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The Vested Rights Doctrine: How a Shield Against Injustice Became a Sword for Opportunistic Developers

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The Vested Rights Doctrine: How a Shield Against Injustice Became a Sword for Opportunistic Developers

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In an era of pioneering environmental and land use laws, savvy developers are using the “vested rights” doctrine to circumvent and undermine critical public health, safety, and environmental regulations. This controversy pits two legitimate interests against each other: On the one hand, local governments must have the power to pass land use laws and regulations in the public interest to protect their community’s health, safety, welfare, and environment. On the other, developers who rely on the laws in existence at the time their project is approved should be protected from subsequent changes to the law that could increase transactional costs and impair their projects. In theory, the vested rights doctrine helps minimize these costs by “freezing” the law applicable to a permit application at a certain point in time. From developers’ perspective, the earlier the rights vest, the better.

While the vested rights doctrine is based on an understandable estoppel rationale, developers are increasingly using it as a sword to thwart reasonable regulation instead of as a shield against injustice. Common sense policy has too often been co-opted by opportunistic developers at the expense of the public interest—witness the unfettered explosion in fracking operations across America as well as new urban centers being installed in particularly inappropriate locations, oftentimes in contravention of sensible smart growth or growth management policies. The situation has become so perverse that one elected official argued that manipulation of the vested rights doctrine is “the least sexy but probably one of the most important aspects of environmental law” today.¹

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¹ Robert McClure, *Odd Provision in State Law Severely Undercuts Growth Management*, CROSSCUT.COM (Jan. 12, 2011) (quoting Washington State Sen. Adam Kline), <http://crosscut.com/2011/01/odd-provision-in-state-law-severely-undercuts-grow/> [<https://perma.cc/7KPJ-P3NM>].

It is past time that we restore balance to the vested rights doctrine in order to prevent the best intentions of legislatures and public policy makers from going awry. Local governments must have the power to update land use laws and regulations as new information becomes available and as public policy preferences change. This can be done without destroying private property rights as we know them, or imposing unreasonable transaction costs on the development community.

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I. INTRODUCTION

The vested rights doctrine has become a controversial topic in property and land use law, spurring increasing litigation throughout the country in the last two decades.² The doctrine allows a property developer to proceed with its project under the rules and regulations in place at the time that its rights “vested,” despite subsequent changes to the law that public policymakers enact to protect the environment or public safety.³ Based on an estoppel rationale, vested rights understandably attempt to provide developers with a reasonable degree of certainty that the applicable laws and regulations that govern their project proposals will not change once they have already taken steps in detrimental reliance upon them.⁴ Different states take different approaches to the doctrine (witness the majority versus minority rules described *infra*), but at heart they all are based on society’s desire to balance reasonable governmental regulation with the long-held investment expectations of private property owners.⁵

Unfortunately, the best intentions of legislatures and public policy makers often go awry. Increasingly, property developers have co-opted the vested rights doctrine in order to circumvent and undermine important public health, safety, and environmental concerns.⁶ In fact, one elected official has argued that potential abuse of the vested rights doctrine is “the least sexy but probably one of the most important aspects of environmental law” today.⁷ One need not look far to find particularly egregious examples. In Texas, the oil and gas industry has successfully employed the vested rights doctrine to evade new public health and safety regulations for fracking operations, arguing that new wells drilled on old property shouldn’t be subject to current regulations.⁸ In

² See, e.g., *Jordan-Arapahoe, LLP v. Bd. of Cty. Comm’rs*, 633 F.3d 1022 (10th Cir. 2011). In this case, plaintiffs spent \$2.6 million to develop property as a car dealership, but defendants rezoned the land to prohibit car dealerships. *Id.* at 1024. Plaintiffs thus brought a 42 U.S.C. § 1983 action, alleging that the defendants’ rezone deprived plaintiffs of a protected property interest under both Colorado’s Vested Property Rights Act (VPRA) and Colorado’s vested rights common law. *Id.* at 1023. The 10th Circuit concluded that neither Colorado’s VPRA nor common law granted plaintiffs a vested right to develop a car dealership on their property. *Id.* at 1025; see also *1350 Lake Shore Assocs. v. Randall*, 928 N.E.2d 181, 183, 193 (Ill. App. Ct. 2010) (affirming, after eleven years of litigation, the state circuit court’s holding that plaintiff’s pre-development expenditures of \$272,022.18 were not enough to acquire a vested right to build a high-rise property under former zoning classification); *Cerrillos Gravel Prods. v. Bd. of Cty. Comm’rs*, 117 P.3d 932, 938 (N.M. 2005) (finding that Cerrillos Gravel did not have a vested right to continue its mining operation and could not ignore public health and safety conditions imposed by the county).

³ 4 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 32:3 (5th ed. 2015).

⁴ Donald G. Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsy*, 7 ENVTL. L. 519, 523 (1977).

⁵ 4 SALKIN, *supra* note 3, § 32:2.

⁶ *Id.* § 32:9.

⁷ McClure, *supra* note 1 (quoting Washington State Sen. Adam Kline).

⁸ See *infra* Part IV.D.

Washington State, scholars have argued, and courts have found, that the state's early vesting statute is undermining the state's Growth Management Act (GMA) and State Environmental Policy Act (SEPA).⁹ For example, a prominent developer used the sword of vested rights to turn a small parcel of land at the end of a single lane road into an "Urban Center" with plans for skyscrapers possibly as tall as eighteen stories¹⁰ despite Growth Management Hearings Board rulings that the site was illegally zoned.¹¹ Even in Napa Valley, winemakers upset about proposed rules that will reduce the percentage of land that can be used for residences, winery tasting rooms, and event space are raising claims of vested rights to evade the new regulations.¹²

One might reasonably inquire: How did this conflict arise? Why is it becoming worse? And what can we do about it? The vested rights doctrine originated during simpler times; a time when developers "could swagger as ostentatiously as robber barons when it came to developing whatever and wherever they wished."¹³ Land use regulations and environmental laws either did not exist or were not nearly as robust as they are today.¹⁴ But as communities have grown, so have environmental concerns.¹⁵ Developers now operate in a much more complex regulatory environment and must comply with countless laws, including state environmental impact assessments (colloquially known as Little NEPA's), smart growth policies, and a plethora of zoning and building regulations.¹⁶

While one could argue that the complex regulatory environment creates an even more intense need for strong vested rights principles, this Article argues that the doctrine should be modified to ensure that it serves its intended purpose—providing developers with the certainty that they need to plan and

⁹ See *infra* Part IV.C.

¹⁰ Bill Willard & Jerry Patterson, *Point Wells Monthly Updates*, RICH. BEACH CMTY. ASS'N (Feb. 2013), <http://www.richmondbeachwa.org/pointwells/updates.html> [<https://perma.cc/J5GR-9GTE>].

¹¹ *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1227 (Wash. 2014) (en banc) (Johnson, J., dissenting) ("The majority . . . uses the vested rights doctrine as a sword to disregard the mandates of both the GMA and SEPA.").

¹² See Barry Eberling, *Agricultural Protection Ideas Going to Supervisors*, NAPA VALLEY REG. (Nov. 4, 2015), http://napavalleyregister.com/news/local/agricultural-protection-ideas-going-to-supervisors/article_cbc2256d-04ea-5b81-aebd-9efb9eca19fa.html [<https://perma.cc/XAB5-U7PD>].

¹³ See Donald G. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U. L. REV. 545, 578 (1979).

¹⁴ *Id.* at 577–78.

¹⁵ NAT'L ACAD. OF PUB. ADMIN., U.S. ENVTL. PROT. AGENCY, ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING 25–33, 37–46 (July 2003), <https://www.epa.gov/sites/production/files/2015-02/documents/napa-land-use-zoning-63003.pdf> [<https://perma.cc/G32R-HRDL>].

¹⁶ Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1048–54 (2000); see also *Erickson & Assocs. v. McLerran*, 872 P.2d 1090, 1096 (Wash. 1994) (discussing the "modernizing" of the vested rights doctrine and new regulations).

build—without undermining critical environmental and land use planning regulations. While different jurisdictions will need different solutions, there are a variety of changes that states across the land can make to reform the doctrine. First, jurisdictions should consider attaching an economic price tag to comprehensive plans or regulations that give rise to “illegal” projects and issue monetary sanctions against local governments and developers for projects and regulations that violate land use and environmental laws. Second, jurisdictions should prohibit rights from vesting when the comprehensive plan or regulations that the rights are vested to are later found to violate land use or environmental laws. Third, jurisdictions can limit the invidious practice of “permit speculation” by expiring vested rights after a certain period of time, ensuring that only developers with the actual intent to build in the near future are afforded the protection of the doctrine.

This Article examines the history of the vested rights doctrine, detailing its various versions. It then explores the benefits of vested rights as well as its current perversions, and ultimately makes sensible recommendations for policy reform that should be enacted as soon as possible. If we fail to do so, we will enable a new generation of property developers to use the cloak of vested rights as a pretext to evade sensible land use and environmental regulations at a time when society can no longer afford it. A doctrine that was intended to serve as a shield against injustice should no longer be utilized as a sword for the opportunistic.

II. THE VESTED RIGHTS DOCTRINE

Developing property—e.g., building homes, subdivisions, or a shopping center—is a risky and costly endeavor.¹⁷ It can take months or years before a developer secures all of the necessary permits and approval for her project.¹⁸ While waiting to secure project approval, local ordinances or regulations could change: commercial property might be rezoned to residential property, or a thirty-foot setback ordinance could be increased to a 100-foot setback.¹⁹ The change in law—such as a rezone from commercial to residential—could make the project less profitable, or force the developer to abandon the project altogether, even if the developer has expended thousands of dollars on the project.²⁰ When laws change, developers incur additional transactions costs as they attempt to analyze and comply with the new law.²¹

The vested rights doctrine, however, helps minimize these transaction costs by “freezing the law applicable” to a permit application at a certain

¹⁷ See Overstreet & Kirchheim, *supra* note 16, at 1048–53.

¹⁸ *Id.* at 1057, 1065.

¹⁹ See *Erickson*, 872 P.2d at 1096.

²⁰ Overstreet & Kirchheim, *supra* note 16, at 1064.

²¹ *Id.* at 1064–65.

point.²² “‘Vested rights’ are the legal protections that a property owner can rely on when developing real property to ensure that a subsequently enacted regulation will not impair the project he or she initially applied to build.”²³ The vested rights doctrine grants developers a degree of certainty: at a particular point, the applicable laws for the developer’s project will not change.²⁴ The point at which rights vest varies state to state,²⁵ with most jurisdictions adhering to one of two models: the majority rule and the minority rule.²⁶ These are detailed in turn below.

A. *The Majority Rule: An Estoppel Rationale*

The majority rule is based on the principle of estoppel.²⁷ In order to obtain vested rights under the majority rule, “a developer must (1) make substantial expenditures (2) in good faith reliance (3) on a validly issued building permit.”²⁸ The majority rule protects land use developers who substantially rely on a certain body of law at the time they developed their plans from changes in the law occurring after a building permit has been issued.²⁹ The majority rule has been criticized as “fuzzy” and harsh, and is thought to offer the least protection to developers.³⁰

The harshness of the majority rule is best epitomized in a California Supreme Court case from 1976, *Avco Community Developers, Inc. v. South Coast Regional Commission*.³¹ The plaintiff, Avco, spent over \$2 million on a coastal development, obtained a grading permit, and “had completed or was in the process of constructing storm drains, culverts, street improvements,

²² Roger D. Wynne, *Washington’s Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 SEATTLE U. L. REV. 851, 851 (2001).

²³ Overstreet & Kirchheim, *supra* note 16, at 1043 (footnote omitted).

²⁴ Wynne, *supra* note 22, at 856.

²⁵ For a comprehensive summary of state by state vested rights, see 4 SALKIN, *supra* note 3, § 32.

²⁶ Some commentators argue that there are three vested rights doctrines: the majority rule, the minority rule, and Washington’s rule. See Overstreet & Kirchheim, *supra* note 16, at 1045–46.

²⁷ See Hagman, *supra* note 4, at 523 (“Estoppel . . . supplies the theoretical basis for vested rights . . .”). David G. Heeter articulated the black-letter statement of zoning estoppel in 1971. David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 66 (stating that under zoning estoppel, rights vest according to the following principle: “A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.”).

²⁸ Overstreet & Kirchheim, *supra* note 16, at 1045.

²⁹ See 4 SALKIN, *supra* note 3, § 32:3.

³⁰ Overstreet & Kirchheim, *supra* note 16, at 1061–63.

³¹ *Avco Cmty. Developers, Inc. v. S. Coast Reg’l Comm’n*, 553 P.2d 546 (Cal. 1976).

utilities, and similar facilities for the tract.”³² But before Avco obtained a building permit for the project, a new law came into effect that required any project within a “coastal zone” to obtain a permit from the California Coastal Zone Commission.³³ The new law included an exemption: if the developer obtained a “building permit and in good faith diligently commenced construction and performed substantial work in reliance thereon” by February 1, 1973, the project was vested and no permit from the California Coastal Zone Commission was needed.³⁴ Part of Avco’s project was in a coastal zone, but because Avco had not yet obtained a building permit, it did not qualify for the exemption.³⁵ Avco nonetheless argued that “it had acquired a vested right to build multiple dwellings on the lot because, in good faith reliance on the existing zoning and the permits issued by the city, it had incurred substantial expenses to develop and grade the property.”³⁶ The California Supreme Court disagreed, and held strong to the harsh principles of the majority rule: despite the millions of dollars Avco had already spent on the project, because Avco did not have a building permit in hand, no rights had vested.³⁷

Recognizing that California’s majority rule can lead to costly delay and litigation that can kill a project, the California legislature tried to temper the harshness of the *Avco* ruling by enacting statutory vested rights for development agreements³⁸ and subdivision vesting maps.³⁹ A development agreement is essentially a contract between the developer and a local municipality to freeze the existing laws and regulations applicable to the project.⁴⁰ When a developer is required to file a tentative map for a subdivision, she may opt to file a vesting tentative map to freeze existing laws and regulations applicable to the subdivision.⁴¹ Both vesting maps and development agreements “allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations.”⁴² Thus, while California follows the majority rule at common law, developers *can* obtain vested rights for their projects much earlier in the process by either entering into a development agreement with the local government or filing a vesting tentative map.

³² *Id.* at 549.

³³ *Id.* at 548.

³⁴ *Id.*

³⁵ *Id.* at 548–49.

³⁶ *Id.* at 550.

³⁷ *Avco*, 553 P.2d at 554.

³⁸ See CAL. GOV’T CODE §§ 65864–65869.5 (West 2009).

³⁹ See *id.* §§ 66498.1–9.

⁴⁰ See *id.* § 65864 notes of decs. 2 (describing California’s Development Agreement Statute).

⁴¹ See *id.* § 66498.1.

⁴² *City of West Hollywood v. Beverly Towers, Inc.*, 805 P.2d 329, 334–35 (Cal. 1991) (en banc).

However, developers do not always utilize California's statutory vested rights and under California's common law vesting doctrine, developers have much to lose when they do not have a development agreement or vesting map in place to protect their project from subsequent changes in the law. For instance, in 2015, the Orange County Board of Supervisors (Board) voted to repeal a senior housing project that was originally approved by the Board in 2011.⁴³ Since the project was approved in 2011, the Catholic Church—the project's sponsor—had been entangled in ongoing litigation brought by unhappy neighbors, and the project never vested despite the Board's approval.⁴⁴ In Hermosa Beach, California, a local oil developer was prohibited from proceeding with its oil drilling project after the City passed an initiative banning all oil drilling within the City.⁴⁵ Even though the oil company entered into a lease agreement with the City three years before the initiative passed, the court held the oil company did not have a vested right to proceed with its project, and noted that the oil company "could have protected itself from subsequent regulatory changes by insisting that the City enter into a development agreement" beforehand.⁴⁶

North Carolina also follows the majority rule, recognizing both common law vested rights and statutory vested rights.⁴⁷ The common law vested rights doctrine in North Carolina requires that "[a] party claiming a common law vested right in a nonconforming use of land must show: (1) substantial expenditures; (2) in good faith reliance; (3) on valid governmental approval; (4) resulting in the party's detriment."⁴⁸ In 2010, the North Carolina Court of Appeals made it clear that the common law vested rights doctrine has a high bar for vesting. In *MLC Automotive, LLC v. Town of Southern Pines*, a developer purchased property for approximately \$1.5 million to open up an auto dealership.⁴⁹ Relying on letters from the local municipality that the property was zoned to allow such a venture, the developer proceeded to secure a contract with an auto company and spend more than \$500,000 to prepare the

⁴³Nick Gerda, *Supervisors Scrap Controversial Housing Project in North Tustin*, VOICE OC (Dec. 16, 2015), <http://voiceofoc.org/2015/12/supervisors-scrap-controversial-senior-housing-project-in-north-tustin/> [<https://perma.cc/Q8BM-7GMA>].

⁴⁴*See, e.g.*, *Foothill Cmty. Coal. v. County of Orange*, 166 Cal. Rptr. 3d 627, 631–32 (Ct. App. 2014); *see also* Gerda, *supra* note 43 ("County Counsel Leon Page advised that supervisors can move forward with undoing the zoning because the church hasn't gained any 'vested rights' to develop.").

⁴⁵*Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 103 Cal. Rptr. 2d 447, 455, 475 (Ct. App. 2001).

⁴⁶*Id.* at 464.

⁴⁷*See* N.C. GEN. STAT. ANN. § 160A-385.1 (West 2015); *see also* 4 SALKIN, *supra* note 3, § 32:3.

⁴⁸*MLC Auto., LLC v. Town of Southern Pines*, 702 S.E.2d 68, 73 (N.C. Ct. App. 2010) (quoting *Kirkpatrick v. Vill. Council for Pinehurst*, 530 S.E.2d 338, 343 (N.C. Ct. App. 2000)).

⁴⁹*Id.* at 70.

property for an auto dealership.⁵⁰ But public opposition to the project grew, and the city council eventually rezoned the area so that an auto dealership was prohibited on the property.⁵¹ The developer sued, alleging a common law vested right to develop the property for an auto dealership based on his substantial expenditures in good faith reliance on the letters from the local municipality that the area was zoned to allow that specific use.⁵² However, the court found that the letters stating that the property was, at the time, zoned to allow an auto dealership did not constitute “valid government approval” and did not create a vested right.⁵³ Thus, despite a half million dollars in expenditures, the developer had no vested right to build his auto dealership without valid government approval (such as a building permit) under North Carolina’s common law vested rights doctrine. This example also serves as a cautionary tale illustrating how the majority rule can (literally) cost developers money, and in some instances, derail an entire project.

B. *The Minority Rule: Providing Greater Certainty for Developers*

The minority rule relies on a bright line fairness rationale and aims to provide developers with more certainty earlier in the building/planning process.⁵⁴ Generally, the minority rule allows a developer’s rights to vest once a complete project application is filed—even if it is later determined by a court or other decision making body to violate state or local rules.⁵⁵ Under this rationale, “a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application’s submission.”⁵⁶ Under the minority rule, development rights are recognized as “valuable property interests” and the doctrine “ensures that ‘new land-use ordinances do not unduly oppress development rights.’”⁵⁷ The minority rule tends to favor developers because it provides certainty well before the project has begun, or before the public is given a chance to voice concern.

A case from the Georgia Supreme Court, *Banks County v. Chambers of Georgia, Inc.*, demonstrates the benefits of the minority rule.⁵⁸ On August 20, 1991, a landowner sought written verification from Banks County that his

⁵⁰ *Id.*

⁵¹ *Id.* at 72.

⁵² *Id.*

⁵³ *See id.* at 73, 79.

⁵⁴ *See Wynne, supra* note 22, at 856, 888, 932.

⁵⁵ *Overstreet & Kirchheim, supra* note 16, at 1045, 1065–69, 1095.

⁵⁶ *Friends of the Law v. King County*, 869 P.2d 1056, 1058–59 (Wash. 1994) (en banc).

⁵⁷ *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1223 (Wash. 2014) (en banc) (internal quotations omitted) (quoting *Abbey Road Grp., LLC v. City of Bonney Lake*, 218 P.3d 180, 183 (Wash. 2009) (en banc)).

⁵⁸ *See Banks County v. Chambers of Ga., Inc.*, 444 S.E.2d 783, 785 (Ga. 1994).

proposed project was in compliance with local land use laws.⁵⁹ Written verification was the first necessary step for the landowner to obtain the appropriate permit for the project.⁶⁰ Because “[i]t soon became apparent that the County was not going to give plaintiffs the written verification they sought,” on September 26, 1991 the landowner filed a mandamus petition seeking “an order compelling the County . . . to issue written verification of zoning ordinance compliance.”⁶¹ A few hours after the landowner filed his mandamus petition, however, the County adopted a Restated Zoning Ordinance.⁶² Banks County argued that the Restated Zoning Ordinance precluded the landowner from obtaining written verification of zoning compliance.⁶³ The Georgia Supreme Court disagreed.⁶⁴ The court held the landowner was “in compliance with the County’s zoning ordinances when [he] sought written verification of compliance on August 20, 1991.”⁶⁵ Therefore, the landowner acquired a vested right to obtain the written verification of zoning compliance from Banks County, despite the zoning ordinance adopted on September 26.⁶⁶ The application of the minority rule in this case provided the landowner with certainty and fairness, and prevented the landowner from being harmed by uncooperative political officials.⁶⁷

Another excellent example of the minority rule (and its ironic consequences) can be found in Washington’s vested rights doctrine. Washington stands out across the states for its exceptionally early vesting doctrine.⁶⁸ In the Evergreen State, rights vest upon the filing of a complete permit application for three categories of permits: subdivision applications,⁶⁹ building permits,⁷⁰ and development agreements.⁷¹ This is known as the “date certain” approach.⁷² While Washington’s vested rights doctrine originated at common law, the Washington Supreme Court has declared that the doctrine is

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.* at 786.

⁶⁴ *Banks County*, 444 S.E.2d at 786.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *But see id.* at 788 (Hunstein, J., dissenting) (arguing that the application of the minority rule to this case “allows appellees to evade the operation of the Banks County zoning ordinance by the mere filing of an application and allows appellees, who acted with knowledge of the impending zoning ordinance, to defeat that ordinance,” and urging the state to adopt the majority rule).

⁶⁸ Overstreet & Kirchheim, *supra* note 16, at 1095.

⁶⁹ WASH. REV. CODE ANN. § 58.17.033 (West 2004).

⁷⁰ *Id.* § 19.27.095 (West 2005).

⁷¹ *Id.* § 36.70B.170 (West 2011).

⁷² *See Hull v. Hunt*, 331 P.2d 856, 859 (Wash. 1958) (en banc). For an overview of the “date certain” approach, see Brian K. Steinwascher, Note, *Statutory Development Rights: Why Implementing Vested Rights Through Statute Serves the Interests of the Developer and Government Alike*, 32 CARDOZO L. REV. 265, 284–92 (2010).

now strictly statutory.⁷³ Even without the common law vesting doctrine, Washington has one of the broadest vesting doctrines on the books. “To put it bluntly,” one commentator said of Washington’s vested rights doctrine, “developers have a sweet deal in Washington.”⁷⁴

III. THE BENEFITS OF THE VESTED RIGHTS DOCTRINE

Whether or not a state adheres to the minority or majority rule for vested rights, all jurisdictions recognize the positive benefits that the doctrine provides to landowners and developers.⁷⁵ In Washington, the Supreme Court recognized that vesting rights were necessary because “[s]ociety [as a whole] suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin.”⁷⁶ If vested rights were not granted, the complex web of laws and regulations that developers must comply with would essentially prove to be an unhittable, moving target. As a result, some commentators have argued that “the economic engine of the building industry [would be] stifled, resulting in unnecessary and unfair losses for property owners and lost tax revenues for local governments.”⁷⁷

Development projects can take many years, and the vested rights doctrine provides developers with the protection and certainty that they need to complete the entire project without the risk that new regulations will make the project uneconomical or impossible. In New Hampshire, for instance, a town approved a developer’s subdivision plan to build fifty houses on a piece of property in 1968.⁷⁸ However, in 1970, the town created a planning board and adopted a new zoning ordinance requiring subdivision lots “to have a minimum lot area of 40,000 square feet.”⁷⁹ The developer’s lots were only 10,000 square feet and did not comply with the new statute.⁸⁰ Nonetheless, between 1970–1975 the planning board continued to approve amendments to the developer’s original subdivision plan and allowed the project to proceed on 10,000 square foot lots as originally planned.⁸¹ Unfortunately, in 1978, with 70% of the subdivision complete, the local planning board suddenly refused to

⁷³ *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1223 (Wash. 2014) (en banc) (“While it originated at common law, the vested rights doctrine is now statutory.”); *see also* *Potala Vill. Kirkland, LLC v. City of Kirkland*, 334 P.3d 1143, 1144 (Wash. Ct. App. 2014). In reaction to the supreme court’s *Snohomish* decision, Washington lawmakers have introduced legislation to preserve the common law vested rights doctrine. *See* H.B. 2062, 64th Leg., Reg. Sess. (Wash. 2015); S.B. 5921, 64th Leg., Reg. Sess. (Wash. 2015).

⁷⁴ Wynne, *supra* note 22, at 932.

⁷⁵ *See* 4 SALKIN, *supra* note 3, § 32:1.

⁷⁶ *W. Main Assocs. v. City of Bellevue*, 720 P.2d 782, 785 (Wash. 1986) (en banc).

⁷⁷ *Overstreet & Kirchheim*, *supra* note 16, at 1044.

⁷⁸ *Henry & Murphy, Inc. v. Town of Allentown*, 424 A.2d 1132, 1133 (N.H. 1980).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See id.*

approve the plan for the last sixteen lots since they did not meet the 40,000 square foot ordinance.⁸²

The developer sued.⁸³ Applying the majority rule, the New Hampshire Supreme Court found that the developer had proceeded “with its original plan in good faith, reasonable reliance upon the town’s ongoing approval of that plan over a period of years,” and acquired a vested right to develop the remaining lots regardless of the 40,000 square foot zoning ordinance.⁸⁴ Here, the planning board adopted a new ordinance *after* the developer’s subdivision plan was approved, and attempted to deny the developer its right to proceed with the project as originally approved, ten years later. Here, the vested rights doctrine sensibly and fairly protected the developer from the planning board’s inconsistent decisionmaking.

The vested rights doctrine also protects the rights of individuals against the political whims of local government. Commentators have gone so far as to state that vested rights “are the jurisprudential testing ground for a much bigger issue: the ebbs and flows of the protection of individual rights versus the power of the government to impose regulations.”⁸⁵ Vested rights ensure that the government applies the rules fairly and evenly, and “further[s] society’s interest in the government following the law and establishing certainty.”⁸⁶

IV. THE UNINTENDED CONSEQUENCES OF THE VESTED RIGHTS DOCTRINE

While the vested rights doctrine provides developers a safety net for their risky and expensive investments, it comes at a cost to the public interest. Early vesting can lead to an invidious practice called “permit speculation.”⁸⁷ Opportunistic developers have recently begun to take advantage of the vested rights doctrine as a way to skirt environmental and land use regulations. For instance, a loophole in Washington’s Growth Management Act allows savvy developers to apply for a permit and obtain vested rights for a project even when the project is later found to violate SEPA or be noncompliant with the GMA (and when it is well known in advance that those risks are already present).⁸⁸ In Texas, the doctrine has been perverted to make it difficult for local municipalities to effectively enforce public health and safety regulations on fracking operations.⁸⁹ Other states have experienced similar unintended

⁸² See *id.* at 1133–34.

⁸³ *Id.* at 1133.

⁸⁴ *Henry & Murphy*, 424 A.2d at 1133–34.

⁸⁵ Overstreet & Kirchheim, *supra* note 16, at 1044.

⁸⁶ *Id.* at 1056.

⁸⁷ See Steinwascher, *supra* note 72, at 285 n.114.

⁸⁸ See Wynne, *supra* note 22, at 851, 890–91; see also *infra* Part IV.C.

⁸⁹ See John Tedesco, *Losing Ground*, MY SAN ANTONIO (Jan. 7, 2009), <http://www.mysanantonio.com/news/local/article/Losing-Ground-868529.php> [<https://perm>

consequences⁹⁰—and we are finding that the development industry relies on the doctrine as a sword to evade predictable environmental regulation rather than as a shield to protect it from unfair surprise.⁹¹

A. *Vesting Doctrines Can Subvert the Public Interest*

There is an inherent tension between the public interest and development interests. Granting a vested right essentially sanctions a nonconforming use, and “[a] proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.”⁹²

A balance must therefore be struck between the private sector’s interest in developing property and a local government’s interest in controlling development to protect the public’s health, safety, and the environment. The late Judge Betty Fletcher of the Ninth Circuit noted that the vested rights doctrine must balance these two competing goals: “the public interest in lower construction costs that result from providing developers a fair degree of certainty about their investments; and the public interest in controlling pollution and congestion effectively.”⁹³ Grant a vested right too early, and the public interest is subverted. Grant a vested right too late, and a developer’s ability to efficiently and economically pursue a project is thwarted.

In addition, vested rights interfere with authoritative state land use legislation that is intended to prevent sprawl and protect the environment. The doctrine “leaves local governments less able to update and enforce their land use laws to keep pace with changing conditions and evolving views of appropriate land uses.”⁹⁴ While we understand the need to protect private property rights, governments must also have the power to update land use laws as new information becomes available and public policy preferences change.

B. *Early Vesting Can Lead to Permit Speculation, Leaving the Government Unable to Enforce Its Land Use Laws*

Take, for example, the invidious recent phenomenon of “permit speculation.” Briefly put, permit speculation refers to the practice of developers obtaining permits before new, more restrictive laws go into effect,

a.cc/VBZ9-VF3A]; *see also infra* Part IV.D.

⁹⁰Heeter, *supra* note 27, at 66–76 (discussing cases from various states that fit into distinct factual categories to demonstrate how zoning estoppel has been used as a defense tactic).

⁹¹*See infra* Part IV.B.

⁹²*Erickson & Assocs., Inc. v. McLerran*, 872 P.2d 1090, 1095–96 (Wash. 1994) (en banc).

⁹³*Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1298 (9th Cir. 1990).

⁹⁴Wynne, *supra* note 22, at 855.

with no intention of actually proceeding with the project on the permit application.⁹⁵ The developer's only intention is to secure a permit with the less restrictive laws, and then sit on the permit until a lucrative business opportunity arises.⁹⁶ It is of particular concern in minority rule jurisdictions, where the fear is that "developers may obtain a building permit with no intention to build in the near future, but rather purely to secure a vested right."⁹⁷ In early vesting states, this is a significant risk since rights can vest so easily.

For example, suppose a county wants to increase the stream buffer ordinance from fifty feet to 100 feet. The county must show its cards before the new stream buffer takes effect: it must proceed under a public, democratic process including public notice of the proposed change, public hearings, and public comment.⁹⁸ Private developers, on the other hand, can sit back and watch the county amend the ordinance, and then simply file a permit application before the new ordinance goes into effect. Voila! In a minority rule state, the developer's rights have vested to the fifty-foot buffer, and the project is now exempt from the 100-foot buffer.

The Washington Supreme Court, however, has stated that the date certain vested rights doctrine prevents permit speculation because rights vest at a point "which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured."⁹⁹ Practitioners Gregory Overstreet and Diana Kirchheim argue in their article, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, that "permit speculation is not a problem in the real world,"¹⁰⁰ and others similarly believe "permit speculation may be a concern in theory rather than in practice."¹⁰¹ However, scholar Roger Wynne disagrees vociferously, noting that Overstreet and Kirchheim and others who feel that permit speculation is not a problem focus on *building permit* speculation.¹⁰² Wynne notes that "a developer usually seeks a building permit *after* investing considerable time in a project and at the point that the developer is ready to break ground. When developers rely on *earlier* permits to freeze applicable development regulations, permit speculation is a very real possibility."¹⁰³ But early vesting for other permits—such as subdivision applications—indicates that speculation in early vesting

⁹⁵ See Steinwascher, *supra* note 72, at 285 n.114.

⁹⁶ See *id.*

⁹⁷ *Id.* at 286–87.

⁹⁸ 4 SALKIN, *supra* note 3, § 32:2 (discussing the Sunshine Acts, open zoning meetings, and freedom of information laws).

⁹⁹ Erickson & Assocs., Inc. v. McLerran, 872 P.2d 1090, 1096 (Wash. 1994) (en banc).

¹⁰⁰ Overstreet & Kirchheim, *supra* note 16, at 1078 n.201.

¹⁰¹ Steinwascher, *supra* note 72, at 286 n.123 ("There appears to be few cases in the permitting and vested rights context in which the issue of permit speculation arises.").

¹⁰² Wynne, *supra* note 22, at 921 n.278.

¹⁰³ *Id.* (citation omitted).

jurisdictions *is* a real problem. For instance, in 1999 King County Executive Ron Sims issued an emergency order requiring all pre-1937 subdivision approvals to be reviewed under modern law before the subdivision could be developed.¹⁰⁴ Sims's action specifically targeted a subdivision plan filed "around the turn of the century" with the township of Ravensdale—a township that no longer exists—to allow fifty-seven lots on 103 acres.¹⁰⁵ Current zoning laws for the lot, located in a rural area near a salmon stream, "allows just one house per five or 10 acres."¹⁰⁶

More recent experience seems to fall on the side of Wynne's concerns. For instance, King County, Washington adopted a tougher critical-areas ordinance in 2005 and "the number of building-permit applications jumped nearly 30 percent in the two months before the law took effect compared with the same period in the previous year. . . . The reason: to get in under the wire to avoid the controversial new rules."¹⁰⁷ In Washington's Snohomish County, when developers heard that "the county council was considering protecting wetlands, streams, and other environmentally sensitive areas," they rushed to file permit applications before the law went into effect.¹⁰⁸ The county received a staggering 616 applications in the two years before the law was passed, while only "one-fifth that many came in during the two years afterward."¹⁰⁹

In San Antonio, Texas, the vested rights doctrine has cost the city "millions of dollars, stripped parts of the scenic Hill Country of trees and blocked attempts to protect the region's water supply."¹¹⁰ In October of 1997, the day before a new law was to go into effect "to charge developers new fees to control storm water runoff and prevent flooding," developers filed 200 applications under the old rules—"the most [applications] ever filed in a single day in San Antonio."¹¹¹ In another egregious example, when the San Antonio City Council was contemplating new rules to protect the Edwards Aquifer, it imposed a temporary moratorium on new plats over the aquifer's recharge zone "to stop landowners from trying to get around the looming aquifer rules."¹¹² But in the week and days before the temporary moratorium went into effect, applications spiked and the city received nearly 200 applications—compared to an average of forty-seven applications per month.¹¹³

¹⁰⁴ Brier Dudley, *Subdivision Loophole Closed*, SEATTLE TIMES, Mar. 19, 1999, at B1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Lynda V. Mapes, *Old Law Lets Developers Use Old Rules, Thwarting Puget Sound Protection, Critics Charge*, SEATTLE TIMES (June 11, 2008), <http://www.seattletimes.com/seattle-news/old-law-lets-developers-use-old-rules-thwarting-puget-sound-protection-critics-charge/> [<https://perma.cc/96NM-QM6L>]; see also King County, Wash., Ordinance 15245 (July 27, 2005).

¹⁰⁸ McClure, *supra* note 1.

¹⁰⁹ *Id.*

¹¹⁰ Tedesco, *supra* note 89.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

Additionally, developers have used claims of vested rights to avoid the ordinance in four out of five cases over the last decade, allowing sprawl and “dense development over the fragile watershed that the city intended to protect” to grow.¹¹⁴ Frustrated environmentalists in San Antonio allege that vested rights have essentially nullified the city’s efforts to protect the aquifer.¹¹⁵

Simply put, the opportunistic manipulation of the vested rights doctrine in Texas, Washington, and numerous other jurisdictions is a prime example of the dark side of good intentions. Instead of protecting developers’ reliance interests, it perversely “encourages the development industry to blur the line between legitimate projects and outright land speculation,” and has served as “a boon to developers while hampering efforts by residents, community groups and officials to make San Antonio a better place to live.”¹¹⁶

C. Washington’s Problem: The Vested Rights Doctrine Undermines the State’s Growth Management Act and State Environmental Policy Act

While Overstreet and Kirchheim argue that Washington’s vested rights doctrine protects *both* the public interest and property owner’s rights,¹¹⁷ recent conflicts indicate that only the latter is the case.¹¹⁸ The intersection of Washington’s vested rights doctrine with the GMA and SEPA demonstrates how the public interest can easily and perversely be subverted when rights are allowed to vest too early. Despite noble intentions, Washington’s vested rights doctrine is rewarding opportunistic developers and undermining these critical environmental and land use policies.

1. The Growth Management Act

Numerous states have enacted sensible growth management acts in recent years in an effort to balance private property rights with reasonable land use

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Tedesco, *supra* note 89.

¹¹⁷ See Overstreet & Kirchheim, *supra* note 16, at 1073 (“[V]ested rights do not shield developers from valid health, safety, and welfare regulations or SEPA, so the public interest can still be protected even with a strong vested rights doctrine. Because the public interest remains protected, the net effect of Washington’s strong vested rights doctrine is the protection of property owners’ rights and expectations with no loss of valid government powers. . . . Washington’s vested rights doctrine appears to have succeeded in balancing the two competing policy interests of the individual and the government.” (footnote omitted)).

¹¹⁸ *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1229 (Wash. 2014) (en banc) (Johnson, J., dissenting) (noting that the majority opinion elevated the developer’s property rights over the public’s infrastructural, public facility and structural, and environmental interests).

growth and regulation.¹¹⁹ For our purposes, Washington State's law is a representative illustration. In Washington, the GMA is the "fundamental land use planning law."¹²⁰ It requires local governments to participate in coordinated and comprehensive land use planning to manage growth and protect the environment.¹²¹ Washington enacted the GMA in 1990 in response to the tremendous growth in the region and concern about the "escalating degradation of community, environment, and quality of life."¹²² The purpose of the GMA is to prevent "uncoordinated and unplanned growth" that "pose[s] a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of [Washington] state."¹²³ While the GMA is not perfect, it has been mostly heralded as a success since its inception twenty-five years ago.¹²⁴ And unlike initial fears, the GMA has not led to wholesale abridgments of private property rights.¹²⁵

Operationally, the GMA requires counties and cities to create comprehensive plans and development regulations consistent with the fourteen goals of the GMA.¹²⁶ Comprehensive plans and development regulations are presumed valid upon adoption.¹²⁷ Parties may challenge comprehensive plans and development regulations by petitioning the Growth Management Hearings Board (the Hearings Board), which has exclusive jurisdiction to determine whether comprehensive plans or development regulations violate the GMA, as

¹¹⁹ For a summary of growth management legislation around the country, see 2 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 15:6 n.10, Westlaw (4th ed., database updated Apr. 2017).

¹²⁰ *Town of Woodway v. Snohomish County*, 291 P.3d 278, 282 (Wash. Ct. App. 2013). For a lengthy summary of Washington's GMA, see Steve P. Calandrillo et al., *Making "Smart Growth" Smarter*, 83 GEO. WASH. L. REV. 829, 852–56 (2015).

¹²¹ WASH. REV. CODE ANN. §§ 36.70A.010 (West 2011 & Supp. 2017).

¹²² Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 871 (1993).

¹²³ WASH. REV. CODE ANN. § 36.70A.010.

¹²⁴ E.g., Joseph W. Tovar, *GMA at 25: Looking Back, Looking Forward*, MRSC (Dec. 12, 2014), <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/December-2014/GMA-at-25-Looking-Back,-Looking-Forward.aspx> [<https://perma.cc/F88R-6AHB>].

¹²⁵ See *Viking Props., Inc. v. Holm*, 118 P.3d 322, 330, 332 (Wash. 2005) (en banc) (finding that a restrictive covenant limiting the density of one dwelling per one-half acre is enforceable and does not violate public policy of the GMA, the City's comprehensive plan, or the City's zoning regulations; noting that the GMA does not override "a contractual property right executed over 60 years ago").

¹²⁶ WASH. REV. CODE ANN. § 36.70A.040. The fourteen goals of the GMA include: urban growth, reduce sprawl, transportation, housing, economic development, property rights, permits, natural resource industries, open space and recreation, environment, citizen participation and coordination, public facilities and services, historic preservation, and shoreline management. See *id.* § 36.70A.020; see also *id.* § 36.70A.480 (adding the Shoreline Management Act as the fourteenth GMA goal).

¹²⁷ *Id.* § 36.70A.320(1); *Woods v. Kittitas County*, 174 P.3d 25, 33 (Wash. 2007) (en banc).

well as SEPA challenges to the comprehensive plans and development regulations.¹²⁸

The Hearings Board has two options if it finds the comprehensive plan or development regulation is inconsistent with the GMA, SEPA, or the Shoreline Management Act (SMA): “(1) it may enter a finding of noncompliance or (2) it may enter a finding of invalidity.”¹²⁹ Most unfortunately, rights that vested to the flawed comprehensive plan or regulation are still valid even if there is an order of noncompliance or invalidity; the Hearings Board’s order does not retroactively extinguish vested rights despite noncompliance with the law.¹³⁰ In fact, section 36.70A.302(2) of the GMA specifically states, “[a] determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board’s order by the city or county.”¹³¹ Thus, quite inexplicably, vested rights are still valid even if the Hearings Board finds that the comprehensive plan or regulations themselves are not. Compliance with the law matters not.

2. *The Vested Rights Doctrine Undermines the Purpose of the Growth Management Act*

The GMA was gutted at its inception by Washington’s vested rights doctrine. This loophole allows developers to utilize the pretext of vested rights as a sword to proceed with projects that violate the state’s most important land use and environmental laws.¹³² As it currently stands, the GMA incentivizes a developer to persuade a jurisdiction to amend its comprehensive plan or regulations, and then file a development application immediately so that rights to the project vest to the new regulations—before the Hearings Board has a chance to issue a decision of noncompliance or invalidity.¹³³ Even if the Hearings Board determines that the comprehensive plan or regulations violate the GMA, SEPA, or the SMA, the developer may nonetheless proceed with its project since its rights vested to the flawed comprehensive plan or regulations.¹³⁴ Meanwhile, the public suffers from a project that violates the very laws intended to protect them.¹³⁵

This is not just a theoretical dilemma; it has already materialized in the Washington Supreme Court case of *Town of Woodway v. Snohomish*

¹²⁸ WASH. REV. CODE ANN. § 36.70A.280.

¹²⁹ *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1223 (Wash. 2014) (en banc) (citing WASH. REV. CODE ANN. §§ 36.70A.300(3)(b), .302).

¹³⁰ WASH. REV. CODE ANN. § 36.70A.302(2).

¹³¹ *Id.*

¹³² *See Woodway*, 322 P.3d at 1227 (Johnson, J., dissenting) (“The majority . . . uses the vested rights doctrine as a sword to disregard the mandates of both the GMA and SEPA.”).

¹³³ *See, e.g., id.* at 1221–22 (majority opinion).

¹³⁴ *See* WASH. REV. CODE ANN. § 36.70A.302(2).

¹³⁵ *See Woodway*, 322 P.3d at 1227 (Johnson, J., dissenting).

County.¹³⁶ Defendant Blue Square Real Estate (Blue Square) desired the redevelopment of a sixty-one-acre parcel of waterfront land (known as Point Wells) that it owned in unincorporated Snohomish County.¹³⁷ Point Wells had been used for the prior 100 years for petroleum storage and other industrial purposes.¹³⁸ The land was zoned as “Urban Industrial,” but Blue Square asked Snohomish County to amend its comprehensive plan and zoning regulations to allow for 3,000 housing units in towers up to eighteen stories tall as well as 100,000 square feet of commercial and retail space.¹³⁹ This request came despite its obvious environmental contamination and the fact that the land is situated at the end of a single lane road that provides the only entrance and egress.¹⁴⁰ Shockingly, in 2009 and 2010, Snohomish County granted Blue Square’s requests and amended its comprehensive plan and building regulations to allow the redevelopment project as an “Urban Center.”¹⁴¹ Perhaps this was not so surprising after all when one considers that all of the negative externality effects would fall on neighboring King County to the south, particularly the small community of Richmond Beach, given that the single lane road mentioned above (and providing the only access) existed there.¹⁴²

In response, a local citizens group, Save Richmond Beach, along with the neighboring town of Woodway, challenged the validity of Snohomish County’s amendments to the comprehensive plan and building regulations.¹⁴³ The petitioners asserted the reasonable argument that the area wholly lacked adequate infrastructure, namely public roads and public transit, to support such a large-scale development.¹⁴⁴ A hearing before the Hearings Board was set for March 2, 2011.¹⁴⁵ Blue Square was too savvy to wait—it filed two permit applications for the project, first on February 14, 2011 and next on March 4, 2011, two days after the hearing.¹⁴⁶ On April 25, 2011, the Hearings Board issued its final order finding that the Snohomish County ordinances were noncompliant with SEPA, and invalidated the comprehensive plan amendments because they substantially interfered with the goals of the GMA.¹⁴⁷

After the decision, the Town of Woodway and Save Richmond Beach filed suit in Washington Superior Court arguing that Blue Square’s rights

¹³⁶ *Id.* at 1219 (majority opinion).

¹³⁷ *Id.* at 1221.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1227, 1229 (Johnson, J., dissenting).

¹⁴¹ *Woodway*, 322 P.3d at 1222 (majority opinion).

¹⁴² *Id.* at 1221.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1221–23.

¹⁴⁵ *Id.* at 1222.

¹⁴⁶ *Id.*

¹⁴⁷ *Woodway*, 322 P.3d at 1222.

should not vest since the Hearings Board found that the ordinances violated SEPA and invalidated the comprehensive plan amendments.¹⁴⁸ The plaintiffs asked the court to harmonize SEPA and the GMA, and declare that Blue Square's "permits had not vested because the ordinances were 'void' under SEPA and the GMA."¹⁴⁹ But while the citizen groups pointed to pre-GMA precedent indicating that ordinances found to violate SEPA did not create vested rights, the Washington Supreme Court made it clear that "[t]he GMA fundamentally changed the review process for local land use plans and building regulations."¹⁵⁰ Section 36.70A.302(2) of the GMA provides:

A determination of invalidity is *prospective* in effect and does not extinguish rights that [already] vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.¹⁵¹

The Washington Supreme Court examined this statutory language and found that "whether or not a challenged plan or regulation is found to be noncompliant or invalid, any rights that vested before the growth board's final order remain vested after the order is issued."¹⁵² Most unjustly, the court held that the vested rights doctrine applies even to permit applications later found to be noncompliant with the SEPA.¹⁵³

In his blistering dissent, Justice Johnson argued, "[t]he GMA was enacted to fight 'uncoordinated and unplanned growth,' but in finding that [Blue Square] has a vested right to develop Point Wells as an urban center, the majority has facilitated such uncoordinated, unplanned, and in fact illegal growth."¹⁵⁴ SEPA is supposed to overlay and supplement all other laws.¹⁵⁵ But cases like *Town of Woodway* are clear evidence to the contrary. As it stands now, Washington's early vested rights statute, combined with section 36.70A.302(2) of the GMA, actually allows the vested rights doctrine to be used as a pretext to completely circumvent SEPA and the other goals of

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1225.

¹⁵¹ WASH. REV. CODE ANN. § 36.70A.302(2) (West 2011) (emphasis added).

¹⁵² *Woodway*, 322 P.3d at 1224.

¹⁵³ *Id.*; see also WASH. REV. CODE ANN. §§ 36.70A.300(3)(b), .302 (stating that the Board may find noncompliance with the requirements of SEPA in its final order).

¹⁵⁴ *Woodway*, 322 P.3d at 1229 (Johnson, J., dissenting) (citation omitted) (quoting WASH. REV. CODE ANN. §§ 36.70A.010).

¹⁵⁵ See WASH. REV. CODE ANN. § 43.21C.060 (West 2009) ("The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of all branches of government of this state, including state agencies, municipal and public corporations, and counties."); see also *Adams v. Thurston County*, 855 P.2d 284, 287 (Wash. Ct. App. 1993) ("SEPA overlays and supplements all other state laws . . .").

the GMA.¹⁵⁶ It is abundantly clear that the GMA and the vested rights doctrine must be harmonized so that the state's primary environmental protection law is not eviscerated through the backdoor.

D. Texas's Problem: The Oil and Gas Industry Is Using Vested Rights to Evade Public Health and Safety Regulations for Fracking Operations

The negative consequences of the vested rights doctrine are also on full display in Texas, as the oil and gas industry is using the state's early vesting doctrine to skirt numerous public health and safety regulations.¹⁵⁷ Texas follows the minority rule: rights vest at the time the original application for the permit is filed.¹⁵⁸ The practice of hydraulic fracturing—commonly referred to as fracking—has exploded in Texas over the last decade, but local municipalities have struggled to keep their public health and safety regulations in pace with the booming industry.¹⁵⁹

As fracking operations increased throughout parts of Texas, residents grew uneasy as the drilling grew closer and closer to their homes.¹⁶⁰ Denton, Texas has 270 wells within its city limits, with drilling sites as close as 187 feet away from a resident's backyard.¹⁶¹ Concern about "air quality, water quality and the heavy truck traffic" grew.¹⁶² Due to pressure from Denton residents, in 2013 city officials imposed a 1,200-foot setback ordinance to create a buffer zone between fracking activities and areas where people lived, worked, or gathered.¹⁶³ But industry officials claimed they were not subject to the new 1,200-foot setback: their fracking operations were vested to existing drilling sites, so they claimed the new setback ordinance did not apply.¹⁶⁴

Soon thereafter, the City of Denton filed a lawsuit against EagleRidge Energy, LLC for violating the setback ordinance.¹⁶⁵ EagleRidge Energy claimed that the new setback ordinance did not apply to their fracking wells because they received approval from Denton to drill at that location in 2002—

¹⁵⁶ *Woodway*, 322 P.3d at 1227 (Johnson, J., dissenting).

¹⁵⁷ Wade Goodwyn, *New Texas Law Makes Local Fracking Bans Illegal*, NPR (May 20, 2015), <http://www.npr.org/2015/05/20/408156948/new-texas-law-makes-local-fracking-bans-illegal> [<https://perma.cc/H47Y-3PTK>].

¹⁵⁸ TEX. LOC. GOV'T CODE ANN. § 245.002 (West 2005).

¹⁵⁹ Tiffany Dowell Lashmet & Amber Miller, *Texas Exempt Wells: Where Does Fracking Fit*, 55 NAT. RESOURCES J. 239, 242–43 (2015); see also Walker Friedman & Jack Price, *Too Close for Comfort?*, 79 TEX. B.J. 214, 214 (2016).

¹⁶⁰ Goodwyn, *supra* note 157.

¹⁶¹ *Id.*

¹⁶² *Id.* (quoting Wade Goodwyn, Correspondent, NPR).

¹⁶³ Peggy Heinkel-Wolfe, *City of Denton Sues over Wells*, DENTON REC.-CHRON. (Oct. 2013), <http://www.dentonrc.com/local-news/local-news-headlines/20131021-city-of-denton-sues-over-wells.ece> [<https://perma.cc/5DUX-EXSS>].

¹⁶⁴ Goodwyn, *supra* note 157.

¹⁶⁵ See generally Plaintiff's Original Petition, *City of Denton v. Eagleridge Energy, LLC*, No. 2013-30817-211 (Tex. Dist. Ct. Oct. 18, 2013).

when the setback was only 250 feet.¹⁶⁶ Denton argued that a separate permit application was required for *each* new gas well, so EagleRidge Energy was subject to the 1,200-foot setback.¹⁶⁷ The City of Denton and EagleRidge Energy ultimately resolved the dispute out of court.¹⁶⁸ But the suit with EagleRidge Energy is a representative example of how vested rights in Texas are being employed by industry forces to circumvent new environmental safety regulations.

Frustrated that the new setback ordinance could not be enforced against the oil and gas industry due to their vested rights claims, Denton voters passed a law banning fracking completely within the city in November 2014.¹⁶⁹ But, the fracking ban in Denton was short lived. By May 2015, Texas Governor Gregg Abbott signed H.B. 40 into law, a bill prohibiting local governments from banning fracking (essentially a ban on bans).¹⁷⁰ H.B. 40 preempts local efforts to regulate oil and gas drilling.¹⁷¹

The legislation does not, however, address the vested rights problem that triggered voters in Denton to ban fracking in the first place.¹⁷² H.B. 40 leaves the vested rights question unanswered: can the oil and gas industry hide behind vested rights to avoid new fracking regulations?¹⁷³ After H.B. 40 was passed, Denton Mayor Chris Watts told reporters “[w]e’re right back where we started.”¹⁷⁴

Another avenue worth exploring derives from the fact that Texas’s vested rights statute includes numerous public interest exemptions.¹⁷⁵ Perhaps a solution would be to exempt oil and gas wells from the vested rights statute under a public interest exemption. That way, a new permit would be required

¹⁶⁶Jess Krochtengel, *Texas City Seeks to Block Gas Wells in Permit Fight*, LAW360 (Oct. 22, 2013), <http://www.law360.com/articles/482130/texas-city-seeks-to-block-gas-wells-in-permit-fight> [<https://perma.cc/2PVS-6HKM>]; *see also* Heinkel-Wolfe, *supra* note 163.

¹⁶⁷Krochtengel, *supra* note 166.

¹⁶⁸The parties entered into a “Standstill Agreement” on November 22, 2013, to freeze EagleRidge’s fracking operations within the city until the two parties could come to a more permanent agreement. *See Litigation & News*, CITY DENTON, <http://38.106.4.184/departments-services/departments-g-p/gas-well-inspections/news-notice> [<https://perma.cc/T2ZZ-C2SC>].

¹⁶⁹Krishnadev Calamur, *Voters in Texas City Approve Ban on Fracking*, NPR (Nov. 5, 2014), <http://www.npr.org/sections/thetwo-way/2014/11/05/361732151/voters-in-texas-city-approve-ban-on-fracking> [<https://perma.cc/UT83-Y3YE>].

¹⁷⁰H.B. 40, 84th Leg., Reg. Sess. (Tex. 2015); Peggy Heinkel-Wolfe, *HB 40 Signed into Law*, DENTON REC.-CHRON. (May 2015), <http://www.dentonrc.com/local-news/local-news-headlines/20150518-hb-40-signed-into-law.ece> [<https://perma.cc/Y2KB-G5PK>].

¹⁷¹*See* Heinkel-Wolfe, *supra* note 170.

¹⁷²Marissa Barnett, *Bill to Limit Texas Cities’ Rules on Fracking Heads to Governor*, DALL. NEWS (May 2015), <https://www.dallasnews.com/news/local-politics/2015/05/04/bill-to-limit-texas-cities-rules-on-fracking-heads-to-governor> [<https://perma.cc/72FX-8R5C>].

¹⁷³*Id.*

¹⁷⁴*Id.* (quoting Chris Watts, Mayor of Denton).

¹⁷⁵*See* TEX. LOC. GOV’T CODE ANN. § 245.004 (West 2005).

for each new well, and the oil and gas industry would not be able to use vested rights to evade public health and safety regulations. In any event, legal conflict is likely to increase as fracking operations in Texas continue to expand, and the oil and gas industry hold fast to the claim of vested rights as a way to avoid new regulations. This example from Texas demonstrates the tension that arises when vested rights are used to subvert the public interest.

V. REFORM THE VESTED RIGHTS DOCTRINE

The vested rights doctrine serves an important purpose: developers who have relied to their detriment on existing land use rules and regulations deserve the certainty and protection that the doctrine provides.¹⁷⁶ But today, overall social welfare is being thwarted by manipulation of the vested rights doctrine—it is a sword for savvy developers rather than a shield against injustice.¹⁷⁷ Different jurisdictions require different solutions, but the doctrine needs to be updated so that developers are not allowed to exploit vested rights to protect their own private interests over the public interest. The vested rights doctrine originated decades ago in a much simpler regulatory environment, but it is past time to update the law's approach so that the doctrine protects developers' legitimate, long-term private property rights without rewarding their short-term opportunism.¹⁷⁸

Fortunately, there are a variety of reforms sensible public policy makers can employ to improve the vested rights doctrine. Possible solutions include: (1) fining local governments and developers for undertaking projects that violate land use and environmental laws; (2) prohibiting rights from vesting when the jurisdiction's comprehensive plan or regulations are later found to violate land use or environmental laws; and (3) limiting permit speculation by expiring vested rights after a certain period of time.

A. Fine Local Governments and Developers Whose Projects Violate Land Use and Environmental Laws and Regulations

One possible solution is to attach a price tag to development projects that violate land use and environmental laws and regulations. Fining local governments and developers for projects that are found to violate critical land use or environmental laws—such as Washington's GMA or SEPA—would disincentivize local governments from making hasty planning decisions at the behest of greedy developers.¹⁷⁹ It would also make illegal projects less economically feasible for developers without banning or stripping them of their rights completely.

¹⁷⁶Overstreet & Kirchheim, *supra* note 16, at 1043–44.

¹⁷⁷Town of Woodway v. Snohomish County, 322 P.3d 1219, 1227, 1229 (Wash. 2014) (en banc) (Johnson, J., dissenting).

¹⁷⁸See Hagman, *supra* note 13, at 577–58.

¹⁷⁹Woodway, 322 P.3d at 1221.

This approach has several benefits: a monetary fine would allow the development to proceed in certain cases and would not override a developer's vested rights but attaches a reasonable price tag to the project in an effort to make the endeavor less economically attractive and internalize the negative externalities it might impose. Of course, the fine would need to be substantial enough to actually provide proper incentives for both the developer and local government.

This monetary sanction approach would vary depending on jurisdiction. Many states have smart growth or antigrowth legislation similar to Washington's GMA, but each is unique.¹⁸⁰ States and local governments would need to decide which laws and regulations would be subject to enforcement and financial discipline in this manner. In Washington, that would most likely implicate the GMA, SEPA, and SMA. Under such a scheme in Washington, Blue Square Real Estate and Snohomish County would have been fined for the Point Wells project¹⁸¹ after the Hearings Board found that the project violated SEPA and the GMA.¹⁸² In Texas, a fine could be triggered if the project violated specific environmental ordinances (such as regulations related to the Edwards Aquifer in San Antonio) or if an oil and gas company used vested rights to place a fracking operation too close to a home, school, workplace, or gathering place.¹⁸³

While a fine does not ultimately eliminate the problem of "illegal" developments and could still result in environmental damage, it attaches a price tag (and additional risk) in the hopes that speculative investments will become less attractive to opportunistic developers.¹⁸⁴ A fine also imposes a concrete incentive for local governments and developers to ensure that comprehensive plans and regulations (and projects that vest to plans and regulations), comply with critical land use and environmental laws.

B. Do Not Allow Rights to Vest if a Recent Land Use Decision Is Found to Violate Land Use or Environmental Laws

A recent land use decision (e.g., a comprehensive plan amendment, rezone, regulatory amendment, etc.) that is later found to violate land use or environmental laws should not give rise to a vested property right.¹⁸⁵ Loopholes like section 36.70A.302(2) of Washington's GMA should be closed

¹⁸⁰For a summary of states with smart-growth legislation, see RATHKOPF & RATHKOPF, *supra* note 119.

¹⁸¹*See supra* Part IV.C.1.

¹⁸²*Woodway*, 322 P.3d at 1222.

¹⁸³*See supra* notes 157–74 and accompanying text; *see also* Heinkel-Wolfe, *supra* note 163.

¹⁸⁴For a discussion of similar shortcomings of a reactive penalty approach in the context of Environmental Protection Agency enforcement, see Theodore L. Garrett, *Reinventing EPA Enforcement*, 12 NAT. RESOURCES & ENV'T 180, 181 (1998).

¹⁸⁵*See Woodway*, 322 P.3d at 1227 (Johnson, J., dissenting).

so that the vested rights doctrine is not used by opportunistic developers to proceed with projects that violate the state's land use and environmental laws.¹⁸⁶

One way to close such a loophole is to create a window of review where the vested rights may not attach: if the zoning laws change within a certain timeframe of when the permit application is filed (say, thirty to sixty days), *and* the zoning regulations or comprehensive plan are later deemed invalid, no vested rights attach. Washington legislators have proposed a similar solution in the past, but the legislation did not gain steam.¹⁸⁷ This solution would prevent situations like Point Wells.¹⁸⁸ Opportunistic developers, who sway a local jurisdiction to change their comprehensive plans and regulations in violation of laws like the GMA, SEPA, or SMA will lose their vested rights and an illegal project will not be able to proceed.¹⁸⁹

Some may voice concern about how the review window will cost developers precious time for their project while they wait to hear whether or not their vested rights are valid.¹⁹⁰ But a project should not move forward if it violates land use or environmental laws.¹⁹¹ A brief delay in a developer's project is a small price to pay to ensure that the public's interest is not subverted. To lessen the financial impact on developers, jurisdictions could limit the length of the window and require the decision making board (either a local court or body similar to the Hearings Board) to review the challenged comprehensive plan or regulations expeditiously. Furthermore, awarding attorneys' fees could ensure that anti-development groups do not file frivolous challenges simply to delay a developer's project. If the challenged comprehensive plan or regulations are *not* found to be invalid, the developer could be entitled to recover attorneys' fees and perhaps even be liable to the developer for damages.

¹⁸⁶ See *supra* Part IV.C.2.

¹⁸⁷ See H.B. 2245, 63rd Leg., Reg. Sess. (Wash. 2014). The bill created a new section in the GMA that does not allow rights to vest for "land use activities" in territory added to an Urban Growth Area (UGA) until sixty days after the publication of notice of the changes to UGA, or, if the land use activity is reviewed by the GMHB, until the GMHB determines that the new territory added to the UGA and land use activities in the new UGA area comply with the GMA. *Id.* A close vote in the House Committee on Local Government was the last action taken on the bill in the legislature. *HB 2245 – 2013-14*, WASH. ST. LEGISLATURE, <http://app.leg.wa.gov/billsummary?BillNumber=2245&Year=2013> [<https://perma.cc/PS3L-MDA6>]. However, the bill did not garner strong support and died just two months after its introduction. *Id.*

¹⁸⁸ See *supra* notes 136–47 and accompanying text.

¹⁸⁹ See Wash. H.B. 2245.

¹⁹⁰ Overstreet & Kirchheim, *supra* note 16, at 1056.

¹⁹¹ *Town of Woodway v. Snohomish County*, 322 P.3d 1219, 1229 (Wash. 2014) (en banc) (Johnson, J., dissenting).

In his 2001 article examining Washington's "muddled" vested rights doctrine,¹⁹² Roger Wynne recognizes that the abuses like the Point Wells situation are "unfortunate," but are "best addressed through the political process by electing local legislators who will not bend to such lobbying."¹⁹³ Wynne feels that the alternative—invalidating vested rights that are attached to comprehensive plans or regulations that are found to violate laws like the GMA—"essentially reintroduce[s] the majority vesting law to Washington's minority scheme."¹⁹⁴ However, this is not so. Invalidating vested rights attached to "illegal" projects or regulations does not introduce a majority rule into a minority rule state; it simply harmonizes the doctrine with other critical land use and environmental laws designed to protect the public interest. If a developer's vested rights are attached to a valid comprehensive plan or regulation, the developer's rights still vest at the early date of filing a permit application.

C. *Limit Permit Speculation by Allowing Vested Rights to Expire*

While early vesting doctrines can lead to permit speculation, setting a time limit on how long vested rights last can help to limit such speculation.¹⁹⁵ In Washington, local municipalities are allowed to create vesting schemes as they see fit and set expiration dates on vested rights,¹⁹⁶ while other early vesting

¹⁹² Wynne, *supra* note 22, at 851. Wynne advocated fixing the "muddled" vested rights doctrine by creating an "applicable law rule" that would replace the vested rights doctrine. *Id.* at 851, 916. Wynne's "applicable law rule" has four components: (i) the rule would apply "to all project permit applications" as defined by [the Revised Code of Washington (RCW) section 36.70B.020(4)]; (ii) the rule would freeze regulations affecting "the type, degree, or physical attributes" of a development and only apply to prospective regulations; (iii) the relevant laws will vest once the developer's permit application is "deemed complete" pursuant to RCW section 36.70B.070, which grants the local government twenty eight days to determine whether the application is complete; and (iv) for multiple-permit applications, rights will vest for "only consolidated applications or prompt, sequential applications." *Id.* at 922–29. However, Wynne's solution, while a valid attempt to provide more certainty and clarity to a convoluted doctrine, is now outdated since the Washington Supreme Court declared that the common law vested rights doctrine—which caused much of the confusion—is dead and the doctrine is now entirely statutory. *See Woodway*, 322 P.3d at 1223 ("While it originated at common law, the vested rights doctrine is now statutory."). Additionally, Wynne's applicable law rule also does not address the problem of the vested rights doctrine undermining the GMA or SEPA. *See generally* Wynne, *supra* note 22.

¹⁹³ Wynne, *supra* note 22, at 927.

¹⁹⁴ *Id.*

¹⁹⁵ *See supra* Part IV.B.

¹⁹⁶ *Erickson & Assocs., Inc. v. McLerran*, 872 P.2d 1090, 1095 (Wash. 1994) (en banc) ("Within the parameters of the doctrine established by statutory and case law, municipalities are free to develop vesting schemes best suited to the needs of a particular locality."); *see also* WASH. REV. CODE ANN. § 58.17.033(2) (West 2004) ("The requirements for a fully completed application shall be defined by local ordinance.").

states include expiration dates for vested rights in their statutes. Washington's subdivision vesting statute grants local governments the authority to determine when applications are complete as well as the parameters of vesting once permit applications are filed.¹⁹⁷ Under this authority, local governments can limit speculation by providing for the expiration of applications not timely acted upon.¹⁹⁸ The Pierce County Council enacted such an ordinance in 2005 and promptly sent a letter to a developer who originally filed a preliminary plat application on April 25, 1996, just days before new land use regulations were to take effect on May 1, 1996.¹⁹⁹ The application that the developer filed provided "very little information regarding the proposed uses of the land," and many of the answers on the permit application were "flippant."²⁰⁰ The Washington Court of Appeals held that the expiration of the developer's preliminary plat permit was valid under the Pierce County Council's ordinance because "[t]he purpose of the vesting doctrine is to allow property owners to proceed with their planned projects with certitude. The purpose is not to facilitate permit speculation. Extended project delay is antithetical to the principles underlying the vesting doctrine."²⁰¹

Some of the vesting statutes in minority rule states specifically stipulate when vested rights expire, rather than leave the expiration date up to local municipalities. For example, vested rights generally expire after three years under Colorado's Vested Property Rights Act,²⁰² while Texas's vested rights statute allows regulatory agencies to set expiration dates for dormant projects.²⁰³ In Indiana, vested rights are guaranteed for at least three years after the application is filed, but will expire if the project is not completed within ten years.²⁰⁴ North Carolina's vested rights statute allows rights to remain vested for two to five years, depending on the size of the project.²⁰⁵ Setting an expiration date on vested rights ensures that vested rights protects

¹⁹⁷ See WASH. REV. CODE ANN. § 58.17.033(2); see also *Erickson*, 872 P.2d at 1095–97 ("Within the parameters of the doctrine established by statutory and case law, municipalities are free to develop vesting schemes best suited to the needs of a particular locality."); *Graham Neighborhood Ass'n v. F.G. Assocs.*, 252 P.3d 898, 900 (Wash. Ct. App. 2011) (holding that county ordinances mandating that land use permit applications will be cancelled if they are not timely acted upon are proper under the GMA, "which confers upon the local legislative authority the ability to set forth requirements for project permit applications").

¹⁹⁸ See, e.g., PIERCE COUNTY, WASH. CODE ch. 18.150 (2016).

¹⁹⁹ *Graham*, 252 P.3d at 900–01.

²⁰⁰ *Id.* at 900 ("In response to a query on the environmental worksheet, a document required to be filed as part of the application, F.G. Associates indicated that the noise impact of the project would include screams of exasperation from filling out tedious environmental checklist questions for preliminary plats.").

²⁰¹ *Id.* at 907.

²⁰² COLO. REV. STAT. § 24-68-104 (2016).

²⁰³ TEX. LOC. GOV'T CODE ANN. § 245.005(a)–(b) (West 2005).

²⁰⁴ IND. CODE ANN. § 36-7-4-1109 (West 2006).

²⁰⁵ N.C. GEN. STAT. § 160A-385.1(d) (2015).

only developers who truly need the protection of the doctrine and move forward in good faith with their projects, rather than protecting vested rights of opportunistic developers with no intention to build in the near future.

VI. CONCLUSION

It is time for the vested rights doctrine to be updated so that opportunistic developers can no longer use it as a pretext to subvert the overall public welfare and avoid critical land use and environmental laws. Now more than ever, we need innovative laws and regulations to protect our health and environment as our communities continue to grow and strain our natural resources. Particularly as urban communities across the country continue to grow, the vested rights doctrine will play a pivotal role balancing the competing goals of protecting the public's health, safety, and environment while providing developers with the certainty they need to efficiently and economically build.²⁰⁶

Courts should not be locked up by an antiquated vested rights rule when they see a coup, like the explosion in fracking operations in Texas or the Blue Square urban center project in Washington.²⁰⁷ All the vested rights doctrine accomplishes in these cases is the perpetuation of injustice by allowing one party to impose negative externalities on another without penalty. Local governments must have the power to update land use laws and regulations as new information becomes available and as public policy preferences change, but the vested rights doctrine does not need to be eroded so as to penalize the development community. Minority rule states do not need to transform themselves into a majority rule state; all that is required is the imposition of outside the box reforms to harmonize the vested rights doctrine with reasonable land use and environmental laws. We should impose fines on entities or prohibit vesting of rights if their land use decisions violate applicable regulations or environmental laws, and consider allowing vested rights to expire in certain situations to prevent permit speculation. These sensible reforms will go far towards bringing the vested rights doctrine into its rightful place as a shield against injustice rather than as a sword for the savvy.

²⁰⁶ See Overstreet & Kirchheim, *supra* note 16, at 1055–60.

²⁰⁷ See *supra* Part IV.D.