THE NEED FOR LEGISLATIVE AUTHORIZATION OF NONCOMPETE SERVITUDES IN COMMERCIAL LEASES

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I. INTRODUCTION: FRAMING THE PROBLEM OF NONCOMPETE SERVITUDES IN COMMERCIAL LEASES IN LOUISIANA

Winn-Dixie Stores, Inc. is a Florida-based supermarket chain that operates over 500 grocery stores across the southeastern United States.[1] In the Greater New Orleans area alone, Winn-Dixie operates nearly twenty stores.[2] Winn-Dixie stores generally "anchor" shopping centers, meaning that Winn-Dixie stores attract customers to shopping centers, and those customers in turn patronize other stores in those centers.[3] As a general policy, when Winn-Dixie agrees to anchor a shopping center, its leases include a "Grocery Exclusive" clause.[4] This Grocery Exclusive clause purports to prohibit other tenants in that shopping center from selling certain grocery items in competition with Winn-Dixie.[5] In an attempt to establish its

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1. *About Us*, WINNDIXIE, https://www.winndixie.com/AboutUs/Default.aspx (last visited Feb. 20, 2015).

2. *Locator*, WINNDIXIE, https://www.winndixie.com/locator/ (Type "70118" (the zip code of Loyola University New Orleans College of Law) into "Search" and set the "radius" to "25 miles") (last visited Sept. 11, 2015).

3. Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1015 (11th Cir. 2014); *see Anchor Tenant*, THEFREEDICTIONARY.COM, http://financial-dictionary.thefreedictionary.com/anchor+tenant (last visited June 1, 2015).

4. *Dolgencorp*, 746 F.3d at 1015.

5. A typical Grocery Exclusive clause in a Winn-Dixie lease provides:

> Landlord covenants and agrees that Tenant shall have the exclusive right to operate a supermarket in the shopping center and any enlargement thereof. Landlord further covenants and agrees that it will not directly or indirectly lease or rent any property located within the shopping center, or within 1000 feet of any exterior boundary thereof, for occupancy as a supermarket, grocery store, meat, fish or vegetable market, nor will the Landlord permit any tenant or occupant of any such property to sublet in any manner, directly or indirectly, any part thereof to any person, firm or corporation engaged in any such business without written permission of the Tenant; and Landlord further covenants and agrees not to permit or suffer any property located within the shopping center to be used for or occupied by any business dealing in or which shall keep in stock or sell for off-premises consumption any staple or fancy groceries, meats, fish, vegetables, fruits, bakery goods, dairy products or frozen foods without written permission of the Tenant.

Grocery Exclusive clause as a real property right enforceable against third parties (i.e., a noncompete servitude), Winn-Dixie's leases declare that the Grocery Exclusive clause "shall be deemed both a covenant and a condition and shall run with the land."[6] Additionally, Winn-Dixie records its leases in the public registry to put others on notice as to the clause's existence.[7]

Winn-Dixie recently brought suit to enforce this Grocery Exclusive clause against tenants located in Winn-Dixie-anchored shopping centers in Florida, Georgia, Alabama, Mississippi, and Louisiana.[8] Winn-Dixie alleged that these stores sold products in violation of the Grocery Exclusive clause.[9] Of course, none of these cotenants were parties to the contract of lease between Winn-Dixie and the shopping center landlords. Therefore, the court would have to find that Winn-Dixie's Grocery Exclusive clause created a real right running with the land to make it enforceable against these cotenants.[10] If, however, the court refused to recognize the validity of Winn-Dixie's Grocery Exclusive clause as a real right, Winn-Dixie's only recourse would be to enforce the Grocery Exclusive clause through its landlord as a contractual right.[11]

In *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, the Eleventh Circuit was presented with the issue of whether this Grocery Exclusive clause created a real right under the laws of Florida, Georgia, Alabama, Mississippi, and Louisiana.[12] With regard to Louisiana, the court applied the only available, yet nonetheless inappropriate, legal framework to hold that the Grocery Exclusive clause did not create a real right.[13] It was thus

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Complaint at 4, Winn-Dixie Stores, Inc. v. Dollar Tree Stores, Inc., 886 F. Supp. 2d 1326 (S.D. Fla. 2012) (No. 9:11-CV-80638-DMM), 2011 WL 2148690, at *3.

6. The leases purport to establish the Grocery Exclusive clause as real rights burdening the land by including the following language: "This lease and all of the covenants and provisions thereof shall inure to the benefit of and be binding upon the heirs, legal representatives, successors and assigns of the parties hereto. *Each provision hereof shall be deemed both a covenant and a condition and shall run with the land.*" Complaint, *supra* note 5, at 5 (emphasis added).

7. *See id.*

8. Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1016 (11th Cir. 2014).

9. *See id.*

10. *Id.*

11. *See id.* at 1031.

12. *See id.* at 1020-27, 1030-33.

13. Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1030-31 (11th Cir. 2014).

unenforceable against Winn-Dixie's cotenants in Louisiana.[14]

The Eleventh Circuit's decision, though not binding on Louisiana courts, highlights a deficiency in Louisiana law. Under the current framework, an anchor tenant like Winn-Dixie cannot enforce a noncompete provision in a lease as a real property right. This is problematic when one considers the value and ubiquity[15] of these types of restrictive-use clauses in commercial leases coupled with New Orleans Mayor Mitch Landrieu's plan to increase tax revenues in Orleans Parish by attracting national "big-box" retailers. The Eleventh Circuit's decision reflects a needless restriction on commercial lessees that might hinder the maximum economic impact of the Landrieu administration's plan.

This Comment fleshes out relevant Louisiana servitude law and explores the layers of legal tradition that collectively explain why current Louisiana law is stacked against enforcement of noncompete servitudes in commercial leases. This Comment characterizes application of the current framework to noncompete servitudes in commercial leases as misplaced. Using New Orleans's current retail boom as a backdrop, this Comment argues that judicial enforcement of noncompete servitudes in lease agreements would promote economic growth, respect for the contractual expectations of the landlord and lessee, and judicial efficiency. However, recognizing the Louisiana judiciary's traditional adherence to a *numurus clausus* of property rights,[16] this Comment proposes legislation authorizing courts to uphold noncompete servitudes in commercial leases so long as those servitudes are (1) fair, (2) reasonable, (3) reasonably likely to benefit the local economy, and (4) recorded.

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14. Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1030-31 (11th Cir. 2014).

15. *See* John A. Lovett, *Title Conditions in Restraint of Trade*, *in* MIXED JURISDICTIONS COMPARED 30, 32 (Vernon Valentine Palmer & Elspeth Christie Reid eds., 2009) ("Another common type of commercial title condition is a *lease exclusive*, an agreement between a landlord and tenant that one of the parties may not use or lease any other property he owns in a defined area for certain commercial activities that compete with those of the other party.").

16. *Numerus clausus* is a Latin phrase meaning "closed number." *See* A.N. YIANNOPOULOS, PROPERTY, 2 LOUISIANA CIVIL LAW TREATISE §§ 216-27 (4th ed. 2001).

II. LOUISIANA SERVITUDE LAW AND THE MISPLACED POLICY AGAINST NONCOMPETE SERVITUDES IN COMMERCIAL LEASES

This section discusses and analyzes the legal background pertinent to this issue. First, this section provides a crash course in Louisiana servitude law, highlighting features of that law relevant to noncompete servitudes in commercial leases. Next, this section explores the legal theories and traditions that weight Louisiana law against enforcement of noncompete servitudes in commercial leases. This section then analyzes the appropriateness of applying this framework to noncompete servitudes in commercial leases and concludes that the framework should not apply to such servitudes.

A. CRASH COURSE IN LOUISIANA SERVITUDE LAW

This subsection begins with the basics, first defining servitudes and then providing examples that illustrate how servitudes function as a subcategory of property rights in Louisiana. Second, this subsection defines the different classifications of servitudes permitted under Louisiana law and explains how these classifications relate to noncompete servitudes in commercial leases. Third, this subsection examines the rules of interpretation courts apply to written instruments creating servitudes and explains how such rules of interpretation apply to noncompete servitudes in commercial leases.

1. WHAT IS A SERVITUDE?

A servitude is the Louisiana version of an easement.[17] Like easements, servitudes are real rights; they burden land regardless of whether ownership of the land changes hands.[18] Because servitudes "run with the land," they take on a higher degree of permanency than contractual rights.[19] An example will help to illustrate this point. Suppose Betty owns a large lot and decides to sell half of the lot to Anna. Anna wants access to the alley that borders the southern edge of her half of the lot but does

17. *See, e.g.*, TEX. PROP. CODE ANN. tit. 2 app. Title Examination Standard 5.50 cmt. (2014) ("An easement is an incorporeal interest in land and may be created by grant, covenant, or agreement, express or implied.").

18. *See* LA. CIV. CODE ANN. art. 476 & cmt. (b) (2010). Contractual rights, on the other hand, burden and obligate a person. LA. CIV. CODE ANN. art. 1756 (2008).

19. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1264-65 (1982).

not want to use space on her own lot to build a driveway. Betty's half of the lot already has a driveway that runs to the alley, so Anna offers to pay Betty for use of the driveway. To ensure that Anna can still use the driveway even if Betty sells her lot to someone else, Betty and Anna include language in the act of sale that expressly binds Betty's property with Anna's right to use the driveway. Anna and Betty file their act of sale in the conveyance records of the parish where the properties are located.[20] Anna and Betty have just created a servitude burdening Betty's property such that if Betty sells her lot to Carla, Anna can enforce the right to use the driveway against Carla or any future owner of that lot.[21]

On a very basic level, servitudes fragment and transfer pieces of ownership in immovable property.[22] In the example above, full ownership of Betty's lot would give her the *exclusive* right to use her driveway.[23] But when Betty grants a servitude allowing Anna to use her driveway, she relinquishes a fragment of her ownership of the lot in favor of Anna. A person cannot transfer more real property rights than she actually possesses;[24] thus, when Betty sells her lot to another person (named Carla), the ownership right transferred excludes the right to prevent Anna from using the driveway.

As the example above demonstrates, servitudes not only fragment ownership in immovable property but also bind third parties to agreements—Carla is bound by Betty's promise to Anna even though she was not a party to that agreement. This powerful aspect of servitudes makes them valuable and judicially efficient. Consider this characteristic of servitudes in the context of a noncompete servitude in a commercial lease. If the Eleventh Circuit had interpreted Winn-Dixie's Grocery Exclusive clause as

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20. *See* LA. CIV. CODE ANN. art. 1839 (2008); LA. CIV. CODE ANN. art. 3346 (Supp. 2015).

21. *See* LA. CIV. CODE ANN. art. 650 (2008).

22. *See* A.N. YIANNOPOULOS, PREDIAL SERVITUDES, 4 LOUISIANA CIVIL LAW TREATISE § 1.1 (4th ed. 2013) ("The right of ownership, which according to traditional civilian doctrine includes the elements of *usus, fructus,* and *abusus,* may lawfully be dismembered in a variety of ways by the intent of the owner or by operation of law." (footnotes omitted)); *see, e.g.*, LA. CIV. CODE ANN. art. 639 (2010) (defining a servitude of right of use as "less than full enjoyment").

23. *See* LA. CIV. CODE ANN. art. 477 (2010).

24. YIANNOPOULOS, *supra* note 16, § 211 ("In the field of the law of property one may not ordinarily transfer a greater *real* right than one has but one may always transfer a thing to a particular successor free of all personal obligations that the transferor had assumed.").

a valid servitude under Louisiana law, Winn-Dixie would have been able to directly enforce its provisions against violating cotenants even though those other tenants were not a party to Winn-Dixie's lease contract.

2. PREDIAL VERSUS PERSONAL SERVITUDES

The Louisiana Civil Code provides that there are two main categories of servitudes: "personal servitudes and predial servitudes."[25] Both personal and predial servitudes impose a charge on immovable property.[26] The burdened property is called the servient estate.[27] However, the main difference between personal and predial servitudes lies in who holds the charge's correlative right; estates hold predial servitudes while people hold personal servitudes.[28] Louisiana's concept of predial and personal servitudes is analogous to the concept of easements in gross and easements appurtenant in other states.[29]

Anna and Betty's driveway agreement illustrates the difference between personal and predial servitudes. If Anna's plot of land holds the right to use the driveway, then the servitude is a predial servitude owed to Anna's estate (termed the dominant estate).[30] Suppose Anna and Betty created a predial servitude. Next, suppose that Anna sold her lot to another person, Darlene. Darlene can enforce the right to use the driveway against Betty or Betty's successors even though Darlene

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25. LA. CIV. CODE ANN. art. 533 (2010). Louisiana law allows three types of personal servitudes: "usufruct, habitation, and rights of use." LA. CIV. CODE ANN. art. 534 (2010). Of these three types of personal servitudes, this Comment will deal only with rights of use. *See* LA. CIV. CODE ANN. art. 639 (2010) ("The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment."). Louisiana Civil Code Article 640 provides: "The right of use may confer only an advantage that may be established by a predial servitude." LA. CIV. CODE ANN. art. 640 (2010). While the language of this article seems permissive, comment (b) to the article suggests that parties may only create *affirmative* rights of use. *Id.* cmt. (b). This paper discusses this limitation on contractual freedom as a possible explanation for why courts do not recognize personal noncompete servitudes.

26. LA. CIV. CODE ANN. art. 534 (2010); LA. CIV. CODE ANN. art. 646 (2008).

27. *See* LA. CIV. CODE ANN. art. 646 (2008). In the example of Anna's servitude allowing her to use Betty's driveway, Betty's lot is the servient estate.

28. *Compare* LA. CIV. CODE ANN. art. 534 (2010) (defining personal servitudes) *with* LA. CIV. CODE ANN. art. 646 (2008) (defining predial servitudes).

29. Easements in gross benefit people rather than estates. *See, e.g.*, TEX. PROP. CODE ANN. tit. 2 app. Title Examination Standard 5.50 cmt. (2014). Easements appurtenant attach to and run with the dominant estate. *See, e.g.*, *id.*

30. *See* LA. CIV. CODE ANN. art. 647 (2008); *see also* LA. CIV. CODE ANN. arts. 730-734 (2008) (providing rules for distinguishing personal and predial servitudes).

was not a party to Anna and Betty's contract.[31] This is so because a predial servitude is held by whoever happens to own the dominant estate by virtue of her ownership.[32] Conversely, if Anna and Betty created a personal servitude, then Anna would hold the right to use the driveway personally, not in her capacity as the owner of the neighboring lot.[33] Thus, if Anna were to sell her property to Darlene, the right of use would not transfer with the land.[34] Potentially, Anna could hold the servitude allowing her to use the driveway even after she sold the lot to Darlene because the right was created in favor of Anna the person and not Anna's plot of land.[35]

Lower Louisiana courts rely on the distinction between personal and predial servitudes when analyzing noncompete servitudes. Courts consistently uphold predial noncompete servitudes[36] but invalidate personal noncompete servitudes.[37] The application of this policy to anchor tenants like Winn-Dixie creates a problem: these tenants rent but do not own the land on which they operate. The Louisiana Civil Code provides that only the *owner* of a dominant estate may acquire a predial servitude for that estate.[38] Therefore, because Louisiana courts only enforce predial noncompete servitudes, which may only be acquired by the owner of a dominant estate, a lessee like Winn-Dixie will never be able to enforce a noncompete servitude under current Louisiana law.

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31. *See* LA. CIV. CODE ANN. art. 650 (2008).

32. *Id.*

33. LA. CIV. CODE ANN. art. 534 (2010); LA. CIV. CODE ANN. art. 639 (2010) ("The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment.").

34. *Compare* LA. CIV. CODE ANN. art. 639 (2010) (identifying a servitude of right of use as being "in favor of a person") *with* LA. CIV. CODE ANN. art. 650 (2008) (declaring that a predial servitude continues even "when ownership changes").

35. Intuitively, it seems a bit ridiculous and even unfair to think that Anna could continue to use Betty's driveway even though she no longer owns the neighboring lot.

36. *See, e.g.*, RCC Props., L.L.C. v. Wenstar Props., L.P., 40,996, p. 8-9 (La. App. 2 Cir. 6/5/06); 930 So. 2d 1233, 1238; Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc., 05-12, p. 4 (La. App. 5 Cir. 4/26/05); 902 So. 2d 512, 514; R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc., 521 So. 2d 634, 635 (La. App. 1 Cir. 1988).

37. *See, e.g.*, SPE FO Holdings, LLC v. Retif Oil & Fuel LLC, No. 07-CV-3779, 2008 WL 754716, at *4 (E.D. La. Mar. 19, 2008); E.P. Dobson, Inc. v. Perrit, 566 So. 2d 657, 660 (La. App. 2 Cir. 1990); *cf.* U-Serve Petroleum & Invs., Inc. v. Cambre, 486 So. 2d 821, 823 (La. App. 1 Cir. 1986) (finding that a grant of an exclusive right to sell gasoline at a service station created a personal obligation rather than a real obligation).

38. LA. CIV. CODE ANN. art. 735 (2008).

3. APPARENT VERSUS NONAPPARENT SERVITUDES

The Civil Code also categorizes servitudes as either apparent or nonapparent.[39] An apparent servitude is perceivable by a surface-level survey of the servient estate.[40] In the scenario with Anna and Betty, the servitude of driveway use on Betty's land is made apparent by the visible, outward sign of the driveway itself (accompanied by the lack of a driveway on Anna's property). Conversely, if Anna held a servitude that allowed her to run sewage pipes under the surface of Betty's property, that servitude would be nonapparent because an observer would be unable to see the pipes without digging below the surface of the servient estate.

Whether a servitude is apparent or nonapparent dictates the servitude's method of creation. While apparent servitudes can be established by acquisitive prescription, by title, or by destination of the owner,[41] Louisiana Civil Code Article 739 provides that "Nonapparent servitudes may be acquired by title only . . . ."[42] This limitation on the creation of nonapparent servitudes seems to arise from a concern for notice to third parties; a third party must have notice that a servitude exists on a servient estate in the event that she purchases the servient estate and becomes bound by the servitude. Because a third party can see an apparent servitude by simply looking at the servient estate, such servitudes do not require additional notice.[43] Nonapparent servitudes, however, are not self-evident; thus recordation of a title document helps third parties to know of nonapparent servitudes' existence.[44]

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39. LA. CIV. CODE ANN. arts. 706-707 (2008).

40. LA. CIV. CODE ANN. art. 707 (2008).

41. LA. CIV. CODE ANN. art. 740 (2008).

42. LA. CIV. CODE ANN. art. 739 (2008).

43. Thus, a vendor of immovable property does not warrant to her vendee that the property sold is free from apparent servitudes because the purchaser has the ability to see the servitude. *See* Richmond v. Zapata Development Corp., 350 So. 2d 875, 879 (La. 1977) ("Louisiana courts also have adopted the view that a vendor does not warrant the property conveyed as free from apparent servitudes."); James v. Buchert, 144 So. 2d 435, 441 (La. App. 4 Cir. 1962) ("Since this right of passage is an apparent servitude, it follows that defendants are not entitled to recover in warranty . . . ."); *cf.* Lee Hargrave, *Public Records and Property Rights*, 56 LA. L. REV 535, 557 (1996) (arguing that visible adverse possession in acquisitive prescription cases dispenses with the need for recordation).

44. *Cf.* LA. CIV. CODE ANN. art. 2500 (1996) ("The warranty [against eviction] also covers encumbrances on the thing that were not declared at the time of the sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes,

A noncompete servitude, like that which Winn-Dixie sought to establish via its Grocery Exclusive clause, is nonapparent.[45] Unlike a road that visibly marks a servitude of passage,[46] a noncompete servitude is invisible. Because a noncompete servitude is nonapparent, it may only be acquired by title, and that title must be recorded to bind third parties.[47] But to what extent does a contract of commercial lease constitute title for the purposes of establishing nonapparent, noncompete servitudes?[48] This Comment questions whether the implicated notice concerns related to a lack of title are really triggered where a commercial lessee records its noncompete servitude in the public records.[49]

4. AFFIRMATIVE VERSUS NEGATIVE SERVITUDES

The next subcategories of servitudes are affirmative and negative servitudes.[50] An affirmative servitude burdens the servient estate's owner with an obligation to permit activity on her property that she would otherwise be able to prevent.[51] For

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which need not be declared."); Richmond v. Zapata Development Corp., 350 So. 2d 875, 880 (La. 1977) ("In the event the purchaser is unable to learn of a charge because it is non-apparent, fairness demands that the buyer must either inform him of it before the sale or protect him against eviction.").

45. *See, e.g.*, RCC Props., L.L.C. v. Wenstar Props., L.P., 40,996, p. 6 (La. App. 2 Cir. 6/5/06); 930 So. 2d 1233, 1237.

46. LA. CIV. CODE ANN. arts. 705, 707 (2008 & Supp. 2015).

47. *See* Leonard v. Lavigne, 162 So. 2d 341, 343 (La. 1964).

48. *See* YIANNOPOULOS, *supra* note 16, § 211 ("Leases of immovable property are no longer classified as real obligations; these are personal contracts which, in certain respects, function as real rights."); *see also* Wolfe v. N. Shreveport Dev. Co., 228 So. 2d 148, 150 (La. App. 2 Cir. 1969) ("A lessee's rights under a predial lease are classified in the civil-law tradition as personal rights as distinguished from real rights.").

49. Although a lease does not create real rights, the Civil Code implies that a recorded lease of an immovable can be effective against third persons. LA. CIV. CODE ANN. art. 2681 (2005) ("A lease of an immovable is not effective against third persons until filed for recordation in the manner prescribed by legislation.").

50. LA. CIV. CODE ANN. arts. 706-707 (2008).

51. LA. CIV. CODE ANN. art. 706 (2008). Note the distinction between requiring the owner of a servient estate to *permit* activity on her property versus requiring the owner of a servient estate *to do* something for the servitude holder. The former grants an affirmative *right* to the servitude holder, while the latter imposes an affirmative *obligation* on the owner of the servient estate. Louisiana policy is decidedly against servitudes that impose affirmative obligations on the servient estate owner. *See* LA. CIV. CODE ANN. art. 651 (Supp. 2015); *see also* Lovett, *supra* note 15, at 63 ("Neither decision, however, cited article 651 of the revised Civil Code, which still provides that predial servitudes, and by extension limited personal servitudes (rights of use), cannot impose affirmative obligations on a servient estate owner.").

example, in our driveway servitude, Betty must allow Anna to use the driveway located on Betty's property. A negative servitude, on the other hand, prevents the owner of the servient estate from doing some affirmative act on her estate that she would otherwise be permitted to do.[52] Say, for example, that Anna held a servitude that prohibited Betty from parking in her own driveway; such a servitude would be negative because Betty would be prevented from doing something on her lot that she would otherwise be able to do.[53] A noncompete servitude is another example of a negative servitude.[54] Under a noncompete servitude, the owner of the servient estate is bound by the promise not to sell certain products in competition with the servitude holder.

The negative nature of noncompete servitudes seemingly factors into the rationale supporting Louisiana courts' consistent invalidation of personal noncompete servitudes. Article 640 of the Louisiana Civil Code governs the permissible content of personal servitudes.[55] It provides that "the right of use may confer only an *advantage* that may be established by a predial servitude."[56] Revision comment (a) to this article suggests that the article limits "contractual freedom to create rights of use."[57] Comment (b) provides an illustrative list of rights of use, the majority of which are affirmative and not negative.[58] Thus, it is possible to interpret Article 604 as limiting the content of personal servitudes to *affirmative* rights only.[59] This interpretation makes sense when one considers the bad policy that could flow from permitting a remotely located person to restrict activity on a servient estate. For example, consider the potential for a shoe manufacturer to create a monopoly by perpetually limiting competition in shopping centers around the state simply by holding personal servitudes binding all properties

52. LA. CIV. CODE ANN. art. 706 (2008).

53. *Id.*

54. *See, e.g.*, RCC Props., L.L.C. v. Wenstar Props., L.P., 40,996, p. 6 (La. App. 2 Cir. 6/5/06); 930 So. 2d 1233, 1237.

55. LA. CIV. CODE ANN. art. 640 (2010).

56. *Id.* (emphasis added).

57. *Id.* cmt. (a).

58. *Id.* cmt. (b). ("The rights of passage, of aqueduct, or of light and view, may thus be stipulated in favor of a person rather than an estate. Further, fishing or hunting rights and the taking of certain fruits or products from and estate may likewise be stipulated in the form of a right of use servitude.").

59. Interview with John A. Lovett, Prof. of Law, Loyola University New Orleans College of Law, in New Orleans, La. (Apr. 7, 2014).

used as shoe stores to exclusively sell its shoes. Some Louisiana opinions seem to have considered this policy when invalidating personal noncompete servitudes.[60]

5. JUDICIAL INTERPRETATION OF INSTRUMENTS CREATING SERVITUDES

Courts analyzing the validity of noncompete servitudes seemingly rely on a distinction between predial and personal servitudes. Because noncompete servitudes are nonapparent and can thus only be created through title, Louisiana courts' categorization of noncompete servitudes as personal or predial is based in part on a reading of the title document. This subsection discusses how courts analyze documents creating servitudes when classifying the servitudes as personal or predial.

Before a court reaches the question of whether a servitude is predial or personal, it must first find that the parties who created the title document intended to create a servitude at all.[61] In other words, the title document must indicate intent for the charge to run with a servient estate.[62] Parties can satisfy this requirement by including language that clearly expresses intent for the servitude to burden the land. For example, language in an act that states, "the terms, stipulations, and restrictions contained herein shall be binding upon and run with the land," would indicate intent to create a real right, or more specifically a servitude burdening the servient estate.[63] Without similar language, there can be no real right at all and the act is merely a personal contract between the parties.

Once a court determines that the parties intended to create a servitude, it will often have to determine whether the servitude is personal or predial.[64] As a preliminary matter, only the owner of a dominant estate can acquire a predial servitude.[65] This rule is relevant to noncompete servitudes in commercial leases because a lessee does not own an estate and cannot acquire a predial

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60. *See* discussion *infra* Sections II.B.1.a.iii-iv.

61. *See, e.g.*, YIANNOPOULOS, *supra* note 22, § 6:28.

62. *Id.*

63. *See, e.g.*, U-Serve Petroleum & Invs., Inc. v. Cambre, 486 So. 2d 821, 823-24 (La. App. 1 Cir. 1986). While the *U-Serve* court concededly did not uphold the attempted servitude as valid, it did acknowledge this language as evidence of the parties' intent to bind the servient estate with an obligation. *Id.*

64. YIANNOPOULOS, *supra* note 22, § 6:30.

65. LA. CIV. CODE ANN. art. 735 (2008).

servitude; it can only acquire a personal servitude.

If ownership of the benefiting estate is not an issue, courts can apply Louisiana Civil Code Articles 730-734, which address title document interpretation, to determine whether a servitude is predial or personal.[66] Article 731 of the Code provides that when a title document expressly states that a servitude is for the benefit of a piece of immovable property, it is a predial servitude.[67] For example, in *Theriot v. Consolidated Companies*, the court found that language in the title document reserving a right of passage "for the benefit and advantage of the property" created a predial servitude.[68]

If the title document creating the servitude does not expressly say that the servitude is intended to benefit an estate, courts will look to the nature of the servitude to determine whether it constitutes a predial servitude.[69] For example, in *Burgas v. Stoutz*, the court found that an act of sale containing language allowing the "purchaser" of the dominant estate to use a driveway located on the rear of the servient estate created a predial servitude.[70] This was so even though the act did not express intent for the servitude to benefit an estate.[71] The court found that the nature of the right, i.e., use of the driveway, was such that it would be useful to whoever happened to own the dominant estate.[72]

In summary, when a court analyzes an instrument creating a servitude, it must first determine whether the document creates a servitude at all, and if need be, it will then determine whether the servitude is personal or predial.[73] In making this second determination, a court will first have to determine whether the holder of the right is a person or an estate. If the acquirer of the right could conceivably be an estate, a court will look to the title documents to determine whether the parties

66. LA. CIV. CODE ANN. art. 730-734 (2008).

67. LA. CIV. CODE ANN. art. 731 (2008).

68. Theriot v. Consol. Cos., 107 So. 305, 306 (La. 1926); *see also* LA. CIV. CODE ANN. art. 731 cmt. (c) (2008).

69. LA. CIV. CODE ANN. arts. 732-33 (2008).

70. Burgas v. Stoutz, 141 So. 67, 69 (La. 1932).

71. *Id.*; *see also* LA. CIV. CODE ANN. art. 733 (2008) ("When the right granted be of a nature to confer an advantage on an estate, it is presumed to be a predial servitude.").

72. *See Burgas*, 141 So. at 69.

73. YIANNOPOULOS, *supra* note 22, § 6:30.

intended the servitude as predial or personal. Unless a title document clearly expresses intent for the servitude to benefit a dominant estate, the court will look at the nature of the right to determine whether it is of real utility to a dominant estate.

This process of interpretation is significant for tenants who attempt to establish noncompete servitudes on the shopping centers they lease. For example, Winn-Dixie's Grocery Exclusive clause clearly indicates intent to bind the remainder of the leased premises with the noncompete servitude.[74] Furthermore, the nature of the noncompete servitude is such that it creates an economic benefit for the Winn-Dixie store physically located in the burdened shopping center because it prevents competition within the shopping center.[75] Nonetheless, courts interpreting lease provisions purporting to create such servitudes have found that these provisions could not create valid predial servitudes because the lessees did not own a dominant estate.[76]

B. POTENTIAL EXPLANATIONS FOR LOUISIANA'S DISFAVOR OF NONCOMPETE SERVITUDES IN COMMERCIAL LEASES

The Eleventh Circuit's support for its invalidation of the Grocery Exclusive clause as a servitude in Louisiana provides insight into the layers of tradition that collectively weigh against validating noncompete servitudes held by commercial lessees in our state. For example, the Eleventh Circuit largely relied on the rationale that commercial lease contracts are not appropriate instruments by which to create real rights in Louisiana.[77] Relatedly, the Eleventh Circuit cited a line of cases that, taken together, stand for the general proposition that personal noncompete servitudes are invalid under Louisiana law.[78]

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74. *See supra* note 6 and accompanying text.

75. Revision comment (b) to Article 646 of the Louisiana Civil Code indicates that "predial servitudes may be established on, or in favor of, tracts of land and buildings." LA. CIV. CODE ANN. art. 646 cmt. (b) (2008).

76. *See, e.g.*, Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1031 (11th Cir. 2014) ("Although the contract in question stated that it was to 'run with the land,' it was in fact a personal contract between Cambre and U–Serve because it favored the person of U–Serve and not a dominant estate." (quoting U–Serve Petroleum & Invs., Inc. v. Cambre, 486 So.2d 821, 824 (La. App. 1 Cir. 1986))).

77. *Id.* at 1030.

78. *Id.* This Comment discusses several of these cited cases at length in its discussion of instances where Louisiana courts have struck down personal noncompete servitudes. *See infra* Section II.B.1. Conversely, at least three Louisiana appellate courts have upheld *predial* noncompete servitudes. *See* RCC Props., L.L.C. v. Wenstar Props., L.P., 40,996 (La. App. 2 Cir. 6/5/06); 930 So. 2d

Additionally, the phenomenon of the *numerus clausus*—judicial adherence to a closed list of property rights—arguably underlies any court's decision to strike down a contractually agreed upon servitude in the name of preserving traditional limitations on property rights.[79] This section explores these layers of Louisiana tradition and argues that this framework should not apply to noncompete servitudes in commercial leases.

1. COURTS APPLYING LOUISIANA LAW INVALIDATE PERSONAL NONCOMPETE SERVITUDES BUT UPHOLD PREDIAL NONCOMPETE SERVITUDES.

This subsection discusses Louisiana cases that collectively stand for the proposition that personal noncompete servitudes are invalid while predial noncompete servitudes are valid. The general rationale behind courts' invalidations of personal noncompete servitudes seems based on public policy concerns for providing notice to third parties of a servitude's existence and against allowing remotely located entities to dictate the commercial use of servient estates. One opinion even concluded that *all* noncompete servitudes, both personal and predial, are invalid as a matter of public policy against restrictions on competition.[80] The courts that upheld predial noncompete servitudes, however, appeared less concerned with notice requirements or policies against restricting competition and more concerned with protecting the reliance interests of the contracting parties.[81] This subsection demonstrates how the policy concerns of notice and anticompetitiveness that typically justify judicial invalidation of personal noncompete servitudes are not triggered by recorded noncompete servitudes held by physically present lessees. Rather, these noncompete servitudes actually benefit local economies and carry the same policy concerns of fairness

1233; Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc., 05-12 (La. App. 5 Cir. 4/26/05); 902 So. 2d 512; R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc., 521 So. 2d 634 (La. App. 1 Cir. 1988).

79. *See, e.g.*, Lovett, *supra* note 15, at 33-38.

80. SPE FO Holdings, LLC v. Retif Oil & Fuel LLC, No. 07-CV-3779, 2008 WL 754716, at *5 (E.D. La. Mar. 19, 2008) (citing Solo Serve Corp. v. Westowne Assocs., 929 F.2d 160, 162 (5th Cir. 1991)).

81. *See* Lovett, *supra* note 15, at 58. In his discussion of the appellate court's decision in *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc.*, 521 So. 2d 634 (La. App. 1 Cir. 1988), Professor Lovett notes that "[t]he court was much more concerned with protecting the original benefited proprietors' reliance interests, not Louisiana's traditional limits on private ordering in the dismemberment of ownership." Lovett, *supra* note 15, at 58.

that have motivated courts to uphold predial noncompete servitudes.

a. Personal Noncompete Servitudes Are Invalid

i. Hebert v. Dupaty

In 1890, the Louisiana Supreme Court issued one of the first decisions to address the validity of a noncompete servitude in this state.[82] In *Hebert v. Dupaty,* the court determined whether a clause in a lease binding the original lessor "not to keep a public livery stable during the term of the lease . . . within a radius of six miles of Napoleonville" was enforceable against the lessor's successor in title.[83] Because the court found that language of the lease expressed no intent to burden the lessor's *land* with the promise not to compete, the court held that the lease agreement did not bind the lessor's successors.[84] Instead, the agreement created a personal obligation binding only on the original lessor.[85] Significantly, the *Hebert* court did not hold that noncompete servitudes in leases are per se invalid. On the contrary, the opinion suggested that if the lease document had contained language sufficient to indicate intent to bind the lessor's land as a servient estate, the agreement might have constituted a valid servitude binding on the land itself.[86]

ii. *Leonard v. Lavigne*

Seventy years later in *Leonard v. Lavigne,* the Louisiana Supreme Court reached a similar conclusion regarding another noncompete provision in a lease.[87] In this provision, the original lessors promised on behalf of themselves, their heirs, successors, and assigns, "not to sell or lease any part of the adjoining property owned by them to anyone" who would operate a gasoline retail business that would compete with their lessee's business during the term of his lease.[88] The original lessor sold the adjoining property to the Lavignes, who began constructing a

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82. Hebert v. Dupaty, 7 So. 580 (La. 1890).

83. *Id.* at 581.

84. *Id.*

85. *Id.*

86. *Id.* ("Dupaty did not stipulate that no livery stable should be kept on the balance of the property during the plaintiff's lease, but that he would not keep a livery stable himself." (quoting the district court opinion)).

87. Leonard v. Lavigne, 162 So. 2d 341 (La. 1964).

88. *Id.* at 342.

filling station thereon.[89] Leonard, the lessee, brought suit seeking to enforce the terms of the lease against the Lavignes.[90] In its analysis of whether the lease agreement created a real right binding on the Lavignes, the court likened the restriction to a nonapparent servitude that does not announce itself through any visible signs.[91] Citing the Civil Code, the court held that, such a "real obligation" on land can only be established by title and must be "clearly apparent from the title documents themselves."[92] The court went on to explain that, here, "[t]he stipulation in the contract of lease does not create a real obligation upon the land itself, but is clearly an obligation the lessors placed upon themselves."[93] Consequently, the plaintiff's only recourse was an action for breach of contract against his original lessor.[94]

Holes in the *Leonard* court's rationale create uncertainty as to the true reason behind its invalidation of Leonard's servitude. Overall, the *Leonard* court's discussion seems based on a general concern for notice. The court invalidated the nonapparent, noncompete servitude in *Leonard* because third parties acquiring the land would have no notice of its existence.[95] But did this lack of notice arise from the fact that, like the servitude at issue in *Hebert*, the language in the lease creating the servitude did not clearly express intent to bind the lessor's adjoining property as a servient estate?[96] Or did the lack of notice arise from the fact that a contract of lease, even if recorded, is a personal contract and therefore never a valid document by which a nonapparent servitude can be created?[97] Alternatively, was the servitude invalid because it purported to burden an estate with a negative servitude restricting commercial activity in favor of a person, the lessee, as opposed to a dominant estate?[98]

Regardless of the *Leonard* court's true rationale, courts have

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89. Leonard v. Lavigne, 162 So. 2d 341, 342 (La. 1964).

90. *Id.* at 342.

91. *Id.* at 343.

92. *Id.*

93. *Id.*

94. Leonard v. Lavigne, 162 So. 2d 341, 343 (La. 1964).

95. Recall that to give notice to third parties of a nonapparent servitudes existence, the Civil Code mandates that all nonapparent servitudes be created by title. LA. CIV. CODE ANN. art. 739 (2008).

96. *See supra* notes 61-63 and accompanying text.

97. *See supra* note 48.

98. *See supra* notes 55-60 and accompanying text.

relied on *Leonard* to invalidate personal noncompete servitudes, both in general[99] and in the context of leases.[100] But *Leonard*'s application in the context of noncompete servitudes like Winn-Dixie's Grocery Exclusive clause seems especially misplaced. To explain: The *Leonard* court's concern regarding the absence of clear intent to bind the servient estate is not present in Winn-Dixie's case. Winn-Dixie's Grocery Exclusive clause clearly indicated intent to bind the servient estate, and this language was duly recorded in the public records.[101] *Leonard*'s potential concern for notice arising from the fact that a lease is not a title document is not present here. Winn-Dixie's recordation of its lease should have sufficiently placed third parties on notice that the lease's provisions bound them.[102] Finally, *Leonard*'s potential policy concerns of allowing negative obligations to form the content of personal servitudes are not present here. Classification of servitude held by a shopping center tenant as "personal" is technical and formalistic. As in the case of a predial servitude where the dominant estate is located such that it can derive a benefit from the servient estate,[103] a shopping center tenant is physically present on the servient estate. Thus, when a lessee holds a noncompete servitude, it is not as if the lessee restricts commercial activity on the servient estate from afar. In fact, given the ubiquity of restrictive use provisions in commercial leases, a nationally recognized anchor tenant's mere presence in the shopping center might actually caution third parties of its right to restrict activity on the remainder of the estate.[104] In sum, the *Leonard* court's concerns for notice simply are not triggered in situations where a physically present shopping

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99. *See, e.g.*, SPE FO Holdings, LLC. v. Retif Oil & Fuel, LLC, No. 07-CV-3779, 2008 WL 754716, at *4 (E.D. La. Mar. 19, 2008).

100. *See, e.g.*, Wolfe v. N. Shreveport Dev. Co., 228 So. 2d 148, 150-51 (La. App. 2 Cir. 1969) ("Important to appellees' exception is the nature of plaintiffs' rights under the contract of lease, that is, whether such rights are real, running with the land, or personal. A lessee's rights under a predial lease are classified in the civil-law tradition as personal rights as distinguished from real rights."); *see also* Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1030-31 (11th Cir. 2014) (applying the *Leonard* rationale to invalidate a noncompete servitude allegedly created as part of a commercial lease).

101. *See supra* notes 5-7.

102. *See supra* note 49.

103. LA. CIV. CODE ANN. art. 648 (2008).

104. *Cf.* Sanborn v. McLean, 206 N.W. 496, 497-98 (Mich. 1925) (holding that despite failure to record the deed creating a negative easement, the residential nature of the neighborhood surrounding the property provided notice that the property was burdened by an easement preventing use a gas station).

center tenant records a lease that clearly indicates intent to bind the remainder of the shopping center with a noncompete servitude.

iii. *U-Serve Petroleum v. Cambre*

Over twenty years later, the first circuit assessed the validity of another noncompete servitude in *U-Serve Petroleum & Investments, Inc. v. Cambre.*[105] Importantly, however, the servitude at issue in *U-Serve* was contained in a franchise contract rather than a contract of lease.[106] In *U-Serve,* U-Serve Petroleum and Cambre entered into a contract whereby Cambre promised to exclusively sell U-Serve's petroleum products at his service station.[107] The contract contained a clause expressing that the "stipulations contained in the contract were to be binding upon and to run with" Cambre's service station.[108] The parties duly recorded their contract in the Livingston Parish public records.[109] Then, Cambre sold his service station to Moreau, who began selling another company's petroleum products.[110] U-Serve sued to enforce the terms of its contract with Cambre against Moreau.[111]

To determine whether the terms of the contract bound Moreau, who was not a party to it, the court had to determine if the contract bound Moreau's service station as a servitude.[112] The *U-Serve* court held that, although the contract contained a clear expression of the parties' intent to bind the property with the promise not to sell competitors' products, the contract did not create a real right binding on subsequent owners of the property.[113] The court based its holding on the rationale that servitudes may only be created in favor of an estate and not a person.[114] Therefore, the court held that because the promise not

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105. U-Serve Petroleum & Invs., Inc. v. Cambre, 486 So. 2d 821, 823 (La. App. 1 Cir. 1986).

106. *Id.* at 822.

107. *Id.* at 823.

108. *Id.*

109. *Id.* Cambre's property was located in Livingston Parish. *See id.*

110. U-Serve Petroleum and Invs., Inc. v. Cambre, 486 So. 2d 821, 823 (La. App. 1 Cir. 1986).

111. *Id.*

112. *Id.* at 824.

113. *Id.*

114. *Id.* ("The crucial factor in determining whether a covenant is one that 'runs with the land,' or is a mere personal agreement is whether or not the obligation was

to sell a competitor's petroleum products favored U-Serve, a juridical person, the agreement merely created personal rights binding Cambre alone.[115]

Like the *Leonard* decision, the *U-Serve* court's rationale contains gaps. Why did the *U-Serve* court fail to uphold the servitude as a personal servitude benefiting the economic interest of *U-Serve*, a juridical person? The *U-Serve* court's swift disposition of this issue essentially stated that parties may only burden land with predial servitudes;[116] thus, it appears as though the court failed to recognize that the Civil Code allows parties to create *personal* servitudes as well as predial servitudes.[117] At first blush, this aspect of the *U-Serve* decision seems blatantly wrong.

However, this Comment proposes a rational explanation for the *U-Serve* decision. In *U-Serve*, an oil and gas company sought to permanently control the brand of petroleum products the servient estate could sell without limiting the effects of that control to its status as a physically present owner of a dominant estate.[118] Perhaps the court was wary of rendering a decision that could potentially allow a remote person to control the commercial use of numerous properties—if U-Serve could hold a servitude forcing the exclusive sale of its products on Cambre's property, could it not also hold such servitudes on other properties across the state, eventually snowballing into a U-Serve monopoly on petroleum products?[119] A court would naturally want to avoid such a result. But these concerns are arguably less of a concern in the context of a commercial lease, where the tenant holding the noncompete servitude benefits by virtue of its

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imposed in favor of the estate or in favor of a person.").

115. U-Serve Petroleum and Invs., Inc. v. Cambre, 486 So. 2d 821, 824 (La. App. 1 Cir. 1986) However, the court ultimately held Moreau liable to U-Serve because Moreau assumed Cambre's obligations. *Id.* at 825.

116. *See id.* at 825.

117. LA. CIV. CODE ANN. art. 534 (2010) (defining personal servitudes); LA. CIV. CODE ANN. arts. 639-640 (2010) (defining the personal servitude of right of use).

118. *See Cambre*, 486 So. 2d at 823.

119. In Section II.A.4, *supra*, this Comment discusses the potential for monopoly that could arise if, for example, a shoe business were to hold unlimited personal noncompete servitudes on immovable properties across the state. In one regard, then, Louisiana's pattern of limiting noncompete servitudes to physically present dominant estates serves to curb the anticompetitive effect of these servitudes. Under the current scheme, a shoe business only gets to control competition by virtue of its location relative to the servient estate, as opposed to being able to control competition across the state regardless of its physical location.

physical presence on the servient estate.[120] A remotely located person like U-Serve does not have to invest in creating a physical presence to hold a personal noncompete servitude, making it easier for U-Serve to "rack up" such servitudes. On the other hand, a supermarket tenant like Winn-Dixie invests valuable resources each time it signs on to anchor a shopping center; cost alone would likely prohibit Winn-Dixie from acquiring so many noncompete servitudes as to establish a monopoly. Thus, the *U-Serve* case is also inapplicable to noncompete servitudes in commercial leases.

iv. *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*

Thirty years later in *SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC*, the United States District Court for the Eastern District of Louisiana applied Louisiana law to strike down yet another personal noncompete servitude.[121] In this case, a contract of sale by which Hill City Oil Company sold certain assets to Retif Oil & Fuel contained a clause purporting to prohibit Hill City, its heirs, successors, and assigns from operating a business on Hill City's immovable property that would compete with Retif's fuel sale business.[122] Like the contract at issue in *U-Serve*, the contract here expressly declared that these restrictions would run with the land.[123] The contract of sale was duly recorded in the public records.[124]

SPE FO Holdings subsequently acquired the Hill City property and petitioned the court for a declaration that the noncompete provision of the contract did not create a servitude on the property.[125] In agreeing with SPE FO, the district court discussed Louisiana's policy against restrictions on competition.[126] The court explained that Louisiana law does not permit prohibitions against competition to form the content of *any type* of real right; in Louisiana, prohibitions against

120. *See* discussion *infra* Section III.

121. SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC, No. 07-CV-3779, 2008 WL 754716, at *4 (E.D. La. Mar. 19, 2008).

122. *Id.* at *1.

123. *Id.*

124. *Id.* at *5.

125. *Id.* at *1. SPE FO Holdings also sought a summary judgment declaring that the contract did not establish a building restriction, nor did it bind it as a personal obligation. *Id.*

126. SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC, No. 07-CV-3779, 2008 WL 754716, at *1 (E.D. La. Mar. 19, 2008).

competition may only take the form of personal obligations.[127] In support of this policy argument, the *SPE FO* court referenced the work of prominent Louisiana civilian A.N. Yiannopoulos, who has argued that "prohibitions against competition should not be allowed to restrict the use of lands in Louisiana; existing economic needs may be amply satisfied by means of personal obligations."[128] According to the *SPE FO* court, noncompete servitudes create negative anticompetitive effects; thus, they should be strictly construed to only constitute personal obligations and not real rights.[129] Thus, the *SPE FO* court concluded that the restrictions at issue "did not create a predial servitude, building restriction, *or other real right* against" the SPE FO's property.[130]

The *SPE FO* decision more clearly articulated the policy against restrictions on competition that seemingly influenced the *U-Serve* decision: namely, the undesirable economic consequences that flow from allowing a *person* to control the commercial activity of a piece of property. But the *SPE FO* decision went a step further to conclude that noncompete servitudes cannot ever form the content of *any* servitude, personal or predial.[131] While the *SPE FO* court was correct in its assertion that competition is generally good for the economy, in the limited context of shopping centers, noncompete restrictions can actually benefit the local economy by preventing stores located in the same limited commercial islands from cloning one another's business models.[132] Thus, neither the *SPE FO* court's nor Professor Yiannopoulos's concerns about the anticompetitive effects of noncompete servitudes are triggered by reasonable noncompete servitudes held by shopping center tenants.

b. Courts Uphold Predial Noncompete Servitudes

The above-discussed cases provided the only real legal framework for the Eleventh Circuit to apply to determine whether Winn-Dixie's Grocery Exclusive clause created a valid servitude. However, as discussed in the previous subsection, the

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127. SPE FO Holdings, LLC v. Retif Oil & Fuel, LLC, No. 07-CV-3779, 2008 WL 754716, at *4 (E.D. La. Mar. 19, 2008) (citing Leonard v. Lavigne, 162 So.2d 341 (La. 1964)).

128. *Id.*; YIANNOPOULOS, *supra* note 16, § 227.

129. *SPE FO*, 2008 WL 754716, at *4.

130. *Id.* (emphasis added).

131. *Id.*

132. *See* discussion *infra* Section III.

application of this framework to such servitudes is misplaced. The next three cases demonstrate Louisiana courts' willingness to uphold predial servitudes. The remainder of this section aims to demonstrate the similarities between the servitudes at issue in these cases and noncompete servitudes in commercial leases.

In *R & K Bluebonnet, Inc. v. Patout's of Baton Rouge*, the first circuit considered a contract of sale in which the vendee promised not to open a seafood restaurant that would compete with the vendor's restaurant (located adjacent to the vendee's property) for a period of five years.[133] The *R & K* court applied Louisiana Civil Code Article 646's definition of a predial servitude to the facts of the case.[134] It found that the act of sale did create a valid predial servitude because it restricted competition on the vendee's property and thus created an economic benefit for the vendor's property, located next door.[135]

Eight years later, in *Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc.*, the fifth circuit considered a clause in an act of sale where the vendor sold its adjacent tract of land to the vendee but prohibited the vendee from using the conveyed property as an outpatient center in competition with the vendor.[136] The court upheld the clause as a predial servitude.[137] The *Meadowcrest* court found it important that the parties to the original contract were "on equal footing" and thus free to negotiate the terms of such a servitude.[138] The plaintiff argued that this predial servitude violated public policy by limiting the type of commerce conducted on its property, but according to the court, Louisiana Civil Code Article 706 permitted precisely this this type of restriction on the commercial use of a building.[139]

Finally, in 2006, the second circuit upheld a more complex

133. R & K Bluebonnet, Inc. v. Patout's of Baton Rouge, Inc., 521 So. 2d 634, 635 (La. App. 1 Cir. 1988).

134. *Id.* ("A predial servitude is a charge on a servient estate for the benefit of a dominant estate. The two estates must belong to different owners." (quoting LA. CIV. CODE ANN. art. 646 (2008))).

135. *Id.* (citing LA. CIV. CODE ANN. art. 731 (2008)).

136. Meadowcrest Ctr. v. Tenet Health Sys. Hosps., Inc., 05-12, p. 2 (La. App. 5 Cir. 4/26/05); 902 So. 2d 512, 513.

137. *Id.* at p. 4; 902 So. 2d at 514.

138. *Id.* at p. 6; 902 So.2d at 515.

139. *Id.* (citing LA. CIV. CODE ANN. art. 706 (2008) ("Negative servitudes are those that impose on the owner of the servient estate the duty to abstain from doing something on his estate. Such are the servitudes of prohibition of building and of the use of an estate as a commercial or industrial establishment.")).

noncompete predial servitude in *RCC Properties, L.L.C. v. Wenstar Properties, L.P.*[140] In *Wenstar*, a clause in an act of sale prohibited the purchaser of the servient estate, located adjacent to the dominant estate, from using it as a fast-food restaurant deriving 15% of profits from the sale of chicken sandwiches.[141] The court found that the servitude at issue here was a "negative, nonapparent servitude, which may be acquired only by title."[142] From there, the court upheld the servitude based on a straightforward application of the rule that predial servitudes must involve two estates, one of which is burdened for the benefit of the other.[143] Here, the title documents clearly evidenced the parties' intent for the servitude to create an economic benefit for the dominant estate, which was operating a Wendy's restaurant at the time.[144] The document creating the restriction was duly recorded in the conveyance office in the parish where the properties were located; thus, it created a valid predial servitude binding on successors of the servient estate.[145]

In sum, the courts in the above-discussed cases respected the reliance interests of the contracting parties and upheld the predial noncompete servitudes through a direct application of the provisions of the Civil Code, which expressly allow parties to create predial servitudes that restrict the commercial use of servient estates so long as those restrictions benefit a dominant estate.[146] Arguably, the same rationale could apply to commercial tenants like Winn-Dixie, which have similar reliance interests in their noncompete servitudes and who stand to benefit from such servitudes because of their physical locations relative to the servient estate. Why, then, did the Eleventh Circuit not apply this framework to Winn-Dixie's Grocery Exclusive clause? The most plausible answer is that this framework only expressly applies to true predial servitudes.[147] If the Eleventh Circuit were

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140. RCC Props., L.L.C. v. Wenstar Props., L.P., 40,996 (La. App. 2 Cir. 6/5/06); 930 So. 2d 1233.

141. *Id.* at pp. 1-2; 930 So. 2d at 1234-35.

142. *Id.* at p. 6; 930 So. 2d at 1237.

143. *Id.* at p. 5; 930 So. 2d at 1236.

144. *Id.* at pp. 6-7; 930 So. 2d at 1237.

145. RCC Props., L.L.C. v. Wenstar Props., L.P., 40,996, p. 6 (La. App. 2 Cir. 6/5/06); 930 So. 2d 1237.

146. *See* LA. CIV. CODE ANN. arts. 646, 706 (2008).

147. Louisiana Civil Code Articles 646 and 706 fall under the Title IV of Book II of the Code, which specifically applies to predial servitudes. *See* LA. CIV. CODE ANN. arts. 646, 706 (2008). (A lessee like Winn-Dixie cannot hold a true predial servitude because it does not own a dominant estate. *See* LA. CIV. CODE ANN. art. 735 (2008).

to uphold the Grocery Exclusive clause as a servitude, it would be the first court to recognize the existence of such a property right under Louisiana law. However, as the next section explains, courts are generally reluctant to recognize new property rights.

2. LOUISIANA'S ADHERENCE TO THE *NUMERUS CLAUSUS*

Another possible explanation for Louisiana courts' failure to recognize noncompete servitudes in commercial leases is judicial adherence to the *numerus clausus* of property rights. Virtually every jurisdiction operates on a *numerus clausus* of real property rights.[148] Parties in these legal systems can create almost any type of right imaginable via contract, but the law is far more restrictive regarding rights that can run with the land.[149] The tradition of a *numerus clausus* of property rights dates back to ancient Rome, where the only types of property rights allowed were "use, habitation, usufruct, predial servitudes, pledge, mortgages, superficies, and emphyteusis."[150] Most civil law jurisdictions have codified the Roman tradition of a *numerus clausus*,[151] and legal scholars suggest that common law jurisdictions also adhere to a closed number of property rights, even though common law courts applying the *numerus clausus* doctrine do not explicitly refer to it by name.[152]

Louisiana's original codification of the *numerus clausus* principle, Article 487 of the Civil Code of 1870, listed only three types of real rights: (1) ownership; (2) usufruct; and (3) predial servitudes.[153] Early courts strictly enforced the narrow dictates

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Thus, Winn-Dixie's Grocery Exclusive clause is more amenable to classification as a personal right of use. Pursuant to Louisiana Civil Code Article 645, the laws governing predial servitudes apply to rights of use "to the extent that their application is compatible with the rules governing a right of use servitude." LA. CIV. CODE ANN. art. 645 (2010); *see also* LA. CIV. CODE ANN. arts. 646-774 (2008 & Supp. 2015) (containing the rules for predial servitudes). As mentioned in Section II.A.4, *supra*, however, the extent to which negative obligations can form the content of a servitude of right of use is debatable.

148. Bernard Rudden, *Economic Theory v. Property Law: The* Numerus Clausus *Problem*, *in* OXFORD ESSAYS IN JURISPRUDENCE: THIRD SERIES 239, 239 (John Eekelaar & John Bell eds. 1987); *see supra* note 16.

149. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3 (2000).

150. YIANNOPOULOS, *supra* note 16, § 216.

151. *Id.*

152. Merrill & Smith, *supra* note 149, at 10-11.

153. LA. CIV. CODE OF 1870 art. 487 (Claitor's 1961) (current version at LA. CIV. CODE ANN. art. 476 (2010)).

of Louisiana's seemingly closed menu of property rights.[154] However, Article 487's list did not include lesser property rights such as mortgage or other accessory real rights; thus, it could be interpreted as merely illustrative.[155] In *Queensborough Land Co. v. Cazeaux*, a landmark decision rendered in 1915, the Louisiana Supreme Court approved the creation of real rights outside of the Code's articulation of the *numerus clausus*.[156] In that case, the court upheld a title condition prohibiting the purchaser of a particular tract of land, along with any subsequent owners, from conveying any part of the tract to a member of the black race for twenty-five years.[157] The court held that the title condition created a real obligation, thus recognizing a new kind of property right.[158] Although the content of the real obligation upheld in *Queensborough* was lamentable to say the least, the decision has been credited with throwing "the door to wide-ranging real right innovation . . . wide open" in Louisiana.[159]

The Louisiana legislature has since codified a "more precise" version of the *numerus clausus* doctrine.[160] Article 476 of the Civil Code now provides that, "[o]ne may have various rights in things: (1) [o]wnership; (2) [p]ersonal and predial servitudes; and (3) [s]uch other real rights as the law allows."[161] Professor Yiannopoulos cautions, however, that Article 476 "does not open 'the door to an unregulated brood of real rights . . . .'"[162] Louisiana law still expressly imposes some limitations on the creation of new property rights, prohibiting both perpetual restraints on alienation of land as well as servitudes that impose an affirmative obligation on the owner of the servient estate.[163]

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154. *See, e.g.*, Wemple v. Nabors Oil & Gas Co., 97 So. 666, 668 (La. 1923) ("This court has always emphatically rejected the doctrine that there can be in this state any estate in lands other than (1) simple ownership of the soil; and (2) servitude thereon (including usufruct).").

155. YIANNOPOULOS, *supra* note 16, § 217.

156. Queensborough Land Co. v. Cazeaux, 67 So. 641, 645-46 (La. 1915).

157. *Id.* at 646. These types of racially restrictive covenants were declared unconstitutional by the Supreme Court of the United States in *Shelly v. Kraemer*, 334 U.S. 1 (1948).

158. *Queensborough Land Co.*, 67 So. at 646; Lovett, *supra* note 15 at 56.

159. *See* Lovett, *supra* note 15, at 58.

160. YIANNOPOULOS, *supra* note 16, § 217.

161. LA. CIV. CODE ANN. art. 476 (2010).

162. YIANNOPOULOS, *supra* note 16, § 217 (citing La. & Ark. Ry. Co. v. Winn Parish Lumber Co., 59 So. 403, 426 (La. 1911)).

163. An example of a perpetual restraint on alienation is a servitude that purports to prohibit the owner of the servient estate from ever selling it. For a discussion of servitudes that impose affirmative obligations on the owner of the servient estate,

Despite the fact that Louisiana law imposes so few limitations on the creation of novel property rights, Louisiana courts still adhere to a more restrictive version of the *numerus clausus*.[164] But Louisiana courts are not alone in their reluctance to recognize new real rights. The theory of optimal standardization, espoused by two legal scholars in a 2000 article published in the Yale Law Journal, offers an explanation for this universal phenomenon of judicial adherence to the *numerus clausus*.[165] The article observes that common law courts adhere to a closed list of property rights even though there is no legislation defining the *numerus clausus* in common law jurisdictions.[166] The authors describe this phenomenon "as a norm of judicial self-governance"; even though these courts have the freedom to recognize novel forms of property rights, they consistently choose not to do so.[167] The article proposes that judicial adherence to a set list of property rights can be explained by judicial concerns about imposing "unacceptable information costs" on third parties.[168] When parties create a novel property right, they necessarily externalize costs to third-party market participants, who must now conduct extra research to determine whether a similar novel property right burdens property they seek to purchase.[169]

The article provides an example to demonstrate how these externalities arise: suppose A owns a watch and sells B a "Monday interest" in the watch, allowing B to use the watch on Mondays.[170] Now, anyone seeking to buy a watch must expend resources to investigate whether the watch they want to buy is burdened with a Monday interest, or a Tuesday interest, or any other novel type of interest.[171] The contracting parties cannot possibly internalize all of these information measurement costs, making them pure externalities.[172] While the recordation system

see *supra* note 51.

164. YIANNOPOULOS, *supra* note 16, § 217 (noting that "Louisiana courts have been advisedly cautious" in recognizing new types of real rights).

165. Merrill & Smith, *supra* note 149, at 10-11.

166. *Id.*

167. *Id.* at 11. Merrill and Smith note that with few exceptions, "courts in the modern era for the most part have declined to create new" property rights. *Id.* at 20.

168. *Id.* at 24-26 (referencing Keppell v. Bailey, (1834) 39 Eng. Rep. 1042 (Ch.); 2 My. & K. 517).

169. *Id.* at 26-27.

170. Merrill & Smith, *supra* note 149, at 27.

171. *Id.*

172. *Id.* at 8.

alleviates some of these externalities by allowing third parties to search the public records for hidden property rights, these third parties must still exert extra effort to search registries for new types of property rights.[173] Therefore, courts refrain from recognizing new property rights to reduce these externalities.[174] Similar concerns likely influence the Louisiana judiciary when it decides whether to enforce novel property rights such as noncompete servitudes in commercial leases.

As previously explained, a clearly worded, recorded noncompete servitude contained in a shopping center lease does not raise sufficient concerns about notice or anticompetitiveness to merit analysis under the *Leonard* and *U-Serve* line of cases. And although such servitudes share commonalities with the predial servitudes upheld in *R & K*, *Meadowcrest*, and *Wenstar*, these cases are still not expressly applicable. Additionally, if we accept the theory of optimal standardization, judicial concerns about imposing information costs on third-party market participants contribute to why Louisiana courts do not uphold noncompete servitudes in commercial leases. No court wants to be the first to recognize this novel property right and expand the state's *numerus clausus*. In sum, there is a gap in the law when it comes to noncompete servitudes in commercial leases, but no court wants to be the first to fill it. Unfortunately, the *Leonard–U-Serve* line provides the safest framework for courts to apply to noncompete servitudes in commercial leases. But under this framework, noncompete servitudes in commercial leases can never be valid. This is a shame, because as the next section discusses, judicial enforcement of these servitudes has the potential to promote economic growth, respect for the reliance interests of the contracting parties, and judicial efficiency. To encourage these positive effects, this Comment proposes legislative authorization for courts to uphold noncompete servitudes in commercial leases.

III. WHY NONCOMPETE SERVITUDES IN COMMERCIAL LEASE AGREEMENTS ARE IMPORTANT TO LOUISIANA

Using New Orleans's recent retail boom as a backdrop, this section argues that shopping center anchor tenants like Winn-

173. Merrill & Smith, *supra* note 149, at 44 ("[A]lthough land registers furnish notice at far lower cost than would a doctrine of constructive notice, even they can require lengthy and error-prone searches.").

174. *Id.* at 24.

Dixie are valuable to local economies. Allowing such tenants to create valid noncompete servitudes through commercial leases furthers their positive economic impact. Additionally, this section demonstrates that judicial enforcement of noncompete servitudes respects the reliance interests of the contracting parties and also promotes judicial efficiency.

Anchor tenants increase patronage in shopping centers.[175] In many respects, the economic success of shopping centers depends on the presence of an anchor tenant.[176] In fact, banks will often not agree to finance the development of a shopping center unless the landlord has secured an anchor tenant.[177] For an example of how anchor tenancy works, think of a supermarket. Supermarkets increase patronage to shopping centers because people frequent grocery stores for sustenance.[178] People must eat to live, and people obtain food at grocery stores.[179] Because supermarkets draw such a constant flow of customers, other lessees are attracted to and benefit from their presence.[180] Anchor tenants like supermarkets form the backbone of neighborhood shopping centers; in turn, neighborhood shopping centers create jobs for nearby residents and are a source of tax revenue for local economies.

Recognizing the economic benefits of anchor tenants, New Orleans mayor Mitch Landrieu's administration has made it a priority to bring big-name retailers to Orleans Parish to create jobs and increase the parish's tax base.[181] For decades, Orleans Parish residents had to trek to neighboring parishes to shop at stores like Target and Best Buy.[182] In 2012, Orleans Parish

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175. *See* Hornwood v. Smith's Food King No. 1, 772 P.2d 1284, 1286 (Nev. 1989) ("Smith's knew that its presence as the anchor tenant had a critical impact on the shopping center's success. Without an anchor tenant, obtaining long-term financing and attracting satellite tenants is nearly impossible for a shopping center. Perhaps most importantly, the anchor tenant insures the financial viability of the center by providing the necessary volume of customer traffic to the shopping center.").

176. *Id.*

177. *Id.*

178. Emanuel B. Halper, *Supermarket Use and Exclusive Clauses*, 30 HOFSTRA L. REV. 297, 301-02 (2001).

179. *Id.*

180. *See id.*

181. Press Release, City of New Orleans, Mayor Landrieu Touts Economic Development and Job Creation for 2014 (Dec. 30, 2014), *available at* http://www.nola.gov/mayor/press-releases/2014/20141230-economic-developmenteoy/.

182. Jaqueta White, *Officials Hope Costco Reverses Flow: City Hopes to Regain Lost Sales Tax Revenue*, NEW ORLEANS ADVOCATE, Sept. 16, 2013, at A1.

generated only $162.9 million in sales tax dollars, an amount almost doubled by Jefferson Parish's tax revenue of $310.7 million.[183] The Landrieu administration hopes to keep some of Orleans Parish residents' tax dollars at home by bringing more nationally recognized retailers into the parish.[184]

As an added benefit, many of these big-box retail tenants are committed to supporting the local economy. For example, Whole Foods opened its second Orleans Parish store in Spring 2014 in an impoverished section of the city's Mid-City neighborhood.[185] The store is part of the ReFresh Project, the formal name for the group of retailers, restaurants, and offices that now fill in the skeleton of an abandoned 60,000 square foot supermarket.[186] Other tenants include the offices for Firstline Schools, an open admissions public school system,[187] as well as Liberty's Kitchen, a café that focuses on providing job training to New Orleans's youth.[188] The café provides a gumbo bar in the ready-to-eat foods sections of the Whole Foods store.[189] This partnership between Liberty's Kitchen and Whole Foods demonstrates Whole Foods's commitment to improving the communities it serves. Furthermore, as of the opening date, 74% of the employees of the new Whole Foods were residents of Orleans Parish.[190] The store will also locally source 330 products from over seventy local suppliers.[191] Another new shopping center, the Winn-Dixie anchored Mid-City Market, opened in Mid-City in August 2013. The shopping center features a Winn-Dixie grocery store, several restaurants, an Office Depot, a pet supply store, and a spa.[192] Experts predict this shopping center will create 500 jobs and generate annual sales revenues of $61 million.[193]

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183. White, *supra* note 182.

184. *Id.*

185. Jaqueta White, *Reaching into the Food Desert: Whole Foods to Open Doors Next Week*, NEW ORLEANS ADVOCATE, Feb. 1, 2014, at B1.

186. *The ReFresh Project*, BROAD COMMUNITY CONNECTIONS, http://broadcommunityconnections.org/projects/refresh (last visited June 22, 2015).

187. *Our Approach*, FIRSTLINE SCHOOLS, http://www.firstlineschools.org/our-approach.html (last visited June 7, 2015).

188. *Teach. Nourish. Empower.*, LIBERTY'S KITCHEN, http://libertyskitchen.org/ (last visited June 7, 2015).

189. White, *supra* note 185.

190. *Id.*

191. *Id.*

192. *Welcome to Mid-City Market*, MID-CITY MARKET, http://www.mid-citymarket.com/overview.aspx (last visited June 7, 2015).

193. Katherine Sayre, *Winn-Dixie Opens Wednesday: Mid-City Market Nears*

New Orleans is relying on these big-box-anchored shopping centers to grow its economy, and noncompete agreements are essential to the economic survival of these shopping centers. Neighborhood shopping centers are "commercial islands" with limited geographic reach.[194] Anchor tenants must be able to limit direct competition in these small commercial communities to ensure that individual businesses survive.[195] For a basic example, consider the effect of two stores collocated in a shopping center that serves a population of only 1,000 people. If competition goes unlimited, these two stores could possibly clone one another's business models and split the patronage of that small community as a result. Neither store benefits in this scenario.[196] Arguably, tenants with good business sense would seek to avoid this effect and thus refrain from harmful competition without the need for a noncompete agreement. However, not all tenants have such business knowledge. Furthermore, even savvy tenants might compete accidentally if they are ignorant of the exact products they should refrain from selling. An anchor tenant like Winn-Dixie should not be expected to rely on the business sense of others. Instead, it should be able to take precautionary measures through noncompete agreements. Noncompete agreements are, therefore, important to an anchor tenant's own success and to the success of the other tenants in that shopping center.

Noncompete agreements are certainly valuable as contract rights, but they become more valuable if they are enforceable as servitudes. For example, consider the permanency of real rights. If an anchor tenant has a noncompete servitude on the remainder of the shopping center property, that servitude automatically binds both the landlord's successors in title as well as other lessees in that shopping center. This high degree of permanency makes the servitude valuable for two reasons. First, because the servitude binds other lessees, the tenant holding the servitude can enforce that servitude directly against a violating cotenant,

Completion, TIMES-PICAYUNE (New Orleans), July 30, 2013, at A21, *available at* http://www.nola.com/business/index.ssf/2013/07/mid-city_market_winn-dixie_ope.html.

194. Halper, *supra* note 178, at 300.

195. *See id.* at 301 ("When a shopping center's geographic market is small, direct competition between two stores in the same shopping center selling the same kind of merchandise in approximately the same way can impair the ability of both stores to survive.").

196. *Id.* at 300-01.

making legal resolution of servitude violations simpler and more efficient.[197] Second, because the servitude automatically binds the lessor's successors in title, parties can avoid any transaction costs associated with renegotiating the noncompete restriction in future sales of the shopping center.[198]

Additionally, classifying noncompete servitudes as real rights can help further the economic benefits that noncompete agreements create. Because the anchor tenant's lease agreement must be recorded in order for the noncompete servitude to be effective against third parties,[199] prospective cotenants have advanced notice of the noncompete servitude's existence and parameters. This would make it easier for cotenants to avoid violating the terms of the servitude ahead of time. Through recordation, noncompete servitudes can prevent harmful competition before it even begins.

Finally, enforcement of noncompete agreements as servitudes respects the contractual intent of the landlord and the tenant. When a tenant negotiates a noncompete servitude into its lease contract, it likely exchanges valuable consideration to have that right "run with the land" as a property right, and it has a reliance interest in the servitude for which it negotiated. The Massachusetts Supreme Court addressed this issue in *Whitinsville Plaza, Inc. v. Kotseas*, where it overruled precedent that declared noncompete servitudes invalid.[200] The *Whitinsville* court articulated several policy considerations in support of its decision.[201] First, the court noted that when two parties reach an

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197. Consider the alternative if the noncompete agreement is merely personal, i.e., having to go through the landlord to enforce the terms of the servitude or collect damages. *See, e.g.*, Leonard v. Lavigne, 162 So. 2d 341, 343 (La. 1964) ("Consequently, whatever right the plaintiff has for the breach of this obligation must be exercised against his lessors.").

198. *See* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1361 (1982). In his article advocating for the abolition of the touch and concern doctrine as a means of limiting parties' freedom of contract to create servitudes, Professor Epstein describes the transaction costs imposed when a seller who sold land but reserved a servitude has to renegotiate his interest in the land with a subsequent purchaser of that land. *Id.* Epstein posits that in subsequent negotiations, the original seller might have reduced bargaining power, thus increasing transaction costs. *Id.*

199. LA. CIV. CODE ANN. art. 2681 (2005) ("A lease of an immovable is not effective against third persons until filed for recordation in the manner prescribed by legislation.").

200. Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243, 250 (Mass. 1979).

201. *Id.* at 249.

arms-length agreement to restrain commercial competition on a piece of property, that limitation on competition is likely reflected in the contract price.[202] It would be unfair for courts to deny parties the benefits for which they paid.[203] Second, the court noted that failure to enforce a covenant in restraint on competition would frustrate the reliance interest of the party benefiting from the restrictive covenant.[204] These policy considerations supported the *Whitinsville* court's overall conclusion that "reasonable covenants against competition may be considered to run with the land."[205]

Current Louisiana law frustrates the landlord and tenant's contractual intent and also the tenant's reliance interest. If an anchor tenant and a landlord agree that a noncompete clause will run with the land as a servitude, courts should enforce that agreement.[206] Affected cotenants have no basis for complaining about such enforcement because they can simply check the public records to determine whether a restrictive servitude exists. Furthermore, cotenants generally enjoy more patronage from being collocated in a shopping center with a big-name anchor tenant.[207]

In summary, shopping center anchor tenants are valuable economic actors that benefit local economies. Through noncompete agreements, anchor tenants help to control competition within the shopping center to ensure the shopping center's success. Judicial recognition of noncompete agreements as servitudes can maximize the anchor tenant's positive economic impact on the community. This issue is particularly relevant in a place like New Orleans, which is seeking to revitalize its tax base through the introduction of big-box-anchored shopping centers. But under current Louisiana law, the minor, technical detail that an anchor tenant does not own a dominant estate provides the sole basis for invalidating noncompete servitudes in commercial leases. Instead of analyzing such servitudes under irrelevant cases like *U-Serve* and *Leonard*, Louisiana courts should have the

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202. Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243, 249 (Mass. 1979).

203. *Id.*

204. *Id.*

205. *Id.* at 250. While the *Whitinsville* case involved the successor of a dominant estate seeking enforcement of a noncompete agreement found in a contract of sale, the policy arguments set forth by the court are applicable in the context of a lease as well.

206. *See generally* Epstein, supra note 198.

207. *See supra* notes 175-80 and accompanying text.

statutory authority to uphold noncompete servitudes in commercial leases that satisfy certain requirements. The next section outlines a proposed statute that will address this problem.

IV. PROPOSAL

A. WHY A STATUTE?

As previously discussed, the theory of optimal standardization suggests that judicial reluctance to recognize new property rights is founded upon concerns of imposing information measurement costs on third-party market participants.[208] However, in some cases, expansion of the *numerus clausus* is nonetheless desirable.[209] As discussed above, noncompete servitudes in commercial leases come with many economic and social benefits. Yet judicial reluctance to recognize new property rights means that Louisiana cannot rely on the judiciary for an expansion of the *numerus clausus* to include such servitudes. Thus, this Comment proposes a statutory expansion of the *numerus clausus* as a solution to this problem.

The theory of optimal standardization proposes that the legislature is the branch of government best suited to introduce changes to the *numerus clausus*, mainly because the legislature is in the best position to reduce information measurement costs created by the introduction of novel property rights.[210] This is so for several reasons. First, legislated rules are more visible and thus more easily and cheaply discovered by market participants than judge-made law.[211] Second, legislation has an inherent universality; for example, a statute enacted by a state legislature has an "unambiguous domain" of applicability within that state, while judge-made law may cover a limited jurisdiction and may only apply to a certain factual scenario.[212] Furthermore, in Louisiana, judge-made law is given great persuasive weight but is not necessarily binding law.[213] The universality of legislated

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208. Merrill & Smith, *supra* note 149, at 10-11; *see supra* text accompanying notes 165-74.

209. Merrill & Smith, *supra* note 149, at 38.

210. *Id.* at 60-61.

211. *Id.* at 61-62.

212. *Id.*

213. *See* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 780-81 (2005) (discussing the extent to which Louisiana court precedent is binding law).

rules, especially in a civil law state like Louisiana, reduces information costs associated with novel property rights by giving parties a clear idea of which rules apply to them.[214] Third, legislation is often released in a comprehensive package, such as an act, that contains all of the answers a party might want to know about a new property right.[215] The centrality of this information greatly reduces the information measurement costs the novel property right introduces by limiting the places a party has to look to find it.[216] Fourth, introducing or amending a piece of legislation is concededly more procedurally burdensome and expensive than introducing or changing judge-made law.[217] But, in this respect, legislation is also inherently more stable than judge-made law.[218] Once a novel property right is created through legislation, it is likely to remain unchanged for a long time, thus reducing information measurement costs with regard to discerning changes to that right.[219]

Louisiana has opted for legislative expansion of the *numerus clausus* to meet economic and environmental needs in the past. For example, in 1986, the legislature enacted the Louisiana Conservation Servitude Act, enabling government entities and nonprofits dedicated to the preservation of nature to hold servitudes on land for conservation purposes.[220] Additionally, the Louisiana legislature enacted a series of articles in the Civil Code dedicated to building restrictions.[221] Building restrictions are burdens imposed on land in furtherance of a general development plan.[222] While both conservation servitudes and building restrictions impose negative restrictions on the use of land, neither constitutes a predial servitude because neither confers a benefit on a dominant estate.[223] Through the enactment of

214. *See* Merrill & Smith, *supra* note 149, at 62.

215. *Id.* at 62-63.

216. *Id.*

217. *Id.*

218. *Id.* at 63-64.

219. Merrill & Smith, *supra* note 149, at 63-64. The authors discuss two other reasons why the legislature is the most appropriate branch to introduce changes to the legislature—prospectivity and implicit compensation—but these reasons do not directly pertain to the reduction in information measurement costs related to the introduction of a novel type of property right. *Id.* at 64-65.

220. LA. REV. STAT. ANN. §§ 9:1271-1276 (2008).

221. LA. CIV. CODE ANN. arts. 775-783 (2008 & Supp. 2014).

222. LA. CIV. CODE ANN. art. 775 (2008).

223. Conservation servitudes are held by a juridical person and thus constitute a limited personal servitude, while building restrictions cannot be classified as either

special legislation, however, courts were given express authority to veer from strict interpretations of the *numerus clausus* and enforce these novel property rights. The enactment of a statute specifically authorizing courts to enforce noncompete servitudes in favor of economically valuable shopping center tenants would therefore be par for the course in Louisiana.

This Comment proposes the introduction of a novel property right into Louisiana's *numerus clausus*, which would impose information costs on third-party market participants. However, allowing tenants to establish noncompete servitudes carries with it important economic and social benefits, and legislative introduction of this right will reduce external information costs because of legislation's inherent visibility, unambiguous domain of applicability, comprehensiveness, and stability. Louisiana has legislated property rights in the past to advance environmental and economic policies, and it should do so now with regard to noncompete servitudes in commercial leases.

B. CONTENT AND SCOPE OF THE STATUTE

As argued by Professor Yiannopoulos and the *SPE FO* court, noncompete servitudes have the potential to negatively impact the economy by limiting competition. Therefore, the new statute should only authorize fair and reasonable noncompete servitudes that will actually benefit the local economy. The language of the statute might read as follows, "Parties to a shopping center lease may establish a noncompete servitude burdening the remainder of the shopping center provided the servitude is (1) fair, (2) reasonable, (3) creates or is likely to create substantial economic benefits, and (4) is recorded in the conveyance records of the parish where the shopping center is located."

The statute should provide factors for courts to consider when assessing whether the noncompete servitude meets these requirements. When analyzing fairness, the court should look at the relative bargaining power of each party to the lease contract. For example, if the servitude is contained in a lease between two

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personal servitudes or predial servitudes, and are thus classified as *sui generis* real rights. *See* LA. CIV. CODE ANN. art. 775 cmt. (d) (2008) ("The requirements of an ancestor in title and of a general development plan are essential features of building restrictions as *sui generis* real rights. Unlike predial servitudes under the Civil Code, building restrictions may involve certain affirmative duties and may exclude the performance of certain juridical acts; moreover, building restrictions may be imposed even in the absence of a dominant estate.").

savvy commercial entities, and if the lessee makes a fair exchange for the right to burden the shopping center with the servitude, then the servitude would meet the fairness criterion.

The Third Restatement of Property on servitudes provides helpful factors to assess the reasonableness of noncompete servitudes.[224] A provision of the Restatement provides that "[a] servitude that imposes an *unreasonable* restraint of trade or competition is invalid."[225] In a comment to this provision, the Restatement suggests that courts look "to the purpose, geographic extent, and the duration of the restraint to determine" the reasonableness of a noncompete servitude.[226] In order to meet the reasonableness standard, the purpose of the noncompete servitude must be one of preventing another tenant from becoming so similar to the servitude holder that patrons would choose to shop with the other tenant instead. The geographic extent of the noncompete servitude could be limited to the boundaries of the shopping center where the tenant is located and might be even smaller for especially large shopping centers. Finally, the duration of the servitude could be limited to the length of the lease.[227] Under the guidance of this reasonableness standard, Louisiana courts would be able to assess noncompete servitudes in shopping center lease agreements to determine whether the servitude imposed an unreasonable restraint on trade.[228] This step in the analysis would help to regulate the negative anticompetitive effects of such servitudes.

The statute should also provide factors for a court to consider when assessing the economic impact of the servitude on the local

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224. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3:6 (2000).

225. *Id.* (emphasis added).

226. *Id.* cmt. b.

227. *Exit 1 Props. Ltd. P'ship v. Mobil Oil Corp.* provides an example of a reasonableness analysis under these factors. 692 N.E.2d 115 (Mass. Ct. App. 1998). In *Exit 1 Properties*, the court determined the reasonableness of a servitude preventing a gas station from competing with a roadside restaurant through food sales. *Id.* at 116. The court held that because the servitude at issue here was limited in purpose and geographic area and because the duration did not extend past the "useful life of the buildings," the covenant restraining competition was reasonable and valid. *Id.* at 117-18.

228. Although restatements are common-law based, Louisiana would not betray its civilian tradition by adopting the proposed reasonableness analysis. *See* John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 2 (2005) (discussing how Susan French, the American Law Institute Reporter for the restatement, drew upon civilian tradition to support innovations in the new restatement.).

economy. One such factor would be the extent to which a tenant sources locally for products and employees—the more the anchor tenant sources locally, the more appropriate the servitude because that tenant has demonstrated a commitment to the local economy. A second factor would be the economic impact of that tenant in the shopping center at issue. Fulfillment of this factor could be shown through a statistical demonstration that the servitude holder attracts patrons to shop in the shopping center and also attracts lessees to rent space in that shopping center. This factor could also be demonstrated by the servitude holder's past economic impact in other shopping centers around the state, region, and country. A third factor would be the measure of damages caused by competition. A fourth factor would be the burden created if the servitude holder could not bring suit directly against the tenant threatening or engaging in competition. While this economic impact requirement would weigh heavily in favor of established anchor tenants with a proven track record of economic success, the ability to create noncompete servitudes would not be exclusive to established anchor tenants. Small-scale tenants could create noncompete servitudes if they had a large enough presence in the shopping center to create a positive economic impact or if they sourced locally enough to create an economic impact in the community beyond the shopping center.

Finally, because noncompete servitudes are nonapparent, they must be recorded to put other lessees in that shopping center on notice of their existence. In the context of noncompete servitudes in commercial leases, this notice requirement could be achieved through the recordation of the lease, provided that recorded lease contained language clearly indicating the parties' intent bind the remainder of the property with the noncompete servitude. The extent, conditions, and restrictions imposed by servitude would also have to be clearly evidenced in the recorded document.

V. CONCLUSION

Noncompete servitudes in commercial leases currently have no home under Louisiana servitude law. The line of cases relied upon by the Eleventh Circuit in *Winn-Dixie* to invalidate the Grocery Exclusive clause center around concerns of notice and anticompetitive effects, but these concerns are simply not present where the effects of the noncompete servitude are contained

within the limited context of a shopping center, and the physically present tenant records a lease clearly evidencing intent to bind the remainder of the shopping center. Application of this framework to noncompete servitudes in commercial leases is thus inappropriate. In reality, such servitudes have more in common with the predial noncompete servitudes that Louisiana circuit courts consistently uphold. However, the law relied upon by these cases only expressly applies to predial servitudes. And as the theory of optimal standardization explains, Louisiana cannot rely on its judiciary for an expansion of the *numerus clausus* of property rights. Thus, this Comment proposes that the legislature enact a statute expressly authorizing the judiciary to enforce noncompete servitudes in commercial leases so long as those servitudes are (1) fair, (2) reasonable, (3) reasonably likely to benefit the local economy, and (4) recorded. Although the introduction of this novel property right will impose information measurement costs on third parties, the nature of legislation minimizes this effect. Furthermore, the economic boost that enforceable noncompete servitudes in commercial leases could provide for New Orleans, one of the Louisiana's most vibrant cities, outweighs any minimal increase in information measurement costs caused by such legislation.

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