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***Boudreaux v. Cummings*: Time to Interrupt an Erroneous Approach to Acquisitive Prescription**

INTRODUCTION

In rural Vermilion Parish, the seasonal fall sight is the hustle of harvest time. After months of planting crops and watching them grow, Farmer Boudreaux was ready to reap the fruits of his labor. As he had done for the past 50 years, Boudreaux had his plans down to a methodical science. His combines and tractors would enter his right-of-way, travel through his neighbor's land, and arrive at his fields. When harvest day arrived, much to Boudreaux's surprise, the gate to the right-of-way had been chained and locked shut.¹ After using the right-of-way continuously for so long, Boudreaux always believed that he had a legal right of use. However, four Louisiana Supreme Court justices disagreed and denied any kind of legal access, despite Boudreaux's long use and adamant belief of his right of use.

Keeping with civilian tradition, the Louisiana Civil Code, which governs property disputes like Boudreaux faced, frames legal principles in general terms,² and problems often arise in new areas of the law in which the Civil Code provides little or no guidance. In the 1977 revision of the Civil Code, acquisitive prescription, known in the common law as "adverse possession,"³ applied for the first time to apparent, discontinuous servitudes—a legal right to, among other things, use a portion of land belonging to another.⁴ This legal right is the right that Boudreaux believed he held.⁵ The Civil Code provides little guidance for this sweeping change

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1. *Boudreaux v. Cummings*, 167 So. 3d 559, 560–61 (La. 2015) (describing the facts of the case similar to this opening paragraph).

2. 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, 793 (2005).

3. N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265, 1280 (1994) ("Acquisitive prescription is a mode of acquiring ownership by possession for a period of time. Similar to acquiring title through adverse possession under the statute of limitations.").

4. LA. CIV. CODE art. 646 (2017).

5. The effect of the change in the law was not made retroactive, so time could not begin accruing for acquisitive prescription of an apparent, discontinuous predial servitude until the effective date of the change. Thus, if there is no good faith or just title leading to abridged acquisitive prescription, the soonest someone could claim ownership through acquisitive prescription would have been 30 years from the 1977 revision. LA. CIV. CODE art. 740 cmt. a.

and left a legal quandary lying dormant for over 30 years.⁶ *Boudreaux v. Cummings* led the Louisiana Supreme Court to confront the issue of acquisitive prescription of a predial servitude,⁷ but the Court failed to apply proper civilian analyses and continued to leave the state of the law unclear.

Acquisitive prescription, or the ability to acquire a real right over a specified period of time,⁸ should have allowed Boudreaux to acquire a predial servitude of legal use over a portion of his neighbor's land.⁹ A divided Supreme Court held, however, that Boudreaux did not acquire a predial servitude because "acts of simple tolerance" by his neighbors represented tacit permission.¹⁰ As the Court provided no clear explanation of those acts, its incomplete analyses resulted in two problems. First, the Court's plurality and concurring justices ignored the plain language of the Civil Code articles establishing burden-shifting presumptions in favor of possessors, altering a previously settled area of the law.¹¹ Second, and more importantly, the Court unnecessarily confused the issue of acquisitive prescription of predial servitudes through an improper civilian approach. By failing to define terms and engage in a complete analysis, the justices only recited the relevant Code articles while misapplying civilian methodology.

Part I of this Comment provides background information on the fundamentals of proper civilian interpretation of the Civil Code, which contains the law on predial servitudes, acquisitive prescription, and possession. Putting these foundational principles into the context of a specific property law conflict, Part II explains the Louisiana Supreme Court's decision in *Boudreaux v. Cummings*, revealing the problems that arise from the Court's failure to distinguish between a servitude and the underlying land. Part III explores how the Court's application of civilian methods were incomplete. Part IV presents both a retrospective solution and a prospective one for future cases despite the improper civilian approach used in *Boudreaux*. It advocates for Louisiana courts to return to their civilian roots and approach confusing legal issues with the clarity and categorization of civilian deductive reasoning.

6. A. N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 527 (1991) [hereinafter *Possession*].

7. *Boudreaux v. Cummings*, 167 So. 3d 559, 561 (La. 2015).

8. LA. CIV. CODE art. 3446.

9. *Id.* art. 646 (defining a predial servitude); *id.* art. 705 (defining a servitude of passage).

10. *Boudreaux*, 167 So. 3d at 562–64.

11. *Id.* at 565 (Knoll, J., dissenting).

I. BACKGROUND: THIS LAND IS YOUR LAND, THIS LAND IS MY LAND?

Unlike the 49 common law states, the sources of law in a civilian jurisdiction like Louisiana¹² are legislation and custom.¹³ Property law is specifically within the private law domain of the Louisiana Civil Code, which governs things and their ownership.¹⁴ Although Louisiana law admittedly has a distinct common law influence, substantive private law, including predial servitudes, acquisitive prescription, and possession, is still firmly within the ambit of the civil law.¹⁵

Any well-reasoned analysis must begin with a strong foundation. Louisiana judges readily have this foundation, the Civil Code, at their disposal, “provid[ing] a solid base from which courts work to decide cases.”¹⁶ Presenting many property issues and arguments of ownership originating deep within the framework of the Civil Code, *Boudreaux* is the perfect case to demonstrate the importance of beginning any civilian analysis with the heart of the civil law—the Code.

A. *Servitudes at Your Service*

As the primary source of legislation, the Civil Code is the starting point for any examination of predial servitudes,¹⁷ acquisitive prescription,¹⁸ and possession. The Code provides that a predial servitude is “a charge on a servient estate for the benefit of a dominant estate,” with the two estates

12. Christopher Osakwe, *Louisiana Legal System: A Confluence of Two Legal Traditions*, 34 AM. J. COMP. L. SUPP. 29, 30 (1986).

13. LA. CIV. CODE art. 1; *id.* art. 2 (“Legislation is a solemn expression of legislative will.”); *id.* art. 3 (“Custom results from practice repeated for a long time and generally accepted as having acquired the force of law.”). The two sources of law in common law jurisdictions tend to be statutory law and case law developed by precedent. *See* Giacomo A.M. Ponzetto & Patricio A. Fernandez, *Case Law versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 411 (2008).

14. Algero, *supra* note 2, at 793.

15. Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1075 (1988) (“The modern Louisiana legal system is fundamentally a derivative common law system, albeit with a civil law thicket.”).

16. Algero, *supra* note 2, at 778.

17. Kinsella, *supra* note 3, at 1291 (“A predial servitude is a charge on a servient estate for the benefit of a dominant estate. Similar to an appurtenant easement.”).

18. *Id.* at 1280 (“Acquisitive prescription is a mode of acquiring ownership by possession for a period of time. Similar to acquiring title through adverse possession under the statute of limitations.”).

having different owners.¹⁹ For designation and categorization purposes, a predial servitude is an incorporeal immovable,²⁰ which grants a distinct right that the dominant estate owner is entitled to exercise.²¹ There are many different types of predial servitudes that estate owners may establish, but the most relevant in light of *Boudreaux* is a servitude of passage, explicitly recognized by the Civil Code as “the *right* for the benefit of the dominant estate whereby persons, animals, utilities, or vehicles are permitted to pass through the servient estate.”²²

A predial servitude may be established in one of three ways: juridical act, prescription, or destination.²³ The acquisition of a servitude by prescription, however, only applies to apparent servitudes.²⁴ Apparent servitudes, as contrasted from nonapparent servitudes, include those perceived “by exterior signs, works, or constructions; such as a roadway.”²⁵ The 1977 revision of the articles on acquisitive prescription distinctly changed the law by applying prescription to apparent servitudes broadly, in contrast with only continuous apparent servitudes.²⁶ After the revision, prescription now specifically applies to “rights of passage on

19. LA. CIV. CODE art. 646 (2017). The “dominant estate” is the one that receives the benefit of the servitude. *Id.* art. 647. The “servient estate” is the one that owes the duty of the servitude to the dominant estate. *Id.* art. 651. In this context, an “estate” means “a distinct corporeal immovable” that can be tracts of land, buildings, timber estates, or individual apartments. *Id.* art. 646 cmt. b.

20. *Id.* art. 649. An “incorporeal” is something that “ha[s] no body, but [is] comprehended by the understanding.” *Id.* art. 461. “Immovables” are things like tracts of land and their component parts, buildings and their component parts, and standing timber. *Id.* art. 462–67. Thus, “incorporeal immovables” are “[r]ights and actions that apply to immovable things.” *Id.* art. 470.

21. *Id.* art. 476 (providing that a predial servitude is a right in a thing).

22. *Id.* art. 705 (emphasis added to underscore that a predial servitude is a “right”).

23. *Id.* art. 654 (stipulating that these three ways are specifically limited to conventional and voluntary, rather than legal, servitudes). By “juridical act,” the article refers to the “establishment of a predial servitude by title [as] an alienation of a part of the property.” *Id.* art. 708. By “destination,” the article refers to the creation of a servitude stemming from “a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners,” and that relationship becomes an apparent servitude as a default rule “[w]hen the two estates cease to belong to the same owner.” *Id.* art. 741.

24. *Id.* art. 740 (omitting any reference to the ability to acquisitively prescribe on a nonapparent servitude).

25. *Id.* art. 707.

26. *Id.* art. 740 cmt. a.

land,”²⁷ which was the issue in *Boudreaux*.²⁸ Acquisitive prescription on an apparent, but discontinuous, servitude consequently could not begin to run until January 1, 1978,²⁹ so any examination of the requisite elements of possession to determine whether prescription has taken place must begin with that date.

B. Possession: The Foundation of Prescription

The law of possession underlies the inquiry into whether a person like Boudreaux acquired a real right through acquisitive prescription. The Civil Code defines possession as “the detention or enjoyment of a *corporeal* thing,” whether movable or immovable, that someone exercises or has someone else exercise on his or her behalf.³⁰ One element of the definition that fundamentally contradicts the definition of a predial servitude is that possession requires an underlying corporeal, or physical, thing.³¹ An adjustment is necessary to fit this definition to an incorporeal—nonphysical—thing such as a predial servitude.³²

The Civil Code provides this adjustment by establishing an analogous concept, “quasi-possession,” to apply to an incorporeal servitude: “The exercise of a real right, such as a servitude, with the intent to have it as one’s own is quasi-possession.”³³ Notwithstanding the difference in terminology, all of the other articles are to apply to quasi-possession by analogy.³⁴

27. Christopher M. Hannan, *Prescription Lenses: How Louisiana Courts Should Apply the Revised Articles Governing Thirty-Year Acquisitive Prescription of Apparent Servitudes*, 53 LOY. L. REV. 937, 939–40 (2007).

28. *Boudreaux v. Cummings*, 167 So. 3d 559, 560 (La. 2015).

29. Comment a states, “[A]pparent servitudes may be acquired by prescription or by destination of the owner, even though they might be considered discontinuous under the regime of the 1870 Code and thus insusceptible of such modes of acquisition.” LA. CIV. CODE art. 740 cmt. a.

30. *Id.* art. 3421 (emphasis added).

31. JOHN RANDALL TRAHAN, LOUISIANA LAW OF PROPERTY: A PRÉCIS 175 (2012).

32. LA. CIV. CODE art. 461 (“Corporeals are things that have a body, . . . and can be felt or touched. Incorporeals are things that have no body, but are comprehended by the understanding.”). This Code article explains the fundamental difference between corporeal and incorporeal things. Because of the presupposition that possession requires a corporeal thing, the fundamental difference between corporeal and incorporeal things makes the conceptualization of possession itself impossible. An adjustment to provide for an incorporeal thing is necessary. TRAHAN, *supra* note 31, at 175–76.

33. LA. CIV. CODE art. 3421.

34. *Id.*

Beyond this one distinction, however, the Civil Code is silent on how to put the analogy into actual practice and does not offer any special rules with which judges and practitioners should proceed.³⁵ Using doctrine to help expand the skeletal principles outlined by the Civil Code, the Dictionary of the Civil Code defines quasi-possession as “that *possession* . . . which leads to the acquisition of a real right other than ownership . . . by performing, for a certain time, acts which are the same as those of the exercise of the real right in question.”³⁶ This definition draws out the analogy by emphasizing how to apply the constitutive elements of possession to quasi-possession.

For possession to be legally effective, it must include the two component elements of *animus*, which is a state of mind, and *corpus*, which is engaging in certain activity.³⁷ The Civil Code defines corpus as “the exercise of physical acts of use, detention, or enjoyment over a thing.”³⁸ With this emphasis on physical acts, the codal definition of corpus needs an adjustment to be applicable to incorporeal things. Using the method of analogy as directed by the Civil Code, corpus of an incorporeal thing, such as a servitude, may instead be termed “quasi-corpus” and would include “the exercise of acts of use or enjoyment of the rights afforded by that servitude.”³⁹ With this emphasis on using the real right itself, as opposed to physical acts on the thing, the definition of quasi-corpus retains the basic idea of use and enjoyment. By making a direct connection to the right itself, the definition makes it easier to conceive of an assertion of mental ownership over something that does not exist in space.

Once a potential possessor establishes corpus, the Civil Code further requires a necessary state of mind, or *animus*, for effective possession. For *animus* to exist, “one must intend to possess as owner.”⁴⁰ Although the definition initially appears broad enough to apply to both corporeal and incorporeal things, the article fails to clarify how one can “own” a predial servitude, which itself is a right distinct from ownership.⁴¹ Adapting *animus* to an incorporeal thing through quasi-*animus*, “one must intend to

35. *Possession*, *supra* note 6, at 527.

36. GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE 467* (Alain Levasseur & Marie-Eugénie Laporte-Lageais trans., 2014).

37. *Possession*, *supra* note 6, at 524–25.

38. LA. CIV. CODE art. 3425.

39. TRAHAN, *supra* note 31, at 176.

40. LA. CIV. CODE art. 3424. “[O]ne who takes corporeal possession of a thing is presumed to have the intent to own it.” *Id.* art. 3424 cmt. b.

41. LA. CIV. CODE art. 476.

have the right or rights afforded by that servitude as one's own."⁴² Because the idea of a nonphysical thing is difficult to grasp, the emphasis of quasi-animus involving the intention of holding the real right at issue helps to clarify the concept. For both animus and quasi-animus, the Civil Code provides a rebuttable presumption that a possessor has the requisite animus as long as that person did not begin to possess for someone else.⁴³ The limitation on that presumption introduces precarious possession, which occurs when a person begins possession of a thing with the permission of the supposed owner.⁴⁴

C. Like Oil and Water: Precarious Possession and Acquisitive Prescription

To be effective, possession must include both of the requisite elements of corpus and animus.⁴⁵ If there is no animus, then the acts "take place merely as acts of toleration."⁴⁶ The absence of animus or the admittance of proof that possession began on someone else's behalf implicates the concept of precarious possession, which is insufficient for acquisitive prescription.⁴⁷ The Civil Code defines precarious possession as "[t]he exercise of possession over a thing with the permission of or on behalf of the owner or possessor."⁴⁸ The precarious possessor in turn suffers from a legal presumption that he or she is presumed "to possess for another although he may intend to possess for himself."⁴⁹ This presumption is an important part of defeating acquisitive prescription and can be fatal to both a supposed possessor and quasi-possessor.⁵⁰

42. TRAHAN, *supra* note 31, at 176.

43. "One is presumed to intend to possess as owner unless he began to possess in the name of and for another." LA. CIV. CODE art. 3427. The presumption helps ameliorate the problem that a person's subjective state of mind may be difficult to prove.

44. *Id.* arts. 3437–3440.

45. 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW 742 (La. State Law Inst. trans., 2005).

46. *Id.*

47. LA. CIV. CODE arts. 3437 (defining precarious possession), 3477 (explaining precarious possessors cannot acquisitively prescribe on a thing).

48. *Id.* art. 3437.

49. *Id.* art. 3438.

50. *Boudreaux v. Cummings*, 167 So. 3d 559, 562 (La. 2015) (explaining that if *Boudreaux* suffered from the legal presumption, possessed precariously, and had not followed the requisite steps to cure that precariousness, he could never prescribe).

The Civil Code is clear that precarious possession is incompatible with the concept of acquisitive prescription, stating that “[a]cquisitive prescription does not run in favor of a precarious possessor or his universal successor.”⁵¹ Assuming that there is true possession with both corpus and animus, possessors may be able to use acquisitive prescription as “a mode of acquiring ownership or other real rights by possession for a period of time.”⁵² There are two types of acquisitive prescription for immovable things, abridged and unabridged.⁵³ For abridged acquisitive prescription, possessors and quasi-possessors may acquire ownership or other real rights after a delay of ten years.⁵⁴ This abridged acquisitive prescription requires both good faith and just title.⁵⁵ For unabridged acquisitive prescription, possessors and quasi-possessors may acquire ownership or other real rights after a delay of 30 years with no requirement of good faith or just title.⁵⁶ Assuming all requirements are met, a supposed possessor or quasi-possessor may begin to make a case for acquisitive prescription.

D. Putting It All Together: Judges as Methodological Mixers

To make a determinative ruling on whether rights have been validly acquired through acquisitive prescription, judges must utilize the various interpretive tools and methodology provided in the civilian tradition. A proper use of legal methodology is key for Louisiana judges to take the basic general principles of the law and apply them to concrete situations.⁵⁷ Although enacted law is always the starting point in civilian methodology, there are a variety of secondary sources that can aid judges in interpretation. These secondary sources include commentary, doctrine, and jurisprudence.⁵⁸ Particularly in the area of property law, judges must use civilian methods of interpretation as the private law contained in the Civil Code remains civilian at its core.⁵⁹ If the legislature has written the laws in a traditional civilian style, the only proper way to interpret and apply them correctly is in a similar fashion. Such faithfulness to the civilian tradition and an

51. LA. CIV. CODE art. 3477.

52. *Id.* art. 3446.

53. *See id.* arts. 3473, 3486.

54. *Id.* art. 3473.

55. *Id.* art. 3475.

56. *Id.* art. 3486.

57. Algero, *supra* note 2, at 777.

58. Albert Tate, Jr., *Civilian Methodology: Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673, 680 (1970).

59. Osakwe, *supra* note 12, at 38.

acknowledgment of the importance of the Civil Code follow directly from “the judge’s constitutional oath to support the law.”⁶⁰

The first step in civilian methodology is consultation of the Civil Code itself.⁶¹ Property law retains the civilian characteristics of generalized wording that “provides a solid base from which courts work to decide cases.”⁶² If ambiguities remain after legislative application and interpretation, the next step is consultation of doctrine. Doctrine represents an interpretation of the law itself and of its rationale, as opposed to the common law consultation of case law, which emphasizes facts over law.⁶³ Doctrine is a critical element of the civilian approach because of its ability to comment on “the rules and the principles . . . of impure elements, and thus provide both the practice and the courts with a guide for the solution.”⁶⁴ Louisiana judges confronting issues of substantive private law have these interpretive tools at their ready disposal.

II. *BOUDREAUX V. CUMMINGS*: LEGAL BREAKTHROUGH OR BREAKDOWN?

The Louisiana Supreme Court’s review of *Boudreaux v. Cummings* could have been the perfect case for a proper application of the Civil Code and the civilian methods of interpretation. Confronting an area of property law within the Civil Code, the Court had the opportunity to use its civilian tools to resolve whether an incorporeal predial servitude was created over a corporeal piece of land.⁶⁵ Armed with the Civil Code directive to analogize the law of acquisitive prescription and possession to predial servitudes, the justices confronted this novel issue in *Boudreaux v. Cummings*.

A. *Facts and Procedural History*

In rural Vermilion Parish, two adjacent landowners, John Boudreaux and Paul Cummings, were neighbors.⁶⁶ A pathway over Cummings’s land

60. James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 17 (1993).

61. *Id.* at 10.

62. Algero, *supra* note 2, at 778.

63. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 701 (2000).

64. *Id.*

65. *Boudreaux v. Cummings*, 167 So. 3d 559, 560 (La. 2015).

66. *Id.*

connected Boudreaux's land to one of the nearby public roads.⁶⁷ Boudreaux claimed that he and his ancestors-in-title had used the path since at least 1948 "to transport farm equipment, to get to and from town for personal errands, and for convenient access to the adjacent road."⁶⁸ Although Cummings's ancestors-in-title, the Weills, were aware of Boudreaux's use, they never prevented it.⁶⁹ In fact, the testimony indicated that both parties used the path and that Boudreaux and the Weills had worked together in moving the path to a more convenient location in 1969.⁷⁰ Boudreaux and others acting on his behalf made continuous use of the path until Cummings locked the gate in 2012, preventing any use.⁷¹ Boudreaux subsequently brought suit, claiming the acquisition of a predial servitude of passage.⁷²

The trial court ruled in Boudreaux's favor, claiming that he had acquired a predial servitude of passage through acquisitive prescription of 30 years.⁷³ The judge "found precarious possession was irrelevant to a discussion of ownership of an incorporeal immovable, such as a predial servitude."⁷⁴ The appellate court affirmed the judgment of the trial court, finding that "there was adequate evidence for the trial court to conclude that Boudreaux was using the right of way on his own behalf, rather than as a precarious possessor."⁷⁵ The dissenting judge, however, reasoned that Boudreaux's use was premised on permission from the Weills, meaning prescription could not run in his favor as a precarious possessor.⁷⁶ This divergence at the appellate level foreshadowed the divide in opinions that would occur at the Louisiana Supreme Court.⁷⁷

67. *Id.*

68. *Id.*

69. *Id.* at 562.

70. *Id.* at 560, 571.

71. *Id.*

72. *Id.*

73. *Id.* at 560.

74. *Id.* at 560–61.

75. *Boudreaux v. Cummings*, 138 So. 3d 797, 799 (La. Ct. App. 2014), *rev'd*, 167 So. 3d 559 (La. 2015).

76. *Id.* at 801 (Amy, J., dissenting).

77. The resolution of *Boudreaux* by the Court resulted in a plurality opinion authored by Justice Clark, a concurring opinion authored by Justice Weimer, a dissenting opinion by Justice Knoll, and a dissenting opinion by Justice Crichton. *See generally* *Boudreaux v. Cummings*, 167 So. 3d 559 (La. 2015).

B. The Right-of-Way: A Not So Apparent Servitude

In *Boudreaux*, the Louisiana Supreme Court first addressed whether Boudreaux had acquired a predial servitude of passage by acquisitive prescription of 30 years.⁷⁸ If Boudreaux did not begin his possession adversely, then the next issue became whether he had given actual notice to Cummings, or to Cummings's ancestor-in-title, that he was beginning to possess for himself.⁷⁹

First, regarding acquisitive prescription, the Court concluded that Boudreaux's quasi-possession of the passageway was not adverse, so acquisitive prescription could not begin to run in his favor as a precarious quasi-possessor.⁸⁰ Second, regarding the termination of precarious possession, the Court concluded that Boudreaux did not give the requisite actual notice to Cummings, or to the Weills, so he remained a precarious possessor.⁸¹ In the end, "acquisitive prescription could not and did not run in [Boudreaux's] favor."⁸²

Citing primarily to A. N. Yiannopoulos's *Treatise on Predial Servitudes*, among other works, the plurality discussed how precarious quasi-possession, in contrast to adverse quasi-possession, can occur even with merely implied permission or with acts of "indulgence" or "good neighborhood."⁸³ The Weills and Cummings, with a spirit of neighborliness, had allowed Boudreaux to use the pathway uninterrupted, even if they never gave actual, express permission. With this at least implied permission, the Court held that Boudreaux could not benefit from the presumption that, as quasi-possessor, he was quasi-possessing as owner.⁸⁴ Instead, Boudreaux suffered from the presumption that he began his quasi-possession precariously. When precarious quasi-possessors other than co-owners wish to terminate their precariousness, they must provide actual notice to the person on whose behalf they are quasi-possessing, and Boudreaux offered no evidence to show that he had provided such notice.⁸⁵

78. *Id.* at 561.

79. *Id.* at 564. The Civil Code gives the only method in which a precarious possessor may terminate his or her precariousness vis-à-vis someone other than a co-owner: "[W]hen he gives actual notice of this intent to the person on whose behalf he is possessing." LA. CIV. CODE art. 3439 (2017).

80. *Boudreaux*, 167 So. 3d at 564 (explaining that Boudreaux lacked the proper animus because his possession was with permission of the owner).

81. *Id.* at 564–65.

82. *Id.*

83. *Id.* at 563.

84. *Id.*

85. *Id.* at 562–64.

Justice Weimer concurred in the holding of the plurality but provided his own reasoning. He explained that, if implied permission can be derived from acts of neighborliness, then a supposed quasi-possessor is presumed to be engaging in precarious quasi-possession in such a situation, and the quasi-possessor would have to rebut the presumption.⁸⁶ In his opinion, Justice Weimer explained that Cummings provided sufficient evidence to support the presumption, including collaboration between the Weills and Boudreaux in relocating the passageway and beneficial use by both parties.⁸⁷ The Weills allowed Boudreaux to use the passage “in the spirit of being a good neighbor” and “for maintaining good relations.”⁸⁸ Based on these friendly, neighborly acts and what could at best be an equivocal quasi-possession of the passageway, Justice Weimer reasoned that Boudreaux remained a precarious quasi-possessor.⁸⁹

C. An Analysis from Outside the Civil Code

With incomplete civilian methodology and confusing analyses, the resulting opinions from *Boudreaux* cause more confusion than certainty in the law. An analysis of the plurality and concurring opinions reveals two principal problems. First, although unstated in their discussions, the justices’ reasoning could result in possible changes in the legal presumptions applied to acquisitive prescription. Second, and more importantly, the justices conflate two distinct legal categories, collapsing the incorporeal real servitude right and the underlying corporeal land into one issue.

1. Legislating from the Bench

The analyses of both the plurality and the concurrence lead to undesirable consequences that change, or at least confuse, the legal presumptions applied to acquisitive prescription. Because the purported possessor is the only one who knows his or her true state of mind, the proper animus of a possessor is difficult to prove. Consequently, the Civil Code introduces presumptions to aid in overcoming this difficult burden.⁹⁰ An examination of animus under the facts of *Boudreaux* necessarily began with the default rule that Boudreaux, exercising quasi-corpore over the servitude,⁹¹ was presumed to

86. *Id.* at 570 (Weimer, J., concurring).

87. *Id.* at 571.

88. *Id.*

89. *Id.* at 569–72.

90. *Possession*, *supra* note 6, at 554.

91. *See* discussion on “quasi-corpore” *supra* Part I.A.

be in quasi-possession.⁹² The burden was then on Cummings to introduce sufficient evidence to rebut this presumption.⁹³ The plurality initially recognized the importance of an effective rebuttal, underscoring the importance of Cummings's knowledge and acquiescence of Boudreaux's use as evidence that prescription never began to run.⁹⁴ The concurrence also recognized the importance of such evidence, pointing to "neighborly acts" as proof that Boudreaux was never a true possessor.⁹⁵ The dissenting opinion by Justice Knoll, however, noted how the other opinions quickly deviate from the presumption by "eviscerat[ing] the well-established burden-shifting structure laid out in our Civil Code, allowing Cummings to prevail based simply on an assertion of 'neighborliness,' despite his failure to put on any *evidence*."⁹⁶ Though correctly stating the law, as the dissent noted, the plurality and concurrence misapplied the true intention of the law.

Boudreaux, as the quasi-possessor of the servitude, should have benefited from the presumption that he was quasi-possessing as owner. For Cummings to defeat this presumption, he needed to show through evidence and therefore prove that Boudreaux's quasi-possession was precarious.⁹⁷ The only proof that Cummings offered into evidence was that Boudreaux and the Weills were good neighbors, which directly conflicted with Boudreaux's testimony: "I never got any permission We just used [the right-of-way]."⁹⁸ Boudreaux even offered further evidence proving his true quasi-possession, including witness testimony about continuous maintenance of the passage, contracts involving use of the passage, and protection of the passage from possible public works construction.⁹⁹ Beyond mere assertions of being good neighbors, Cummings did not offer any other evidence that could conclusively prove that Boudreaux began his possession precariously.¹⁰⁰

92. LA. CIV. CODE art. 3427 (2017).

93. *Id.* art. 3432 cmt. b.

94. *Boudreaux*, 167 So. 3d at 564 ("[W]e find *support* for the conclusion that Cummings' awareness of Boudreaux's use and his allowance thereof marks Boudreaux's use as an authorized use." (emphasis added)).

95. *Id.* at 569 (Weimer, J., concurring) ("I find that the *evidence* of neighborly acts . . . effectively rebuts any presumption." (emphasis added)).

96. *Id.* at 565 (Knoll, J., dissenting). As a note, for the remainder of this Comment, when reference is made to the "dissenting opinion," it is to the one authored by Justice Knoll.

97. *Id.* at 566.

98. *Id.*

99. *Id.* at 567.

100. *Id.* at 568.

By allowing this low bar for Cummings to defeat the established legal presumption in favor of Boudreaux, the Court makes the acquisitive prescription of a servitude as provided in the Civil Code nearly impossible. For quasi-possession to be precarious, the Code requires either permission from the owner or that quasi-possession was “on behalf of the owner.”¹⁰¹ Although civilian doctrine favorably endorses the idea of tacit permission, and the Code seems to allow for that possibility,¹⁰² a distinction must be drawn between actual ongoing tacit permission and convenient assertions of tacit permission that occur after prescription has perhaps already run.

As the dissent recognized, the plurality’s analysis makes it nearly impossible for someone to prescribe on an apparent servitude because mere assertions of neighborly acts are sufficient to foreclose the running of prescription.¹⁰³ The dissent should have taken this observation, refined it, and developed it further to its logical conclusion. Rather than making a wholesale denial of the ability of tacit permission to defeat quasi-possession, the dissent seems to underscore the fact that a party should do more than merely state such a legal conclusion. By allowing a mere assertion of good neighborliness after the fact, the plurality and concurrence ignored the plain language that a quasi-possessor is presumed to have animus “unless he *began* to possess . . . for another.”¹⁰⁴ As opposed to requiring actual evidence that tacit permission was present from the *beginning* of the possessory period, the Court’s low standard that allows assertions of tacit permission after the fact makes the acquisition of a predial servitude by prescription constructively impossible.

After *Boudreaux*, a party may merely assert acts of good neighborliness to defeat an opposing party’s claim for rights stemming from possession, even if there is no evidence of permission or of quasi-possession begun for another. The justices acted as lawmakers rather than as law interpreters by changing the law or at least distorting legislative will.¹⁰⁵ The Court allowed mere assertions of tolerance to prove precariousness, and this possible change in the law stems from the Court’s failure to engage in proper civilian analysis.

101. LA. CIV. CODE art. 3437 (2017).

102. *Id.*; PLANIOL, *supra* note 45, at 738–39.

103. *Boudreaux*, 167 So. 3d at 568 (Knoll, J., dissenting).

104. LA. CIV. CODE art. 3427 (emphasis added). The person challenging the quasi-possession must have “shown that the possession was *begun* for another” before precarious possession is established. *Id.* art. 3427 cmt. d (emphasis added).

105. *Id.* art. 2 (“Legislation is a solemn expression of legislative will.”).

2. One is Not Like the Other: Confusion of the Incorporeal Right with the Corporeal Land

The recurring problem with all of the various opinions in *Boudreaux* is the confusion of the incorporeal predial servitude, the right at issue in the case, with the underlying corporeal land. Instead of recognizing two distinct legal categories, the justices collapsed the incorporeal predial servitude and the underlying corporeal land into one category.¹⁰⁶ By conflating these two distinct issues, the resulting analyses are difficult to read and create legal uncertainty. This confusion stems from a failure to proceed systematically in a civilian fashion—neither defining legal terms nor proceeding with an adequately formed foundation.

One commentator foresaw the legal confusion that could result by allowing acquisitive prescription on discontinuous predial servitudes: “[S]ome of the changes may conflict with other articles of the Code or result in unanticipated effects.”¹⁰⁷ That conflict underlies the Court’s analyses because the relevant Code articles apply to corporeal things, distinctly different from the incorporeal things by which the articles are to apply by analogy. The critical distinction that one must make when dealing with an incorporeal right, such as a servitude, is the difference between the incorporeal right and the corporeal land on which the servitude is exercised. The person attempting to gain a servitude “possesses the real right with the intent to have it as his own. However, he does not possess the immovable that is burdened with his real right because he has no intent to own that immovable.”¹⁰⁸ The Court provides no explanation regarding how to apply the Code articles, which themselves contemplate corporeal things,¹⁰⁹ to the incorporeal servitude at issue.¹¹⁰ The failure of the Court to make this critical distinction is the key to understanding the subsequent confusion.

Although the plurality began its analysis correctly when stating that it was to determine whether to “recogniz[e] the plaintiff as the owner of a

106. See, e.g., *Boudreaux*, 167 So. 3d at 562 (explaining that *Boudreaux* was trying to prescribe on a predial servitude and that he would have had to have given actual notice to the landowner).

107. Hannan, *supra* note 27, at 978.

108. *Possession*, *supra* note 6, at 541.

109. See *supra* Part I.B.

110. For example, the plurality points to “support in the law for implied or tacit permission being the basis of precarious possession,” but provides no discussion regarding how to apply that general characteristic of possession contemplating corporeal things to an incorporeal servitude. *Boudreaux*, 167 So. 3d at 562.

predial servitude over land owned by the defendant,”¹¹¹ it erred when it stated that, if Boudreaux were a precarious quasi-possessor, it would need to determine whether Boudreaux ever changed his precarious status through “actual notice to the landowner.”¹¹² The plurality’s statement, without any further explanation, is illogical because actual notice to the landowner is not related to whether there is quasi-possession of a servitude. Actual notice would instead have to be to the servitude owner. Similarly, the concurring opinion collapsed the incorporeal servitude and the corporeal land into one issue as well. The concurrence described the lack of Boudreaux’s “intent[ion] to possess, as owner, the passageway” and referenced the need to give actual “notice to Mr. Weill,” as owner.¹¹³ Putting those two assertions together, the concurrence equated Weill with the owner of the servitude, when in fact Weill was merely the owner of the underlying land instead. This confusion stems from the concurrence’s own equivocal use of the word “passageway” to describe what Boudreaux was trying to acquire through prescription.¹¹⁴ Finally, the principal dissenting opinion failed to make a clear distinction between the incorporeal servitude and the land, interchanging different elements of each.¹¹⁵ Because the issue in *Boudreaux* was prescription of an incorporeal servitude of passage, the opinions’ loose use of terminology evidences a failure to distinguish the servitude from the underlying land.

The plain language from the Civil Code clearly explains that precarious quasi-possession “over a thing” occurs “with the permission of or on behalf of the owner or possessor.”¹¹⁶ A precarious quasi-possessor can terminate the precarious nature by “giv[ing] actual notice . . . to the person on whose behalf he is possessing.”¹¹⁷ Reading *in pari materia*, a

111. *Id.* at 560 (emphasis added).

112. *Id.* at 562.

113. *Id.* at 572 (Weimer, J., concurring).

114. The use of the term “passageway” implies an attempt to prescribe on the physical land rather than on the servitude because a passageway is “[a] long, narrow way, typically having walls on either side, that allows access between buildings or to different rooms within a building.” *Passageway*, OXFORD LIVING DICTIONARIES: ENGLISH, <https://en.oxforddictionaries.com/definition/us/passageway> [<https://perma.cc/7NQD-ASB2>] (last visited Jan. 24, 2017).

115. An example of one such interchanging: “[W]hether [Boudreaux] exercised this real right merely as a ‘precarious possessor’—that is, ‘with the permission of or on behalf of’ Paul Christopher Cummings.” *Boudreaux*, 167 So. 3d at 565 (Knoll, J., dissenting). The dissent thus also confused the incorporeal servitude with the underlying corporeal land, making the landowner the same person to own the incorporeal servitude. *Id.*

116. LA. CIV. CODE art. 3437 (2017).

117. *Id.* art. 3439.

person must give this notice to the owner or possessor of the *thing* over which he or she is asserting quasi-possession. Because the thing in *Boudreaux* was a predial servitude, if Boudreaux did indeed begin his possession precariously, there would be no reason for him to change his status vis-à-vis the landowner. Rather, he would instead have to provide actual notice to the servitude owner, if there were one.¹¹⁸ The opinions imply a logical impossibility by stating someone might be a precarious possessor of an incorporeal servitude and then immediately asking whether that person gave notice to the owner of corporeal land to end the precariousness. This unfortunate confusion denies Boudreaux's claim for an incorporeal servitude simply because he could not prescribe on the underlying corporeal land itself, contrary to the plain language of the Civil Code.¹¹⁹

Had the Court consulted the limited jurisprudence, it would have realized that permission to be on the land does not alone mean that a servitude is precarious and that prescription is barred.¹²⁰ In *Levet v. Lapeyrollerie*, at issue was whether one of the parties had acquired, through acquisitive prescription, an apparent, continuous predial servitude of drain.¹²¹ Instead of including broad statements that permission automatically excluded the running of prescription on a predial servitude, the Court noted that the party claiming prescription had received “the consent of [the landowner to dig] the canal.”¹²² The parties claiming prescription in both *Levet* and *Boudreaux* had permission to be on the land, the underlying corporeal thing, but neither case included any evidence of whether there was permission to have a *right* over the land, such as a predial servitude. The *Levet* Court, however, did not allow permission to be on the land to defeat prescription on a servitude, providing that the party

118. A precarious possessor can end precariousness by actually notifying “the person on whose behalf he is possessing.” *Id.* If Boudreaux was indeed possessing the servitude precariously, he would have had to notify the *servitude owner* rather than the *landowner* of his intention to begin possessing for himself. In *Boudreaux*, as there was no servitude, there was no servitude owner for Boudreaux to notify.

119. See *id.* art. 740 (allowing for the creation of a servitude by acquisitive prescription without requiring the ability to prescribe on the underlying land).

120. See *Levet v. Lapeyrollerie*, 1 So. 672, 673–74 (La. 1887) (holding that a predial servitude of drain was created through acquisitive prescription despite the fact that the dominant estate owner had the permission of the servient estate owner); *Guillote v. Wells*, 485 So. 2d 187, 190–91 (La. Ct. App. 1986) (holding that the plaintiff acquired a personal servitude of right of use by title over a gas pipeline despite the fact there was an oral agreement of permission to use it).

121. *Levet*, 1 So. at 673.

122. *Id.*

claiming prescription was “equally capable of acquiring [the servitude of drain] by possession for the requisite length of time.”¹²³ Had the Court in *Boudreaux* consulted this limited, but important, jurisprudence, the justices could have separated the two issues more easily, and the permission claimed by Cummings would not have summarily defeated Boudreaux’s claims.

By failing to consider the jurisprudence, the Court engaged in an analysis tainted by an erroneous premise. Starting from the assertion that Boudreaux began quasi-possession of the servitude with the permission of his neighbor, the Court collapsed the servitude and the underlying land into one issue, leading to an analysis incompatible with the Civil Code. There is no question that Cummings, as the adjacent landowner, owned the underlying corporeal land. The Court’s language, however, results in confusion as to whether Boudreaux possessed the corporeal land on behalf of Cummings or the incorporeal servitude on behalf of Cummings. Without any explanatory analysis, the opinions produce logically inconsistent statements that conflate the land with the servitude, a problem that could have been avoided with proper civilian methodology.

III. *BOUDREAUX V. CUMMINGS*: AN ERRONEOUS CIVILIAN METHODOLOGY

The failure to distinguish an incorporeal servitude from the underlying corporeal land not only results in a confusing analysis but also forecloses any possibility of reaching a logically consistent conclusion. A proper civilian methodology dictates following all premises completely to their logical conclusions by systematically using logic and deduction to proceed “from the general to the particular.”¹²⁴ Erring in the application of this fundamental civilian approach, all of the Court’s opinions in *Boudreaux* misstated their general premises and stopped too early in their respective analyses. Consequently, taking the Court’s premises and following them to their logical conclusions reveals inconsistencies between the opinions and the Civil Code as a whole.

A. In the Beginning is the Code

As the fountainhead of private law in Louisiana,¹²⁵ the Civil Code is the foundation on which courts must build their legal analyses. Judges must place their legal reasoning into the framework of the Code’s general

123. *Id.* at 674.

124. Bergel, *supra* note 15, at 1083.

125. Osakwe, *supra* note 12, at 41.

articles because they are “required to return again and again to the Code seeking its guiding values and adhering as closely to them as possible.”¹²⁶ If the Supreme Court justices had viewed the Civil Code as a unified whole and formulated their analyses from that general foundation, they would have avoided the ensuing inconsistency. There are two errors that are particularly prominent once the Court’s analyses are compared with the relevant codal provisions.

First, by not consulting the portion of the Civil Code explaining predial servitudes, the Court’s opinions all failed to identify the fundamental characteristic of predial servitudes: they require two different estates with two different owners.¹²⁷ If such a characteristic does not obtain, then the civilian concept of confusion results, leading to either the extinction of a pre-existing servitude or the inability for one to form in the first instance.¹²⁸ If, as the Court’s various opinions suggest, Boudreaux possessed the servitude precariously on behalf of Cummings, then the next logical step must be that Cummings was both the dominant estate owner and the servient estate owner. This conclusion, however, is incompatible with the requirement that a servitude must have different estate owners,¹²⁹ and the lack of any explanation by the Court results in an absurd conclusion.

Second, the various opinions are incomplete in their analyses, leading to confusion over the meaning of precarious possession and precarious quasi-possession. By ignoring the only immediately relevant Civil Code article¹³⁰ and directly applying the articles on possession to quasi-possession, the Court’s resulting conclusions conflict with the basic foundation of the law. The Court failed to acknowledge that, when analyzing the quasi-possession of an incorporeal real right rather than the possession of a corporeal thing, “things are not nearly so black and white. In fact, quasi-possession, far from being incompatible with . . . a grant of permission, *presupposes* it!”¹³¹ Although a fundamental characteristic of a servitude is permission to use the underlying corporeal immovable, none of the opinions made this fundamental distinction. The Court’s failure to acknowledge the characteristic elements of quasi-possession by analogy caused the justices to miss a fundamental reality: a quasi-possessor is at

126. Dennis, *supra* note 60, at 17.

127. LA. CIV. CODE art. 646 (2017).

128. *Id.* art. 765 (explaining the working of “confusion” to terminate a predial servitude when one and the same person comes to own the entirety of both the dominant estate and the servient estate burdened by the servitude).

129. *Id.* art. 646.

130. *Id.* art. 3421.

131. TRAHAN, *supra* note 31, at 176.

one and the same time both a true, or not precarious, quasi-possessor of the servitude real right and a precarious possessor of the underlying corporeal immovable.¹³² The absolute insistence on permission defeating the acquisition of a predial servitude is incomprehensible when fit into the proper framework of true quasi-possession of a servitude. Though a servitude implies permission to be on the underlying land, there is not, by that fact alone, permission to hold the accompanying incorporeal real right.

To remedy this confusion, the Court should have contemplated the meaning of precarious quasi-possession of an incorporeal servitude. One illustration of such quasi-possession is as follows. X receives a predial servitude of passage by acquiring a title thereto from the landowner, Y. X, in turn, grants a lease on that incorporeal servitude of passage to Z. In that instance, as a lessee, Z is a precarious quasi-possessor of the servitude because he is quasi-possessing it with the permission of the servitude owner, X. The only way for Z to end his precarious possession would be to give actual notice to the owner of the servitude—the “thing” in question—that he was beginning true quasi-possession.¹³³ By failing to contemplate this key legal distinction between an incorporeal servitude as separate from the underlying land, the justices reached the conclusion that “Boudreaux was possessing the right of passage precariously.”¹³⁴ If the Court had not intended to reach this conclusion that flows from its premises, the justices should not have neglected to apply the articles on quasi-possession as they were intended—by analogy.

B. Legal History Repeats Itself

The plurality and concurring opinions’ inconsistent results and logical failures when applying the Civil Code may be surprising, but *Boudreaux* is not the first case involving predial servitudes in which the Louisiana Supreme Court has engaged in erroneous civilian analysis. The Court heard a remarkably similar case 40 years before *Boudreaux*. In *Louisiana Irrigation & Mill Company v. Pousson*, at issue was whether there was an aqueduct servitude established over the immovable property of several landowners, including the defendant.¹³⁵ By making statements like “[t]he

132. *Id.* at 176 n.6 (“[T]he servitude holder, through one and the same acts, simultaneously quasi-possesses the servitude for himself and precariously possesses the underlying corporeal immovable for his grantor, [which is] ‘compound’ possession.”).

133. See LA. CIV. CODE art. 3439.

134. *Boudreaux v. Cummings*, 167 So. 3d 559, 563 (La. 2015).

135. *Louisiana Irrigation & Mill Co. v. Pousson*, 265 So. 2d 756, 757 (La. 1972).

described servitude was a *canal*” and “[t]here is no allegation that plaintiff possessed the *canal*,”¹³⁶ the majority’s first error was collapsing the incorporeal predial servitude and the underlying corporeal canal into one thing. The *Pousson* Court failed to clarify whether the issue for it to decide was the acquisition of an incorporeal servitude of aqueduct or of a corporeal canal.

The *Pousson* majority also erroneously equated the actions that would be sufficient for eviction of a regular possessor to what would be sufficient to evict a quasi-possessor. This equation stemmed from the Court’s failure to proceed by analogy. Because a servitude is an incorporeal thing and does not physically exist in space, multiple people can use the same underlying corporeal thing—a canal in *Pousson*—at the same time.¹³⁷ Theoretically, there are no actions that should result in an automatic eviction from an incorporeal servitude, yet the majority still noted: “The 1967 and 1968 usurpation of the lateral canal by defendant clearly resulted in a loss of possession by plaintiff.”¹³⁸ If the defendant and plaintiff used the canal at the same time, there would have been no usurpation if both had been able to use it fully. By failing to notice the basic legal principles regarding possession and quasi-possession of the Civil Code, the resulting analysis by the majority does not fit logically into the larger statutory scheme.

Unlike *Boudreaux*, however, not all of the *Pousson* opinions failed to use proper civilian methodology. The dissenting opinion proceeded systematically with the general principles of the Civil Code and carefully incorporated proper language and categorization of the things in question.¹³⁹ The opinion neatly kept the issues clear and avoided a conflation of the incorporeal servitude with the corporeal canal.¹⁴⁰ The dissent carefully noted that use of the portion of a canal was a “species of quasi-possession of th[e] incorporeal right” and that such a use comported with “that species of possession of which the right was susceptible.”¹⁴¹ Unlike the loose and interchangeable language used by the majority to

136. *Id.* (emphasis added).

137. *See* LA. CIV. CODE art. 649 (classifying a predial servitude as an incorporeal immovable, meaning it does not exist in space); *id.* art. 748 (charging that a servient estate owner can do nothing to make the servitude use more inconvenient). Putting these two provisions together, as long as multiple predial servitudes do not diminish the other holders’ enjoyment, it is theoretically possible for there to be multiple servitudes over one servient estate.

138. *Pousson*, 265 So. 2d at 758.

139. *Id.* at 761–62 (Barham, J., dissenting).

140. *Id.*

141. *Id.* at 763.

describe the issue, the dissenter carefully chose clear language: “[P]laintiff continually possessed the *right* to operate the irrigation canal for many years.”¹⁴² By emphasizing the right over the canal, the dissenting opinion maintained the critical distinction. Unfortunately, the majority in *Pousson* and the plurality, concurrence, and dissent in *Boudreaux* failed to replicate this careful, civilian approach.

C. The Root of the Problem: Forgetting the Roots

The pervasive problems in the *Boudreaux* opinions stem from a misapplication of Louisiana’s civilian principles in three distinct ways. First, the justices’ analyses illustrate an incorporation of common law elements. Second, the justices misapplied doctrinal analysis to support their positions. Finally, and most importantly, the justices evinced a clearly misguided application of proper civilian methodology.

1. Louisiana: Where the Common Law Should Not be So Common

The first error by the justices was their use of common law methods of analyses as opposed to proper civilian methods. Louisiana is a unique state that has a legal system based on both the common and civil law, and that mixture results in judges who “giv[e] elaborate statements of facts and discussion of precedents—even when interpreting and applying the Civil Code.”¹⁴³ Applying common law methods of interpretation to strictly civilian areas of the law is a temptation in Louisiana jurisprudence, leading to a mixture of incompatible legal concepts. The common law includes a focus on the specific facts with a narrowly tailored holding, antithetical to the civilian approach that focuses on applying generalized rules.¹⁴⁴ By not striking a proper balance between the general law and specific facts, the Court can easily forget about the guiding principles of the law, as is apparent in the *Boudreaux* analyses. The plurality actually took that explicit position: “Our holding today is strictly limited to the facts before us.”¹⁴⁵

The common law also includes a primary focus on prior jurisprudence when arriving at a result, rather than focusing on the written law and doctrine. Civil law methodology, on the other hand, focuses on “legal

142. *Id.* (emphasis added).

143. Dennis, *supra* note 60, at 1.

144. Tetley, *supra* note 63, at 702 (“Common law jurisprudence sets out a new specific rule to a new specific set of facts . . . while civil law jurisprudence applies general principles.”).

145. *Boudreaux v. Cummings*, 167 So. 3d 559, 564 (La. 2015).

principles” and their meaning and function “in terms of rights and obligations.”¹⁴⁶ The starting point for the civil law is thus the general legal principles as opposed to the holdings of previous cases. With such a strained analysis, the Court easily erred in the application of the various interpretive tools at its disposal. The plurality’s ultimate conclusion follows after stating, “[t]his court has declared that ‘servitudes are restraints on the free disposal and use of property, and are not . . . entitled to be viewed with favor by the law.’”¹⁴⁷ Although the maxim stated by the plurality that doubts about servitudes are to be resolved without restraining the landowner is actually rooted in the civilian doctrine,¹⁴⁸ the plurality chose to cite prior cases rather than either the law or the doctrine that has analyzed the maxim.¹⁴⁹ As compared with pages of confusing analysis, the one statement that the plurality roots in jurisprudence appears to lead directly to the eventual holding.

This inordinate focus on jurisprudence led the Court to neglect one vital Civil Code article on the interpretation of servitudes. When there are ambiguities involved in determining the type of right at issue, the Code provides: “When the right granted be of a nature to confer an advantage on an estate, it is presumed to be a predial servitude.”¹⁵⁰ The threshold issue in whether to apply this interpretive article is whether there is actually a right at issue. Because of the alleged permission given by the Weills for Boudreaux to be on the land, the Court automatically foreclosed on the possibility that Boudreaux could have acquired any kind of right.¹⁵¹ Such a conclusion does not follow,¹⁵² but it instead prevented the Court from engaging in a complete analysis.

In *Levet*, as in *Boudreaux*, there were no written documents or definitive testimony to establish what kind of right, if any, the supposed prescriber had established. Not allowing permission to be on the land to defeat a full analysis, however, the *Levet* Court applied the predecessor to this article, concluding that a predial servitude had been created by acquisitive prescription.¹⁵³ Applying that analysis in *Boudreaux*, the characteristics of a predial servitude of passage become apparent. The dominant estate, owned by Boudreaux, was farmland that required

146. Tetley, *supra* note 63, at 702.

147. *Boudreaux*, 167 So. 3d at 564–65.

148. LA. CIV. CODE art. 730 cmt. b (2017).

149. *Boudreaux*, 167 So. 3d at 564–65 (citing to three prior cases rather than the Civil Code or to civilian doctrine).

150. LA. CIV. CODE art. 733.

151. *Boudreaux*, 167 So. 3d at 564.

152. See discussion *supra* Part II.C.2.

153. *Levet v. Lapeyrollerie*, 1 So. 672, 674 (La. 1887).

convenient access to the public roadway to use the land as intended.¹⁵⁴ This use comports with both the meaning of a predial servitude and of a servitude of passage.¹⁵⁵ Even if servitudes are not to be favored in the law, such a rule should only apply if, even after examining the supposed right in question, ambiguities remain. In *Boudreaux*, Boudreaux claimed a right that was clearly “of a nature to confer an advantage on an estate,”¹⁵⁶ establishing a rebuttable presumption in favor of Boudreaux. Even if jurisprudence says otherwise, the Code, being read as a unified whole, should always be at the forefront of legal analysis.

2. No Doctrine in the House: Misuse of a Critical Civilian Component

The second failure by the justices is their misuse of doctrinal analysis to support the reasoning of their opinions. The plurality cited the Louisiana Civil Law Treatise on Predial Servitudes when discussing acquisitive prescription of a servitude.¹⁵⁷ The portion of the Treatise cited by the Court, in turn, discusses the French historical background of acquisitive prescription of servitudes, yet there is no further discussion within the opinion concerning how France or other civilian jurisdictions have since handled the issue.¹⁵⁸ Furthermore, since the first Louisiana Civil Code, a subsequent revision has recognized discontinuous apparent servitudes,¹⁵⁹ which is an issue still not recognized under French law.¹⁶⁰ Though there is some disconnection between the French background and current Louisiana law, there is no discussion within the opinion involving other civilian jurisdictions that have similar provisions to the current Louisiana law.¹⁶¹ The major problem with the use of French doctrine, or Louisiana doctrine based on historical French sources, is that those commentaries stem from

154. *Boudreaux*, 167 So. 3d at 560.

155. See LA. CIV. CODE art. 646 (explaining that the dominant estate enjoys a benefit); *id.* art. 705 (explaining that a servitude of passage allows, *inter alia*, persons and vehicles to pass on land).

156. *Id.* art. 733.

157. *Boudreaux*, 167 So. 3d at 562–63.

158. *Id.* at 563.

159. LA. CIV. CODE art. 740 cmt. a.

160. A. N. YIANNOPOULOS, PREDIAL SERVITUDES § 6:31, *in* 4 LOUISIANA CIVIL LAW TREATISE 435 (4th ed. 2014).

161. Greece allows for acquisitive prescription on all servitudes, and Italy, like Louisiana, allows prescription on apparent servitudes. A. N. Yiannopoulos, *Creation of Servitudes by Prescription and Destination of the Owner*, 43 LA. L. REV. 57, 58 (1982) [hereinafter *Creation of Servitudes*].

the legal principle that one could only acquire *continuous* predial servitudes through prescription.¹⁶²

Writing at a time when the French legislature as a policy matter chose to disallow acquisition of any discontinuous predial servitude,¹⁶³ there was no need for commentators to delineate what types of acts could lead to prescription or what would lead to precarious quasi-possession. The legislative equation of simple acts of tolerance and good neighborliness with discontinuous predial servitudes led to analyses that acquisitive prescription on discontinuous servitudes could not occur: “[The landowner] is therefore deemed to tolerate such acts through a spirit of good vicinage These servitudes, when not based upon a title, are tainted with precariousness. . . . And these circumstances make prescription impossible.”¹⁶⁴ Because current Louisiana law on acquisitive prescription of servitudes differs from the historical French law, the justices should have recognized this difference and incorporated it into their analyses.

3. The Final Straw: A Strong Civilian Foundation but a Weak Building

The third, final, and most unfortunate error of the justices in *Boudreaux* is their misapplication of methodology and their incomplete analyses of the relevant Civil Code articles. Because of the importance of proper classification in property law, particularly with such a difficult topic as predial servitudes,¹⁶⁵ proper civilian methodology is critical “to consider codal provisions that have been hidden between the lines for the last thirty years.”¹⁶⁶ The acquisition of a discontinuous predial servitude of passage is a relatively new issue in property law,¹⁶⁷ so the charge on the

162. When drafting the French Civil Code, a compromise between competing factions was reached in which “acquisitive prescription was accepted only as to continuous and apparent servitudes.” *Id.* at 59.

163. FRANÇOIS LAURENT, *PRINCIPES DE DROIT CIVIL FRANÇAIS* 310–11 (1878), translated by John Randall Trahan (2015) (on file with author).

164. PLANIOL, *supra* note 45, at 738–39.

165. Boris Kozolchyk, *On Predial Servitudes, Civil Law Institutions and Common Law Attitudes—Apropos of Yiannopoulos’ Predial Servitudes*, 59 TUL. L. REV. 517, 517 (1984) (discussing the difficulty of conceptualizing the subject of predial servitudes).

166. Hannan, *supra* note 27, at 938.

167. Because of its enactment effective January 1, 1978, the first date for 30 year acquisitive prescription of a discontinuous predial servitude was January 1, 2008. See LA. CIV. CODE art. 740 cmt. a. *Boudreaux* represents the first case dealing with the issue.

courts is to “carefully consider the effects of these unprecedented servitudes under the Revision.”¹⁶⁸ Particularly in an area with such little guidance, civilian judges must sometimes reason *a pari*, or by analogy, an important method in civilian methodology,¹⁶⁹ to resolve the conflict in accord with the Civil Code.¹⁷⁰ In this case, the Code itself provides that judges are to proceed according to analogy.¹⁷¹ With a cursory glance at the opinions in *Boudreaux*, it may appear that the justices adhered to these civilian principles with their citation of many Civil Code articles. However, the problem is that there is a civilian façade, but a lack of any detailed analysis or application.¹⁷² For example, the plurality wrote for the reader to “see” a Civil Code article that does not discuss quasi-possession at all, and the Court failed to explain how one should analogize from that article to the issue being considered.¹⁷³

The Court proceeded with its incomplete use of the Civil Code by misstating a critical aspect of the law of quasi-possession of an incorporeal immovable: “Louisiana Civil Code article 742, . . . provides ‘the laws governing acquisitive prescription of immovable property apply to apparent servitudes.’”¹⁷⁴ Although the cited article is ostensibly applicable to *Boudreaux*, the plurality relegated to a passing footnote the later fundamental article that states how the laws are to apply to acquisitive prescription of predial servitudes: *by analogy*.¹⁷⁵ The fact that the issue before the Court involved little legislative guidance, almost nonexistent jurisprudence, and scarce commentary does not excuse a failure to explain

168. Hannan, *supra* note 27, at 940.

169. Dennis, *supra* note 60, at 11–12 (discussing the use of reasoning by analogy).

170. *Id.*

171. LA. CIV. CODE art. 3421.

172. *See, e.g.*, *Boudreaux v. Cummings*, 167 So. 3d 559, 563 (La. 2015) (citing to various Civil Code articles involving possession properly so-called, including articles 3424, 3435, and 3476, regarding corporeal possession and the qualities of effective possession, without any discussion on how to apply them by analogy to the quasi-possession of an incorporeal predial servitude).

173. When explaining that *Boudreaux* would need to give actual notice to the landowner to end his precarious possession, the plurality cites to the Louisiana Civil Code, but the cited article, 3478, does not say how it would apply to a servitude owner. The plurality fails to explain how to apply it by analogy. *Id.* at 562; *see* LA. CIV. CODE art. 3478 (explaining how a precarious possessor, rather than a precarious quasi-possessor, would terminate precarious possession and begin to acquisitively prescribe).

174. *Boudreaux*, 167 So. 3d at 563.

175. LA. CIV. CODE art. 3421. For the passing footnote, *see Boudreaux*, 167 So. 3d at 560 n.2.

and incorporate more fully the most relevant Code article on the issue. Beyond oblique references, none of the justices included any discussion on how to proceed by analogy, and they failed to indicate any legal differences when a person is prescribing on an incorporeal servitude rather than on a corporeal thing like land.¹⁷⁶

Although the plurality and concurring opinions relied heavily on the concept of “acts of simple tolerance,” all of the opinions failed to articulate a clear definition of the concept. In keeping with its misapplication of civilian doctrine, the Court, though citing to it briefly,¹⁷⁷ failed to fully use one of the tools available to Louisiana civilians, the Dictionary of the Civil Code, which itself provides a useful definition of acts of simple tolerance: “[E]ntering onto the land of another which, because it is done with the express or tacit consent of the owner, does not amount to an act of possession capable of establishing acquisitive prescription.”¹⁷⁸ If the justices had cited to this definition, and accordingly adapted it by analogy to acquisitive prescription of incorporeal servitudes, then the resulting analyses would have fit better within the Civil Code’s framework by providing a foundational premise.

Although using some foreign doctrine, the justices failed to include any relevant commentary from Marcel Planiol, who also provided a clear foundation for acts of tolerance and precariousness: “[Precariousness of a servitude] consists in accomplishing, on somebody else’s property, through mere tolerance, acts which would be the exercise of a servitude if performed in virtue of a right.”¹⁷⁹ The justices would have had to place this definition into context, however, because, unlike the consistent use made by Boudreaux of the passageway,¹⁸⁰ the acts described by Planiol are those “performed at long intervals . . . compatible with the ordinary enjoyment of the thing by its owner.”¹⁸¹ Planiol equated “acts of mere tolerance” with “be[ing] on good terms with . . . neighbors,”¹⁸² appearing to describe acts of tolerance as involving a much lower level of activity

176. *E.g.*, *Boudreaux*, 167 So. 3d at 560–61; *id.* at 568–69 (Weimer, J., concurring); *id.* at 565 (Knoll, J., dissenting).

177. *Id.* at 572 n.9 (Weimer, J., concurring).

178. CORNU, *supra* note 36, at 556.

179. PLANIOL, *supra* note 45, at 742. The writings of Marcel Planiol, a renowned French civil law professor, are so insightful because of his highly influential treatise on the French Civil Code, since translated by the Louisiana State Law Institute as an important interpretive tool of the meaning of the Louisiana Civil Code. Algero, *supra* note 2, at 794 n.87.

180. *Boudreaux*, 167 So. 3d at 560.

181. PLANIOL, *supra* note 45, at 742.

182. *Id.* at 743.

than that of Boudreaux. Planiol's conclusion is that someone who performs these acts on another's property implicitly recognizes permission from the landowner and cannot prescribe.¹⁸³ The concurrence cited this conclusion without any of the surrounding context,¹⁸⁴ so there is no understanding of how Planiol's analysis was formed by the older, traditional French model.

Because of the change in legislative policy between the traditional French approach and the modern Louisiana approach, the justices should have placed the doctrine into its proper context and then reasoned by analogy. With a discontinuous predial servitude like a servitude of passage, acts that constitute corpus are similar to those acts that would only constitute acts of simple tolerance.¹⁸⁵ Because Louisiana law now allows prescription on these types of servitudes, the analysis cannot simply end with equating acts of a discontinuous apparent predial servitude with acts of tolerance. Instead, the analysis becomes fact-intensive, with the fact finder having "complete discretion to determine whether the acts that are claimed to be acts of possession . . . have or have not been exercised . . . [as] simple tolerance."¹⁸⁶ The fact finder must distinguish between acts of simple tolerance that include "benevolence"¹⁸⁷ or "express or tacit permission of the owner"¹⁸⁸ from those acts that would be intense and continuous enough that they would "constitute an impingement on the rights of another."¹⁸⁹

Boudreaux's aggressive and intense use of the pathway for over 50 years to move heavy farm equipment, among other uses,¹⁹⁰ appears to go beyond the acts of simple tolerance envisioned by the French commentators. At the very least, the decision of such a fact-intensive issue that seems to go beyond simple tolerance should have been within the pervasive authority of the fact finder, whose conclusions should be entitled to deference.¹⁹¹ Faced with a new legal issue and armed with little actual guidance, the Court should have remained faithful to the Civil Code and proper civilian analysis, but its failure resulted in confusion of the issue at hand, unclear definitions, and uncertainty in the ensuing law.

183. *Id.*

184. *Boudreaux*, 167 So. 3d at 570–71 (Weimer, J., concurring).

185. LAURENT, *supra* note 163, at 310–11.

186. MARCEL PLANIOL & GEORGES RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS: LES BIENS 940–41 (Maurice Picard rev. 2d ed. 1952), translated by John Randall Trahan (2015) (on file with author).

187. LAURENT, *supra* note 163, at 311.

188. PLANIOL & RIPERT, *supra* note 186, at 940.

189. *Id.* at 942.

190. *Boudreaux v. Cummings*, 167 So. 3d 559, 560 (La. 2015).

191. LAURENT, *supra* note 163, at 312–13.

IV. SOLUTION: IT'S IN THE CODE . . . OR SHOULD BE

Although it is too late to fix the erroneous analysis in *Boudreaux*, Louisiana judges can still ensure that a misapplication of the civilian approach to the private law does not happen again. It is beyond the scope of this Comment to provide a comprehensive solution to the misapplication of civilian methodology, but there are three ways in which courts can return to their civilian roots. First, Louisiana judges must return to the Civil Code and its basic legal principles. Even when the Civil Code may not be as clear or complete as might be ideal, it remains the proper foundation to build a subsequent analysis. Second, judges must refrain from the tendency to elevate detailed facts over the law and instead keep clarity and proper categorization in the forefront of their analyses. Finally, when dealing specifically with the issue presented in *Boudreaux*, where courts are unable to apply the law properly, whether directly or by analogy, the legislature, rather than the judiciary, must provide a remedy.

A. The Civil Code: Louisiana's Ace in the Hole

Any type of solution must first recognize the primacy of the Louisiana Civil Code as containing one of the primary sources of law—legislation.¹⁹² Solutions to new legal problems, whether acquisitive prescription or something else, must fit within the general framework of the Code, which is a “bod[y] of coherent and organized rules and not a mere ‘mosaic without unity.’”¹⁹³ Acquisitive prescription of discontinuous predial servitudes might be a new problem, but new problems pose no impossibilities in the civilian tradition because “Civil Code articles tend to be written in general terms . . . to last through time and be applied to changing circumstances.”¹⁹⁴ By not drawing on the Code’s general precepts, courts ignore a fundamental foundation that provides, at the very least, a starting point for further analysis. Although the justices may have been confused as to how to handle a new problem, “when viewed through the proper lens, the framework for adjudicating these new rights [was] already in place.”¹⁹⁵ The tools for the justices to use were available right in front of them: the articles of the Civil Code and the civilian methodology of reasoning by analogy. Fortunately, those same tools remain readily available for all future judges when facing similarly new and complex legal issues.

192. Algero, *supra* note 2, at 793.

193. Bergel, *supra* note 15, at 1084.

194. Algero, *supra* note 2, at 793.

195. Hannan, *supra* note 27, at 987.

Civilian judges have a sworn duty to give “the public consistent, faithful[,] and equal application of the legislated laws.”¹⁹⁶ This duty to uphold the legislated laws entails much more than recitation of the Civil Code, but rather requires a rigorous application of its articles. Accordingly, when deciding a case in an ambiguous area of the law, the judge should stay “as closely as possible to the values of the Code” when arriving at the proper solution.¹⁹⁷ If judges still cannot make sense of the law,¹⁹⁸ and cannot proceed by analogy, the Code provides the basis for a solution: “[P]roceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.”¹⁹⁹ Judges, however, must clearly state that they are proceeding in such a way, and, even in equity, they “should keep the Civil Code . . . at the forefront,” making careful use of analogous legislation.²⁰⁰ Judges cannot simply proceed in their analyses as though the Civil Code articles are simply another piece of ordinary legislation because the Code represents a unified whole.²⁰¹ When the judge recognizes that all of the different parts of the Code interact and form a coherent whole, then there is less potential for narrow results that might comport with one part of the Code but contradict another part.

B. A Clear Analysis Begins with a Clear Premise

Clarity of terms and proper categorization are two essential features in a proper civilian presentation of the law.²⁰² Because the civil law is organized as an internally consistent system, judges must define the issue at hand precisely and proceed with consistent logic. Proper categorization and clear terminology are especially imperative when proceeding by analogy: “Classifications by categories and successive sub-categories make it possible to apply . . . the rules regulating a wide range of situations analogous to all the particular situations which fall under those rules.”²⁰³ When proceeding with proper codal categorization of issues, not only do

196. Dennis, *supra* note 60, at 2.

197. *Id.* at 3.

198. LA. CIV. CODE art. 1 (2017) (explaining law is both legislation and custom).

199. *Id.* art. 4.

200. Algero, *supra* note 2, at 797.

201. Bergel, *supra* note 15, at 1079 (“[C]odification is to be contrasted with simple legislation *tailored to the circumstances.*” (emphasis added)).

202. Tetley, *supra* note 63, at 709 (“The civil law traditional method . . . consists in characterizing the dispute as belonging a [sic] defined category, and then identifying the applicable internal law . . . of the category concerned.”).

203. Bergel, *supra* note 15, at 1083 (discussing the importance of a codified system and its unique way of proceeding in interpretation).

judges produce analyses that are easier for practitioners and even laypeople to read, but they also reduce their chances of applying civilian principles incorrectly. Had the justices in *Boudreaux* followed this step, they would have averted both the conflation of two distinct legal issues and the incorporation of analyses inconsistent with the codal framework.

C. The Legislative Solution: A Balancing Act

If a good-faith use of civilian methodology cannot solve a legal problem or if a judicial solution is untenable, the question becomes whether the legislature, as the proper lawmaker, should intervene. Regarding the issues in *Boudreaux*, the legislature could possibly clarify and expand the solitary directive to analogize the articles involving possession to quasi-possession. At the same time, implicit in the ability to craft new legislation is also the responsibility of the legislature to respect its own duty “to set, by taking a broad approach, the general propositions of the law . . . and not to get down [sic] the details of questions which may arise in particular instances.”²⁰⁴ Respecting this responsibility, the legislature could still enact a new codal section specifically applicable to the quasi-possession of incorporeal real rights, lessening the need to analogize in an area of the law that is difficult to conceptualize on a case-by-case basis.

Because of all of the references in both the Louisiana Civil Law Treatise on Predial Servitudes²⁰⁵ and the *Boudreaux* opinions²⁰⁶ to “acts of simple tolerance” or other synonymous terms, one place for the legislature to start would be to provide a legal definition for the concept, especially in relation to the quasi-possession of servitudes. Although a civil code generally eschews the inclusion of detailed definitions,²⁰⁷ such a use is warranted in this case because of the uniquely difficult conceptual nature of the issue. The Court seemed to struggle with the concept that permission to use the underlying land does not *ipso facto* make the possession of an incorporeal servitude precarious, so clarification of acts of tolerance and how they relate to both corporeal and incorporeal things would be useful. Because of the fact-intensive nature of determining whether acts go beyond simple tolerance,²⁰⁸ a definition would at least provide a foundation for the fact finder to begin an analysis, especially in the case of lay jurors who already lack a background in civilian legal reasoning.

204. *Id.* at 1082.

205. YIANNOPOULOS, *supra* note 160, § 6:36, at 451–52.

206. *E.g.*, *Boudreaux v. Cummings*, 167 So. 3d 559, 562–63 (La. 2015).

207. Tetley, *supra* note 63, at 703–04.

208. LAURENT, *supra* note 163, at 312–13.

On the one hand, people should expect that “*certain invasions* in the spirit of good neighborhood” are customary among neighboring landowners and would not ordinarily lead to the prescription of a servitude.²⁰⁹ On the other hand, however, if all invasions are excluded, then there would be an effective abrogation of the law allowing such acquisitive prescription. The question then appears to become one of the intensity or duration of such an invasion. The types of actions which could lead to the creation of a servitude also include a distinct public policy element: when should neighboring landowners be in danger of losing a part of their ownership rights through the creation of a servitude? Related to that issue, in the interest of amicable resolution and judicial economy, there is also a question of when should a landowner be compelled to evict a neighbor or bring him or her to court. Instead of allowing judges to decide such substantive civilian legal principles on an ad hoc basis, it is instead within the proper realm of the legislature as lawmaker to decide those issues, ensuring a consistent framework and foundation from which courts can then provide more specific applications.

D. Right Result?

Whether the result would have been different in *Boudreaux* is not the critical issue addressed by this Comment. Although concededly the result makes a difference for the application of the law in Louisiana—and this Comment indicates where the law potentially stands—the most important consideration is *how* the result was reached. With confusing language, improper definitions and categorization, and a misapplication of the Civil Code, why there might have been a change in the law and how that change should be interpreted are both left unanswered. A proper methodology may have arrived at the same result, although it is more likely that the opposite result, especially if given to the fact finder,²¹⁰ would have obtained. Regardless of what the right result should have been, a proper civilian methodology is fundamental to arriving at a conclusion that is both articulable and logical.

CONCLUSION

Confronting a yet unresolved legal issue, the Louisiana Supreme Court should have fully relied on its civilian heritage to resolve *Boudreaux v. Cummings*. Although providing a foundation that promised a distinctly civilian approach, the Court erred in its application to the underlying

209. *Creation of Servitudes*, *supra* note 161, at 71.

210. *See* discussion *supra* Part III.C.3.

complex facts of *Boudreaux*. Rather than actually interpreting the Civil Code as the source of private substantive law within the state, the Court failed to provide a proper analysis of an issue minimally addressed by the relevant Code articles. By neglecting to follow its premises to their logical conclusions, the Court not only collapsed two distinct legal issues into one issue but also created an unsettled analysis regarding the state of legal presumptions within the law of possession. Although an admittedly mixed jurisdiction, Louisiana still professes to be civilian in the realm of substantive private law, and the courts should back this assertion, not with a mere recitation of the Civil Code, but with an actual, good-faith use of it.

*Cody J. Miller**

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