Mississippi River from New Orleans, the

101. Nature Land Co. v. Bd. of Comm'rs for the Pontchartrain Levee Dist., No. 76762 (40th Jud. Dist. Ct. May 17, 2021).

102. Levenson, *supra* note 3.

103. POPPY MARKWELL & RAOULT RATARD, DEATHS DIRECTLY CAUSED BY HURRICANE KATRINA 8; JC Canicosa, *Hurricane Ida has caused 26 deaths in Louisiana, official says*, LA. ILLUMINATOR (Sept. 10, 2021, 6:00 AM), https://lailluminator.com/briefs/hurricane-ida-has-caused-26-deaths-in-louisiana-official-says/ [https://perma.cc/DD93-4RXV].

104. Mark Ballard, *After Katrina, Louisiana spent billion improving levees. After Ida, is the power grid next?*, THE ADVOCATE (Sept. 5, 2021), https://www.theadvocate.com/baton_rouge/news/politics/article_82f0ef62-0e75-11ec-8bdd-ebf289faf428.html [https://perma.cc/GDR2-DVUT].

community of LaPlace was inundated with floodwaters from Lake Pontchartrain.[105] A $760 million planned levee project for the protection of LaPlace and nearby communities was not completed in time.[106] As the skies cleared, waters receded, and power returned, completion of the 18.5-mile long levee system along Lake Pontchartrain's west shore was resumed with high priority.[107] Then came another roadblock—a court ruled that the State had to halt construction due to a private landowner's lawsuit challenging the State's right to build a levee on the landowner's property and the method it went about doing so.[108]

In August 2020, the Pontchartrain Levee District notified Nature Land that it intended to appropriate land to construct a hurricane-protection levee and access road on Nature Land's property under the authority of article 665.[109] The Levee District planned to exercise a purported 600-foot-wide servitude covering 300 acres to construct a levee transecting Nature Land's property.[110] Nature Land historically sold pipeline servitudes across its property to oil companies, and constructing the levee would prevent Nature Land from selling any additional pipeline servitudes or extending the width of the existing pipeline corridor.[111] Further, levee construction would require destruction of a hunting camp, the reconstruction of which would be impractical due to wetlands regulations.[112]

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105. Matt Sledge, *After Hurricanes Isaac and Ida, Some LaPlace Residents Say They're Done Waiting For Levee*, NOLA.COM (Sept. 12, 2021, 4:00 AM), https://www.nola.com/news/environment/article_f322128c-11ba-11ec-a6b3-df0c66fb2c5b.html [https://perma.cc/T4BZ-NZ6H].

106. Janet McConnaughey et al., *New Orleans levees pass Ida's test while some suburbs flood*, AP NEWS (Aug. 30, 2021), https://apnews.com/article/environment-and-nature-new-orleans-floods-suburbs-f2a033ef3eca9b98d55351a0736657d9 [https://perma.cc/M53Z-3V8E]; U.S. ARMY CORPS OF ENG'RS, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT TO WEST SHORE LAKE PONTCHARTRAIN HURRICANE AND STORM DAMAGE RISK REDUCTION STUDY, FINAL MITIGATION PLAN UPDATE 6 (2022).

107. Sledge, *supra* note 105.

108. Nature Land Co. v. Bd. of Comm'rs for the Pontchartrain Levee Dist., No. 76762 (40th Jud. Dist. Ct. May 17, 2021).

109. Amended Petition for Injunctive & Declaratory Relief, *Nature Land*, No. 76762, at 2–3.

110. *Id.* at 4.

111. *Id.* at 5.

112. *Id.* at 4.

Nature Land filed a petition for injunctive and declaratory relief alleging four causes of action:[113] (1) an appropriation would deprive Nature Land of its future right to recover surplus property that was expropriated but not needed; (2) the Levee District's proposal unconstitutionally applied Civil Code article 665; (3) Civil Code article 665, as amended in 2006, is facially unconstitutional; and (4) Nature Land was entitled to preliminary and permanent injunctive relief due to the irreparable injury to its immovable property.[114] In response, the Levee District initiated a quick taking proceeding instead of asserting it had rights to appropriate a servitude under article 665.[115] The District Court denied the Levee District's request for an expedited expropriation for two reasons: (1) Nature Land had already filed a contestation prior to the Levee District's motion; and (2) the Levee District failed to show evidence of a compensation negotiation.[116] First, the court stated that the quick taking statute "does not afford or contemplate, as here, for an immediate taking when a prior contestation has been filed."[117] Second, the court noted that "prior to filing an expropriation suit, an expropriating authority shall attempt in good faith to reach an agreement as to compensation with the owner of the property sought to be taken . . . ."[118] In this case, the Levee District provided notice of the amount it would forward to Nature Land, but the District Court held that no negotiation occurred because Nature Land never objected to the amount.[119] However, on appeal the lower court was instructed to grant the quick taking because Louisiana Revised Statutes § 38:354 does not allow for judicial discretion in issuing an order where a quick-taking petition is presented.[120]

113. The first petition only alleged three causes of action and was subsequently amended to include a fourth. *See* Verified Petition for Declaratory Relief, *Nature Land*, No. 76762, at 4–9; Amended Petition for Injunctive & Declaratory Relief, *supra* note 109, at 11–12.

114. Amended Petition for Injunctive & Declaratory Relief, *supra* note 109, at 11–12.

115. *Nature Land*, No. 76762.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Bd. of Comm'rs for the Pontchartrain Levee Dist. v. Nature Land Co., No. 21-C-717, 2021 WL 6053819, at *1–3 (La. Ct. App. 5th Cir. Dec. 20, 2021).

B. Analysis: Appropriations vs. Expropriations from the Landowner's Perspective

The West Shore Lake Pontchartrain levee is necessary for public safety and is eventually going to be built one way or another.[121] Therefore, Nature Land could not have credibly initiated its suit hoping to successfully prevent construction of the levee. With this in mind, there are two possible motives behind Nature Land's actions: (1) to compel expropriation, not appropriation, of the land necessary for construction; or (2) to delay construction as long as possible.

First, what basis is there for Nature Land to prefer expropriation over appropriation? It is critical to note that under the current expropriation and appropriation frameworks, Nature Land should receive fair market value for the property expropriated or appropriated regardless of which action occurs.[122] The petition claims that expropriation is nonetheless preferable so that Nature Land may retain a constitutional right of first refusal.[123] In the Louisiana Constitution, the right to property is the most expounded upon right.[124] One of the specifically enumerated details of this right is the right of first refusal for a landowner or his or her heir(s) where the state wishes to sell or lease property which was expropriated not more than 30 years earlier and was not used.[125] Notably, this right extends only to expropriations, not appropriations, forming the basis of Nature Land's first argument.[126] However, the reason—or, at least, likely *a* reason—that the constitutional right of first refusal does not extend to appropriations is because the landowner never loses ownership of such land. Furthermore, the right of first refusal only applies to surplus land that was expropriated, and appropriating surplus land is not possible.[127] Therefore, the landowner benefits from an appropriation because he or she retains present title to all

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121. *Cf.* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (citing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)) (prohibiting the country government from forcing the acquisition of private land through eminent domain for a private technology park and overruling a previous decision that allowed acquisition for an economic development corporation).

122. LA. REV. STAT. § 38:301(C)(1)(a) (2023).

123. Amended Petition for Injunctive & Declaratory Relief, *supra* note 109, at 7.

124. LA. CONST. art. I.

125. *Id.* art. I, § 4(H)(1).

126. Nature Land Co. v. Bd. of Comm'rs for the Pontchartrain Levee Dist., No. 76762 (40th Jud. Dist. Ct. May 17, 2021); *see* Amended Petition for Injunctive & Declaratory Relief, *supra* note 109.

127. *See* discussion *supra* Part II.A.

property, and all rights that attach to title of such, including what could have been surplus property, instead of acquiring a possible future right. Thus, if Nature Land—or any landowner—is most interested in access and ownership to unutilized property, it is preferable to allow the State to appropriate land rather than compel expropriation proceedings.

If Nature Land's motivation is not to stop the project, and it is not because expropriations are inherently more beneficial to landowners, another possibility is that it simply wants to delay construction as long as possible to preserve a few extra years of personal gain. Inherent in the law of appropriation, and all exercises of the police power, is the notion that the landowner's burden is offset by the benefits of the action.[128] In other words, for the average landowner, the benefits of flood protection generally are worth having a levee constructed. And in the case of hurricane-protection levees (more so than levees meant to prevent river flooding), it is not only the burdened property that is receiving a benefit, or its direct neighbors, but also an entire community. However, this formula is skewed when the landowner is not actually a member of that community, a situation that occurs frequently as many large, wealthy corporations with outside stakeholders are located in vulnerable Louisiana communities.[129] For these corporate landowners, burdened property can mean a direct loss in profits. Not to mention, they likely have better insurance and available funds to respond to a flood if the levee is not built. Therefore, it is more fiscally reasonable and existentially easier for these landowners to sacrifice increased flood protection in exchange for a few extra years of profits. A landowner's interest in obtaining as much personal gain from their own private property is understandable and certainly not condemnable, but it is not an interest the Louisiana legal system should be actively facilitating at the expense of the safety of the general public. Under either of the proposed motivations, the current system is not beneficial for Louisiana residents, so it only makes sense to maintain the status quo if the benefits to the State are worth it.

C. Analysis: Appropriations vs. Expropriations from the State's Perspective

Historically, appropriations were strictly construed and increasingly limited because they conferred several powerful benefits that the State

128. Brewer v. State, 341 P.3d 1107, 1112 (Alaska 2014).

129. *See* Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 373 (2019).

could easily abuse.[130] However, this does not mean that the power is inherently abusive or not critically important. Unfortunately, today, few if any of the benefits remain to still make appropriations an attractive option for the State. It is important to maintain the State's benefits of appropriation because the State is merely allowed, not obligated, to appropriate certain lands; meaning, any land the State appropriates it could choose to expropriate, stripping landowners of title while otherwise inflicting identical injuries.

In the *Nature Land* case, the Levee District likely used appropriation instead of expropriation to expedite the construction process. For an appropriation, judicial proceedings are not necessary to initiate the action.[131] As noted, for the Levee District, fair market value is owed for either option, but for appropriations, price negotiations should not have delayed construction. However, legal uncertainties and public misconceptions led to a challenge from landowners. In other words, the Levee District was forced into court regardless. Further, even when it then sought to initiate a quick taking, it was rejected because Nature Land had already filed a challenge.[132] The fact that this was reversed does not remedy the problem but rather accents it. From a public policy perspective, this seemingly incentivizes the Levee District to simply assert expropriation instead of appropriation to begin with. Doing so would not disadvantage the Levee District because the compensation scheme is the same for both processes, and it would eliminate all of the causes of action Nature Land put forward here. In theory, expropriation proceedings are less desirable for the State because it is a longer process; however, given the option for a quick taking and considering the delay that can also be associated with appropriations, levee districts do not have a strong incentive to attempt appropriations if this is the rule. While on its face this is beneficial to landowners given that due-process protections for expropriations are intended to protect landowner liberties, appropriations are actually more beneficial because landowners retain title of the land and all the benefits that attach to title, while still receiving compensation.

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130. *See* Ar. La. Gas Co. v. La. Dep't of Highways, 104 So. 2d 204, 207 (La. Ct. App. 2d Cir. 1958) ("Implicit in every judicial comment upon the police power is the principle that its use and exercise must be carefully and zealously guarded in the interest of preserving the rights and liberties of individuals who may not be subjected to the burdens of its improper use under the guise of the protection of the people as a whole.").

131. Peterson, *supra* note 20, at 2.

132. Nature Land Co. v. Bd. of Comm'rs for the Pontchartrain Levee Dist., No. 76762 (40th Jud. Dist. Ct. May 17, 2021).

Essentially, over the years the State has neutralized one of its most powerful tools in combatting natural flooding.

III. LIMITING LANDOWNER CHALLENGES BY CLARIFYING THE POWER OF APPROPRIATION AND THE SCOPE OF THE LEVEE SERVITUDES

Throughout the nineteenth and twentieth centuries, appropriations under the riparian servitude were gradually limited to protect private landowners from an especially powerful government authority.[133] Unfortunately, the remedy was worse than the disease. Louisiana has a harrowing road ahead to combat the mounting ecological challenges it will inevitably face. Although the power of appropriation was ostensibly weakened over the years, it is not dead yet. Several changes can be made to restore strength to this power without threatening private rights, essentially amounting to either clarifying the power to limit landowner challenges or capitalizing on the full benefits of the power. The next two Subparts will explore these options.

Limiting procedural delays would enhance the State's ability to erect levees when and where they are desperately needed. Put simply, there is not enough time or resources to allow a landowner to judicially challenge the purpose, location, and everything else about each new project. At a minimum, prohibiting quick takings because the State originally initiated an appropriation proceeding, which is what happened in the *Nature Land* case, should not occur.[134] There are sufficient judicial safeguards to ensure that a landowner will be compensated for an improper action, so if the State determines that an expedited process is necessary for the general welfare of the public, that determination should not be undermined. Beyond not halting processes whose explicit purpose is to expedite essential infrastructure, the judiciary and legislature could both significantly contribute to the future protection of the state by creating and applying law with the purpose and barriers of appropriations in mind.

A. Appropriations Are Exercises of the State's Police Power

The law is regrettably an art firmly rooted in and inherently constrained by the limits of language. As Frederick Coudert provided in an exploration of the historical and jurisprudential development of riparian rights: "[T]he alliance between law and etymology, never very close, has of late years, in our overworked law courts, and at the hands of our non-

133. *See* discussion *supra* Part I.
134. *See* discussion *supra* Part II.

technical legislators, been severely strained."[135] This truism has confounded the law of government acquisitions for years in Louisiana and beyond with significant consequences. To illustrate, consider the word, *taking*. In other U.S. jurisdictions, this term is used synonymously with exercising eminent domain largely without collateral consequences.[136] However, in Louisiana, a *taking* is a defined injury.[137] Thus, using this word to describe a government action results in confusion and contradiction. First, because if the action is itself a *taking*, how should one understand the subsequent evaluation of whether the injury of a *taking* or *damaging* has occurred?[138] And more importantly for the purposes of this Article, is a *taking* a fair way to describe the government actions of both expropriations and appropriations?[139] In an expropriation, the government acquires (takes) title. In an appropriation, the government does not. So, what exactly is the government *taking*? It is *doing* something, and the legal injuries of a taking or damaging could occur as a consequence, but an appropriation is not in and of itself a taking.

When courts use this terminology in appropriation cases, it misleads and confuses landowners into believing that the power violates their rights. This is evidenced by the cases where landowners challenge appropriations arguing that the State should instead expropriate their property, which would leave them with the same amount of compensation but without title to their property.[140] Courts should be intentional in their terminology to

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135. Frederick R. Coudert, *Riparian Rights; A Perversion of Stare Decisis*, 9 COLUM. L. REV. 217, 217 (1909).

136. Although, one could argue the term often causes confusion due to the concept of *regulatory takings*. Similar to appropriations, when a regulatory taking occurs, it is not because the federal government "took" property pursuant to its eminent domain powers but instead because it acted under other powers that nonetheless inflicted an indirect injury, or *taking*.

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

138. *Id.*

139. Courts use *taking* when referring to both appropriations and expropriations, but it can be difficult to ascertain whether this is in a colloquial sense, a carry-over from common law practices, an attempt to develop the law of appropriation, or a reference to injury. *See, e.g.*, Magee v. W. Jefferson Levee Dist., 235 So. 3d 1230, 1238 (La. Ct. App. 5th Cir. 2017) ("[T]he matter at hand concerns the taking of land for levee purposes via appropriation . . . .").

140. *See, e.g.*, Nature Land Co. v. Bd. of Comm'rs for the Pontchartrain Levee Dist., No. 76762 (40th Jud. Dist. Ct. May 17, 2021); Amended Petition for Injunctive & Declaratory Relief, *supra* note 109; Plaquemines Dirt & Clay Co. v. Plaquemines Par. Gov't, No. 2019-CA-0831, 2020 WL 2904055, at *2 (La. Ct. App. 4th Cir. June 3, 2020) (Plaintiff sought a declaratory judgment that its land was not legally riparian and thus not subject to appropriation.).

clearly differentiate between expropriations as exercises of eminent domain and appropriations as exercises of the State's police power.

B. The Problem with the Hurricane-Protection Amendment

The hurricane-protection amendment was an inspired idea poorly executed. One of the biggest challenges to appropriations and exercises of police power in general is whether the planned action is for the right kind of purpose. Explicitly including hurricane protection as an approved purpose for appropriations eliminates the delays that come from judicial challenges disputing purpose—or at least it should. Yet, as illustrated by the *Nature Land* case, the hurricane-protection amendment opened the State up to new challenges on the constitutionality of its actions.[141] The court has not decided on the merits of Nature Land's argument yet, but the hurricane-protection servitude is—or could have been—a constitutional levee servitude that works with the State's powers of appropriation, although not under or in conjunction with the riparian servitude. However, by lumping the hurricane-protection servitude into article 665 with the riparian servitude without a clear explanation, the State invited more challenges.

To expound upon this, one must consider the limits of the power of appropriation and the levee servitudes separately. First, appropriation is above all an exercise of the State's police power. While eminent domain may be used for any project that contributes a public use, the police power is limited by the requirement that the action "tend in some degree to prevent an offense or evil or otherwise to preserve public health, morals, safety or welfare . . . ."[142] Or, as the Louisiana Second Circuit Court of Appeal stated:

> Concededly, there has never been, and likely there will never be, any authoritatively exact, definite and detailed interpretation of the phrase "police power." However, the extent of this power and the drastic effects of its application clearly indicate the restriction of its employment to matters of grave and immediate public concern.[143]

So, while eminent domain may apply for virtually any public works project, appropriations may not be

141. *See* discussion *supra* Part II.

142. Lafourche Par. Council v. Autin, 648 So. 2d 343, 357–58 (La. 1994).

143. Ar. La. Gas Co. v. La. Dep't of Highways, 104 So. 2d 204, 207 (La. Ct. App. 2d Cir. 1958).

> applicable at all where land [is] taken for levees in the nature of vast projects of public works planned long in advance. In such cases there [is] no immediate danger to the public safety, in the sense in which that term is used with reference to the police power, and the object of the taking was a public work of permanent duration, not a stop-gap against impending catastrophe.[144]

Given the differences in levee planning and construction that went into "the frenzied building of a temporary levee at the time of high water to avoid public catastrophe" during early colonial times, and the planning and construction that occurs now for hurricane-protection levees, one could argue that the hurricane-protection amendment does not meet the police power requirements as the riparian servitude did at its conception.[145] However, since at least 1882, construction of levees was not only for the riparian landowners,[146] but also for the whole state.[147] One cannot reasonably suggest that the whole state was in immediate danger.

Further, even supposing that construction of hurricane-protection levees was not always within the scope of the police power because it did not protect against immediate danger, ecological changes over the past century have changed that. The science reports that climate change is bringing stronger hurricanes more frequently, but residents of Southern Louisiana do not need peer-reviewed studies to know that the threat is increasing.[148] Two of the three strongest storms to ever hit the state—Hurricanes Laura and Ida—came only a year apart in 2020 and 2021.[149] Before that, the only storm in state history that rivaled their strength struck in 1856.[150] For those living along the Gulf Coast, the question of whether a hurricane will come has long since given way to the questions of when, how many, and how hard. Therefore, framing the threat of a hurricane as

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144. Wolfe, *supra* note 9, at 268.

145. *Id.* at 287.

146. Bass v. State, 34 La. Ann. 494, 498 (La. 1882) ("[T]he property would be of no value without the levee . . . .").

147. *Id.* ("The building of levees in Louisiana is a public enterprise, or work which concerns at least half of the people of the State and, incidentally, the whole State.").

148. James P. Kossin et al., *Global Increase in Major Tropical Cyclone Exceedance Probability over the Past Four Decades*, PNAS, June 2020.

149. Drew Broach, *The strongest hurricanes to hit Louisiana were Ida, Laura, and this 1856 Storm*, NOLA.COM (Aug. 29, 2021, 6:45 PM), https://www.nola.com/news/hurricane/article_2dbc8840-0910-11ec-b531-7f4e5a8cee6e.html [https://perma.cc/2YD4-9NHP].

150. *Id.*

an immediate danger to public safety is reasonable today even before the forecast has been made.

Further, interpreting immediate danger in the context of modern ecological conditions would not mean that any levee or public works construction could utilize appropriation instead of expropriation because the police power is subject to its own limitations. When a court analyzes whether a statute or ordinance is a valid exercise of the State's police power, it must determine if "any set of facts can be conceived from which it could be concluded that there is a reasonable relationship between its provisions and the public health, safety, morals, or general welfare."[151] Thus, Wolfe's fear that expanding appropriation beyond the riparian servitude would allow the State to "lower the cost of new highways and other public improvements simply by decreeing that all lands necessary for these projects shall henceforth be 'appropriated' at their assessed value" is not a fair representation of the police power.[152]

For these reasons, hurricane protection can be a constitutional and prudent use of the appropriation power. The problem is that the legislature added the hurricane-protection servitude to Civil Code article 665, which previously only contained the riparian servitude.[153] This is confusing because it is unclear whether it is an additional and separate legal public servitude or whether it should be read together with the riparian servitude and its limitations, which are different than those of general appropriations.[154]

As previously discussed, the reserved right or nonsurrender-of-title theories are insufficient to justify the historical—or current, considering appropriations of batture[155]—formulations of appropriations, because they do not justify a government action without just compensation.[156] For that, the police power provides the only suitable explanation. But, these theories do provide an explanation for the very particular geographic limitations of

151. LaSalle v. Iberia Par. Council, 741 So. 2d 812, 817 (La. Ct. App. 3d Cir. 1999).

152. Wolfe, *supra* note 9, at 286; *see also* Ar. La. Gas Co. v. City of Minden, 341 So. 2d 607, 609–10 (La. Ct. App. 2d Cir. 1977) ("To say that the enforcement of a simple regulatory provision constitutes a proper exercise of the police power of the State would be to extend the right of use of such a potentially dangerous power beyond the limits of reason and the necessities of public purpose. . . . The City may not resort to the exercise of its police power in expanding natural drains to avoid paying compensation for the property taken.").

153. Act No. 776, 2006 La. Acts.

154. *See* discussion *supra* Part I.

155. *See* discussion *supra* note 36.

156. *See* discussion *supra* Part I.

the riparian servitude.[157] Specifically, that only properties that were riparian at the time of severance from the sovereign are burdened with the servitude. This cannot derive from the police power because burdening formerly riparian lands and not burdening new riparian lands looks like an arbitrary manner of protecting the general welfare. Nonetheless it is the law. Thus, the riparian servitude should be understood as intimately connected with the State's powers of appropriation but not its only incarnation.

According to this logic, the hurricane-protection servitude and riparian servitude are separate vehicles for the State's powers of appropriation. Reading the two servitudes together would suggest either that the hurricane-protection servitude is subject to the same limitations as the riparian servitude, making it innately invalid, or that the amendment effectively overrules the limitations of the riparian servitude. Ultimately, the principal question in cases of statutory interpretation is legislative intent. Unfortunately, there is no evidence that the legislature was considering either scenario—but it should have been. The hurricane-protection servitude should have been clearly delineated as an additional levee servitude and vehicle for the State's appropriation power separate from the riparian servitude for it to have the intended impact of improving the state's flood protection system.

IV. CAPITALIZING ON THE FULL BENEFITS OF APPROPRIATION

Protection of private property interests is only a logical concern so long as that property remains protected from environmental destruction. Without any apparent disdain for private property rights, the State has acted in explicit acknowledgment of this fact. For example, in 2009, the Louisiana legislature recognized this when it enacted Louisiana Revised Statutes § 49:214.5.6, which states:

> The full police power of the state shall be exercised to address the rapid, ongoing, and catastrophic loss of coastal Louisiana, and in order to devote the maximum resources of the state to meet this immediate and compelling public necessity, compensation to be paid for property taken for public purposes related to coastal wetlands conservation, management, preservation, enhancement, creation, or restoration shall . . . be governed by and strictly limited to the amount and circumstances required by the Fifth Amendment of the Constitution of the United States of

157. *Id.*

America.[158]

This provision served to cap the compensation required for expropriations at fair market value instead of compensation to the full extent of loss as the Louisiana Constitution dictates, which can sometimes be higher than fair market value.[159] In doing so, the State admitted that it should be capitalizing on all of the benefits of its police power and not paying more than absolutely necessary to meet the immediate and compelling public interest of responding to environmental threats. And yet, State agents continue to restrict one of its most traditional exercises of police power and require compensation where it is arguably unnecessary or perhaps even unconstitutional.

A. Is Compensation Under the State's Police Power an Unconstitutional Donation?

Article VII, section 14 of the Louisiana Constitution prohibits the State from loaning, pledging, or donating any funds, credit, property, or things of value of the state or any of its political subdivisions.[160] This provision was not included in Louisiana's first constitution, adopted upon statehood in 1812; instead, it first appeared in 1845 in response to—like in many other states—the Panic of 1837.[161] In the early ninetieth century, many states, beginning with New York, were over-ambitious with financing projects for canals, railroads, and other projects with state funds. As a result, from 1841 to 1842, nine states defaulted on bonds and found themselves in sticky financial situations.[162]

The constitutional prohibition against donations of state property is relevant to Louisiana's power of appropriation and current implementation of the levee servitudes because the problem from the 1800s is still a problem today: there are too many projects that need building and not enough money for them all. Therefore, the State should not—and is not constitutionally permitted to—expend funds where it is not absolutely necessary.[163] Although the riparian servitude existed prior to the constitutional ban on state donations, compensation for appropriations did not. As noted, the ban has applied since 1845, while compensation upon

158. LA. REV. STAT. § 49:214.5.6(A)–(B) (2023).
159. *Id.*
160. LA. CONST. art VII, § 14.
161. Lee Hargrave, *Limits on Borrowing and Donations in the Louisiana Constitution of 1975*, 62 LA. L. REV. 137, 137 (2001).
162. *Id.* at 138.
163. LA. CONST. art VII, § 14.

the exercise of the riparian servitude did not enter the books until 1921.[164] Therefore, the adequacy of the current compensation scheme must be considered in the context of the ban on state donations.

Attorney General opinions, as opposed to jurisprudence, have dominated the guidance on what constitutes an unconstitutional state donation; nonetheless, there have been a couple critical court decisions over the years. There was minimal litigation based on the 1921 Louisiana Constitution's provision against State donations.[165] The few cases that do exist primarily held that the constitutional provision was "violated whenever the state or a political subdivision [sought] to give up something of value when it [was] under no legal obligation to do so."[166] This legal-obligation standard was also applied to the 1974 Constitution by *City of Port Allen v. Louisiana Risk Management*, which remained Louisiana's governing case on whether a state expense was a prohibited donation from 1983 to 2006.[167] One could argue that requiring compensation under Louisiana Revised Statutes § 38:301 is a sufficient legal obligation to negate the prohibition on donations as it applies to appropriations under the levee servitude. However, in 2006, the Louisiana Supreme Court abandoned the legal-obligation component from *Port Allen* and reconceived the standard for a prohibited donation to one focused on non-gratuitous, reciprocal obligations.[168] In what has come to be known as the *Cabela's* case,[169] the Court outlined a three-prong analysis for whether the transfer of public property would be prohibited without a cooperative endeavor agreement: (1) there must be a public purpose for the transfer which comports with the governmental purpose for which the public entity has legal authority to pursue; (2) the transfer, taken as a whole, does not

164. *See* discussion *supra* Part I.

165. *See* City of Port Allen v. La. Risk Mgmt., 439 So. 2d 399, 401 (La. 1983) ("Although subject to interpretation on numerous occasions by the Attorney General, the 1921 provision also produced little relevant jurisprudence."); *but see* Town of Brusly v. W. Baton Rouge Par. Police Jury, 283 So. 2d 288 (La. Ct. App. 1st Cir. 1973); Beaird-Poulan, Inc. v. Dep't of Highways, State of La., 362 F. Supp. 547 (W.D. La. 1973); Dep't of Highways v. Sw. Elec. Power Co., 145 So. 2d 312 (La. 1962); State Through Dep't of Highways v. Sw. Elec. Power Co., 127 So. 2d 309 (La. Ct. App. 2d Cir. 1961).

166. *Port Allen*, 439 So. 2d at 401.

167. *Id.*, *abrogated by* Bd. of Dirs. of Indus. Dev. Bd. v. All Taxpayers, Prop. Owners, Citizens of City of Gonzales, 938 So. 2d 11 (La. 2006).

168. Memorandum from the La. Legislative Auditor on Cabela's Test and Cooperative Endeavor Agreements (Sept. 2, 2022).

169. Note, this case did not involve an appropriation under the riparian servitude but rather an expropriation to promote economic development through the development of a Cabela's Retail Center and Sportsman Park Center.

appear to be gratuitous (there should be real reciprocal obligations between the parties to the transfer); and (3) the public entity has a demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the transfer.[170]

The first prong of the test is likely satisfied by any appropriation for levee purposes. One might conceivably argue against this fact suggesting that a levee has a limited scope of benefits to only those in its vicinity and sometimes may even only provide protection for a single landowner. However, the scope of a levee's impact does not change the fact that levee construction is typically for the intended purpose of benefitting the public and often accomplishes this purpose. Although not controlling authority, in *Brewer v. State*, the Alaska Supreme Court ruled on the issue of public purpose where the State conducted a burnout on private property to control a wildfire.[171] There, the Court held that "implicit in these provisions is the accepted wisdom that fighting wildfires, even on private property, is of benefit to the public as a whole regardless of whether only individual landowners are immediately benefitted."[172] The same could be said of flood protection in Louisiana.[173]

The second prong of the test is strongly emphasized by the courts and is questionable in the case of compensation for riparian servitude appropriations. The test requires that the transfer not appear to be gratuitous.[174] Notably, when compensation was first provided for in 1921 in the amount of the previous year's valuation, the courts expressly referred to such as a "mere gratuity."[175] Recall, at that time, although the *Cabela's* test was not in effect, the ban on state donations was. Now, payment for appropriations is no longer referred to as a *mere gratuity*, but does that make it any less gratuitous? If anything, it appears more gratuitous now as the payment level has increased while what the State receives in return has not changed.

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170. *Bd. of Dirs. of Indus Dev. Bd.*, 938 So. 2d 11.

171. Brewer v. State, 341 P.3d 1107 (Alaska 2014).

172. *Id.* at 1112.

173. *See* Zenor v. Par. of Concordia, 7 La. Ann. 150, 150 (La. 1852) ("In this State, so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi river, to use of the space of ground necessary for the making and repairing of the public levees and roads.").

174. *Bd. of Dirs. of Indus Dev. Bd.*, 938 So. 2d 11.

175. *See, e.g.*, Richardson & Bass v. Bd. of Comm'rs of the Orleans Levee Dist., 77 So. 2d 32, 35 (La. 1954); Mayer v. Bd. of Comm'rs for Caddo Levee Dist., 150 So. 295, 296 (La. 1933); Boyce Cottonseed Oil Mfg. Co. v. Bd. of Comm'rs of Red River, Atchafalaya and Bayou Boeuf Levee Dist., 107 So. 506, 510 (La. 1925).

Finally, the third prong of the *Cabela's* test is most problematic for the current compensation framework for the levee servitudes. The test requires that there be a "demonstrable, objective, and reasonable expectation of receiving at least equivalent value in exchange for the transfer."[176] Currently, expropriations and appropriations demand the same payment upon exercise.[177] So, for the same amount as the State pays for appropriating land which results in no transfer of title, it could expropriate the land and acquire all rights of ownership. Therefore, the reasonable expectation in return for that value should be title to the land—a benefit which the State does not receive for appropriations. For these reasons, it is possible that compensating landowners upon the exercise of appropriations under the riparian servitude is an unconstitutional donation of state funds.

However, while the value of compensation due for levee appropriations is exclusively governed by Louisiana Revised Statutes § 38:301, since 1974, it is arguably provided for in general in the Louisiana Constitution.[178] Therefore, the seeming contradiction between these provisions would be assessed under the law of constitutional conflicts. This area of law is relatively new and is applied in different ways by different jurisdictions. In the United States, holding constitutional amendments unconstitutional is generally disfavored.[179] As such, "[c]onstitutional provisions are only considered irreconcilably inconsistent when they 'are related to the same subject, are adopted for the same purposes, and cannot be enforced without material and substantial conflict.'"[180] Given that the two provisions have co-existed with little conflict or criticism for decades, it is unlikely a court would hold compensation for appropriations unconstitutional. Nevertheless, the fact that the legislature enacted and maintained a possible constitutional conflict across several versions of the Louisiana Constitution is emblematic of the State's occasional misunderstanding and misuse of its power of appropriation.

176. Memorandum from the La. Legislative Auditor on Cabela's Test and Cooperative Endeavor Agreements, *supra* note 168, at 4.

177. LA. REV. STAT. § 38:301 (2023).

178. LA. CONST. art. VI, § 42.

179. Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion*, 86 IND. L.J. 713, 719 (2011).

180. *Id.*

B. If Not Unconstitutional, Is It Required?

The Louisiana Supreme Court and U.S. Supreme Court have repeatedly upheld the constitutionality of the riparian servitude and its many iterations of compensation or lack thereof.[181] To this day, the batture exemption, which offers no compensation or damages for property use or injury, remains constitutional.[182] Just compensation is a standard associated with the State's eminent domain power, not police power.[183] Exercises of police power generally require no compensation.[184] As discussed, the limitations and requirements that govern eminent domain do not control exercises of appropriation. Therefore, the state legislature's will is the only legal basis requiring compensation for appropriations. The legislature could easily amend this requirement without disruption to any other aspects of Louisiana's legal regime. In fact, because article VI, section 42 of the Louisiana Constitution only states that levees should "be paid for as provided by law" and that "such payment shall not exceed the amount of compensation authorized under [a]rticle I, [s]ection 4(G)[,]" but it does not set a minimum compensation level, the legislature could accomplish this without a constitutional amendment, only amending Louisiana Revised Statutes § 38:301.

Furthermore, the evolution of Louisiana's compensation framework for appropriations, and levee construction under the riparian servitude in particular, was based upon social issues that the courts and legislature accepted as unfair at the time, not on an evolution in the legal refinement of appropriations or the servitude. Today, given the threat to coastal Louisiana from storms and flooding, the number of projects necessary to adequately protect vulnerable communities, and the limited availability of funds and other resources to complete those projects, from a public policy perspective, the scales have shifted. Now, the community at large and individual landowners are best served when the state spends its limited funds where it is actually required by immutable law. If the State has to pick and choose which projects it can complete based on funds, landowners are at risk of losing more money should a storm come through than what they would gain in compensation. Thus, reducing or eliminating the compensation requirement for appropriations under the levee servitudes would be consistent with past evolutions of the power and in the best interest of the state and its residents.

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181. *See, e.g.*, Eldridge v. Trezevant, 160 U.S. 452 (1896); DeSambourg v. Bd. of Comm'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

182. LA. CONST. art. VI, § 42.

183. U.S. CONST. amend. V.

184. Avenal v. State, 886 So. 2d 1085, 1107 n.28 (La. 2004).

C. A Regulatory Framework Without Compensation Would Not Preclude Damages

Exercising the levee servitudes without compensation would not let the State off the hook for damages. As happens with the terms *expropriation* and *taking*, *compensation* and *damages* are often used interchangeably, concealing their distinction. According to Black's Law Dictionary, *compensation*, on the one hand, refers to "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages."[185] Salary and wages are specifically noted as examples of compensation.[186] *Damages*, on the other hand, refer to "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury."[187] The distinction is not inconsequential. Compensation is owed as a matter of fact in exchange for something, without the necessity of an injury. In contrast, damages are assessed after an injury has occurred.

As related to appropriations, the State should not be obligated to compensate landowners purely for exercising a servitude because it does not receive any benefit in return that it does not already possess. Nonetheless, these projects can, although do not necessarily, cause injury to private property. Limiting payment upon appropriation to damages for injuries and eliminating compensation would save the State money that it could reallocate to other projects. In this case, critical projects are constructed with minimal obstacles, but landowners still receive payment for injury in addition to the direct benefits they receive from the protection of a levee.

CONCLUSION

In many ways, Louisiana is poised for a more precarious climate-adaptation battle than most other states. Nonetheless, Louisiana continues to overlook what could and should be a vital instrument for constructing essential, life-saving infrastructure. To many residents, appropriations under the state's levee servitudes are at best a quirky remnant of the state's French and Spanish heritage and at worst a blatant violation of basic constitutional rights. The State has done little to clarify these misperceptions and has in fact perpetrated a systematic dismantling of its own power over the years—but not irreversibly. Such simple acts as increased intentionality about what words are used to describe State

185. *Compensation*, BLACK'S LAW DICTIONARY (11th ed. 2019).
186. *Id.*
187. *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

actions could be the difference between whether an entire community is saved or wiped off the map.

Thinking bigger, the legislature should at least revisit the compensation framework and scope of application for appropriations to ensure they still align with the purpose, reach, and limitations of the power and the needs and capacity of the state. If Louisiana wants to have a fighting chance against rising water, sinking lands, and stronger storms, it must use every tool at its disposal to its full capacity, including appropriation. Such a move would not prioritize the public or the state over private landowners—it would benefit everyone.