Retrospective Application of the 2008 Amendments to New York's Adverse Possession Laws

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NOTES

RETROSPECTIVE APPLICATION OF THE 2008 AMENDMENTS TO NEW YORK’S ADVERSE POSSESSION LAWS

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The right being gone, of course the remedy fell with it; and as there could be no remedy without a corresponding right, it was useless for the legislature to restore the former, so long as it was prohibited by the [C]onstitution from interfering or meddling with the latter.¹

INTRODUCTION

Sharon and her husband, Leonard Franza, purchased their home on Kester Road in Memphis, New York² in the fall of 1974 from their neighbors Barbara and Duane Olin.³ The Olins owned the property next to Sharon and Leonard’s new home.⁴ Soon thereafter, Sharon began tending to her house, yard, and also the Olins’ adjacent property.⁵ For over thirty years, Sharon regularly mowed the lawn, raked the fallen leaves, and removed unwanted shrubbery from her yard and the Olins’.⁶ Shortly after moving into her new home, Sharon also landscaped a garden on the Olins’ property, where she began planting and caring for trees

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¹ Knox v. Cleveland, 13 Wis. 245, 249 (1860).


³ See id.

⁴ See id.

⁵ See id. at 2.

⁶ See id.
and other kinds of plants. Over twenty years ago, after realizing that she needed more storage space, Sharon built a shed next to her garden. And around the same time she also erected a satellite receiver on that same parcel. Over the years, Sharon continued to tend, care to, and develop the Olins’ property. By the mid-1990s, she had built a wishing well, windmill, horseshoe pit, and even a swing set on their land.

After thirty years, in an effort to avoid any future conflicts with the Olins, Sharon sought to quiet title to the property bordering her yard. Sharon asked the New York Supreme Court of Onondaga County to declare that the Olins’ title to that specific parcel was extinguished as many as twenty-three years earlier due to Sharon’s successful adverse possession of that land. To Sharon’s surprise and dismay, the New York State Supreme Court entered a judgment in favor of the Olins.

Between the time Sharon acquired title to that portion of the Olins’ property and the time she filed her action, New York’s adverse possession statutes were changed drastically. In rendering its decision, the court applied the amended statute in effect at the time Sharon filed her claim, as opposed to the law in effect when she allegedly acquired title to the property. The court concluded that Sharon’s use and possession of the Olins’ property did not satisfy the new requirements and was considered “permissive and non-adverse.” The court dismissed Sharon’s petition, stripping Sharon of the contested property that she had acquired title to twenty-three years earlier. Although
this case was reversed on appeal by the Fourth Department of the New York Appellate Division, if it were heard by the First or Second Departments or by the New York Court of Appeals, there remains a possibility that Sharon would have lost—highlighting the potential issues created by this new legislation.19

On July 7, 2008, the New York legislature amended over one hundred and seventy-five years of adverse possession law.20 Prior to the amendments, a possessor would acquire title in property that once belonged to someone else if possession was proven to be: "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the [statutorily] required"21 ten-year period.22 The 2008 overhaul of this established legal principle produced three dramatic differences between the old statute and the amended statute. First, the adverse possessor now needs "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."23 Second, routine maintenance, like "acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property . . . [are now] deemed permissive and non-adverse."24 Lastly, de minimis and non-structural encroachments, such as "fences, hedges, shrubbery, plantings, sheds[, and] non-structural walls, shall [also] be deemed to be permissive and non-adverse."25 Consequently, Sharon’s facts fell into the niche of cases—specifically addressed in the second and third aforementioned

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19 See id.; infra Part II.C–D.
20 New York’s first adverse possession statute was enacted in 1829 as part of New York’s Revised Statutes. 2 N.Y. REV. STAT., pt. 3, ch. 4, tit. 2, art. 1, §§ 1–17 (1829). Since 1829, the statutes underwent some minor aesthetic revisions, but the substance of the laws remained relatively the same. Compare id., with 4 N.Y. Civ. P. Act, §§ 31–43 (1921), and N.Y. REAL PROP. ACTS. LAW §§ 501–51 (McKinney 1963).
22 N.Y. C.P.L.R. 212(a) (McKinney 2011).
24 N.Y. REAL PROP. ACTS. LAW § 543(2) (McKinney 2011).
25 Id. § 543(1); see, e.g., Walling, 7 N.Y.3d 228, 851 N.E.2d 1167, 818 N.Y.S.2d 816 (erecting shed, digging trench, mowing, planting and raking grassy area in question, constructing underground dog wire fence, and installing post for birdhouse were deemed adverse).
changes—that would warrant starkly different results under the old statute versus the amended statute. Under the old statute, Sharon adversely possessed her neighbor’s property and had vested title. However, under the amendments, Sharon’s use of the disputed parcel was permissive, non-adverse, and did not vest her with title.

In deciding to apply the amended statute, the lower court in *Franza v. Olin* relied on a literal reading of section 9 of the amendments, which defines their scope, and did not engage in the requisite statutory construction. Section 9 states that, “This act shall take effect immediately, and shall apply to claims filed on or after such effective date.” Under a literal interpretation of section 9, the lower court appears to have correctly applied the amendments to Sharon’s petition. After all, Sharon filed her claim to quiet title six weeks after the effective date, which rendered it a “claim[] filed on or after July 7, 2008”—the effective date. However, had the court looked at the purpose behind adverse possession laws generally—or more specifically, the amendments, as proper statutory construction requires—it would have realized that the amendments should not have been applied to Sharon’s claim. Nonetheless, the Fourth Department of the New York Appellate Division still reversed the New York Supreme Court’s decision on separate and distinct constitutional grounds. The court found that “title to the disputed property would have vested in [Sharon] prior to the enactment of the 2008 amendments . . . [rendering] application of those amendments to [Sharon] . . . unconstitutional.” The matter was remanded for a determination of Sharon’s rights under the original statute in effect at the time she allegedly acquired title to the Olins’ property.

Although the Third Department has joined the Fourth in declining to apply section 9 where it would permit the retrospective application of the amended statute to vested

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27 See N.Y. REAL PROP. ACTS. LAW § 543 (McKinney 2011).
28 See 73 A.D.3d 44, 46, 897 N.Y.S.2d 804, 807 (4th Dep’t 2010).
29 See Ch. 269, § 9, 2008 N.Y. LAWS 892, 894 (McKinney).
30 *Franza*, 73 A.D.3d at 46, 897 N.Y.S.2d at 807.
31 See infra Part III.A.
32 See *Franza*, 73 A.D.3d at 47–48, 897 N.Y.S.2d at 808.
33 Id.
34 See id.
property rights, the issue still remains unresolved in New York. Neither the New York Court of Appeals nor the First Department has addressed how section 9 should be interpreted and consequently how the 2008 amendments should be applied. And dicta from the Second Department suggests that if it were confronted with facts similar to Franzia, the court might also interpret section 9 according to its literal meaning and apply the amendments retrospectively.\(^35\)

While this issue remains unsettled, New York faces an indeterminate period of future litigation in this area, coupled with the abrogation of vested property rights without just compensation in violation of the Fourteenth Amendment. This issue arises specifically for possessors, similar to Sharon, who would qualify as having successfully adversely possessed a piece of property under the old statute, but not under the amended statute (“niche possessors”). If courts were permitted to rely on the literal interpretation of section 9, niche possessors would be susceptible to losing their property forever. For example, because a niche possessor's title is not considered vested under the 2008 amendments, an original owner who did not avail himself of the right to eject the niche possessor during the requisite statutory period could bring an ejectment action at any time after the statutory period ended. In this manner, an original owner can use section 9 offensively to regain possession of land he already lost title to for an indefinite period of time. Therefore, a literal reading of section 9 essentially extingishes the limitations period for real property actions in niche possessor cases.

This Note argues that the new requirements imposed by New York's amended adverse possession statute are being unconstitutionally applied retrospectively to vested property rights, thereby divesting individuals of their property without just compensation. Part I outlines the history of adverse possession and the status of the law in New York today. Part II exposes the issues in applying the amended statutes by looking at how recent New York State Supreme Court and Appellate Division cases have interpreted section 9. Part III analyzes the

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\(^35\) See, e.g., Almeida v. Wells, 74 A.D.3d 1256, 1258, 904 N.Y.S.2d 736, 739–40 (2d Dep't 2010) (finding Plaintiff's adverse possession claim failed on common law elements, but noting that the governing statute would have been the one in effect at the time the claim was filed).
issues raised by the retrospective application of the amended statute through statutory construction and a discussion of the policies behind adverse possession. This Part will also demonstrate how the indefinite expansion of the limitations period for adverse possession—as permitted by the literal interpretation of section 9—abrogates substantive rights as well as procedural remedies. Consequently, the limitations period for adverse possession is distinct from purely procedural statutes of limitations that have been revived and upheld by New York as constitutional. Lastly, this Part will argue that retrospective application of the amended laws to vested property rights violates the Fourteenth Amendment as an unconstitutional taking of property without just compensation. Part IV proposes three solutions: (1) the New York Court of Appeals hears and decides a case on point, setting the requisite precedent; (2) the legislature modifies the language of section 9 to prohibit the retrospective application of the amended statutes to niche possessors; or (3) New York justly compensates niche possessors divested of their property in this manner with the fair market value of their property at the time of divestment.

I. ADVERSE POSSESSION IS A TWO-CENTURY-OLD DOCTRINE, LITTLE CHANGED IN NEW YORK UNTIL 2008

A. The Inception of Adverse Possession Can Be Traced Back to Twelfth-Century England

Adverse possession has been enforced as "a necessary means of clearing disputed titles"\(^{36}\) in New York for more than two hundred years.\(^{37}\) Essentially a policy decision,\(^{38}\) this legal doctrine is the product of a statute of limitations on actions enforcing rights to real property.\(^{39}\) Adverse possession was born


\(^{37}\) The first New York statute of limitations on actions for the recovery of land was enacted in 1788, making adverse possession a 222 year-old statutory principle. See Ch. 43, 1788 N.Y. LAWS 683 (Weed).

\(^{38}\) See Belotti v. Bickhardt, 228 N.Y. 296, 308, 127 N.E. 239, 243 (1920) (noting that adverse possession "is a necessary means of clearing disputed titles and the courts adopt it and enforce it, because, when adverse possession is carefully and fully proven, it is a means of settling disputed titles and this is desirable").

when legislative authority made the presumption of ownership arising from long possession conclusive.\textsuperscript{40} It is a means by which a person who uses another individual's real\textsuperscript{41} or personal\textsuperscript{42} property for a statutorily determined period of time becomes the owner of the property.\textsuperscript{43} As a statute of repose,\textsuperscript{44} “[a]dverse possession for the requisite period of time not only cuts off the true owner’s remedies but also divests [the owner] of his [or her] estate.”\textsuperscript{45} Thus, at the expiration of the statutory period, the owner’s legal title to the land is extinguished and is vested in the adverse possessor,\textsuperscript{46} even if the former had legal or record title.\textsuperscript{47}

\textsuperscript{40} Adverse possession is a derivative of the common law rules of prescription, which only raised a presumption of title under common law. “[No length of possession will, in law, create a conclusive presumption of title, unless by the force of a positive statute.” Id. at 3. Since adverse possession is generally a question of fact, the jury makes the final determination. See Ramapo Mfg. Co. v. Mapes, 216 N.Y. 362, 370, 110 N.E. 772, 775 (1915).


\textsuperscript{44} See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 365 (Da Capo Press 1972) (1868). A limitation law fixes upon a reasonable time within which a party is allowed to bring suit to recover his rights, and, if he fails to do so, establishes a legal presumption against him that he has no rights in the premises. . . . [The government] is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove the claim are lost in the lapse of time.

Id.

\textsuperscript{45} Franza v. Olin, 73 A.D.3d 44, 47, 897 N.Y.S.2d 804, 807 (4th Dep't 2010) (second and third alterations in original) (quoting Connell v. Ellison, 86 A.D.2d 943, 944, 448 N.Y.S.2d 580, 581 (3d Dep't 1982)) (internal quotation marks omitted). Where under common law, only prescription was deemed to affect the right to property, and the statute of limitations was only considered to bar the remedy of ejectment, today New York’s statute of limitation expressly states that the adverse possessor “gains title to the occupied real property upon the expiration of the statute of limitations.” N.Y. REAL PROP. ACTS. LAW § 501(2) (McKinney 2011). Thus, adverse possession during the period of limitation extinguishes the previous owner’s right to that property. See BUSWELL, supra note 39.

\textsuperscript{46} See Franza, 73 A.D.3d at 47, 897 N.Y.S.2d at 807.

\textsuperscript{47} N.Y. REAL PROP. ACTS. LAW § 501(1) (acknowledging that adverse possession divests the original owner of property of their superior ownership rights without excepting those with record or legal title).
Limitations on real actions can be traced as far back as twelfth-century England.\textsuperscript{48} Interestingly, it appears that the first recorded instance of adverse possession involved retrospective application, regardless of when a claim was brought.\textsuperscript{49} Real property could not be recovered where the right of the claimant accrued before the year 1100—the first year of the reign of Henry I.\textsuperscript{50} This limitation was reduced time and time again as the throne of England continued to change hands, using each coronation of a new king as the benchmark for the limitation.\textsuperscript{51} As the periods created by these statutes grew longer, the number of lawsuits and other inconveniences did as well.\textsuperscript{52} England needed “a more direct and commodious course.”\textsuperscript{53} Consequently, in the sixteenth century,\textsuperscript{54} Henry VIII imposed a limitation by way of a fixed period of years.\textsuperscript{55} “The limitation of time, in every case, was reduced to a fixed interval between the accrual of the right and the commencement of the action.”\textsuperscript{56}

Thereafter, in 1623 James I enacted a “more mature[ ] and comprehensive statute”\textsuperscript{57} that was later adopted by New York in creating its own first statute of limitations on real property actions.\textsuperscript{58} What is referred to today as a statute of limitations on actions in ejectment, the statute provided a twenty-year

\textsuperscript{48} See \textsc{raleigh colston minor \& john wurts, the law of real property} § 817 (1910).
\textsuperscript{49} See id.
\textsuperscript{50} See id.
\textsuperscript{51} See \textsc{buswell, supra} note 39, at 13–14.
\textsuperscript{52} See id. at 14.
\textsuperscript{53} Id. (quoting Coke, 2 Inst. 95) (internal quotation marks omitted).
\textsuperscript{54} See id.
\textsuperscript{55} See \textsc{raleigh supra} note 48; 32 Hen. VIII, c.2 (1540).
\textsuperscript{56} Kyle v. Green Acres at Verona, Inc., 207 A.2d 513, 514 (N.J. 1965). The Act of Henry VIII held in pertinent part that:
No person shall sue, have, or maintain any writ of right or make any prescription, title, or claim to, for any Mannors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corodies, or other Hereditaments of the possession of his or their Ancestors or predecessors; and declare and alleadge any further seisin or possession of his or their Ancestor or predecessor, but onley of the seisin or possession of his Ancestor or predecessor, which hath beene, or now is, or shall be seised of the said Mannors, Lands... or other Hereditaments within sixtie yeares next before the teste of the same writ, or next before the said prescription title or clause so sued, commenced, brought, made, or had.
\textsc{buswell, supra} note 39, at 553.
\textsuperscript{57} \textsc{buswell, supra} note 39, at 14.
\textsuperscript{58} See \textsc{People v. clarke, 9 n.y. 349, 361–62 (1853).
limitations period on all actions enforcing rights to real property.\textsuperscript{59} The statute was enacted with the purpose of "quieting . . . men's estates, and avoiding . . . suits."\textsuperscript{60} And operated to "bar[,] the real owner's right to recover his property . . . extinguish his title[,] and make absolute the wrongful possessor's."\textsuperscript{61}

The language of James I's Act of Limitations was adopted nearly verbatim by the State of New York when it passed its first statute of limitations in 1788.\textsuperscript{62} There were two primary differences between the two statutes. New York's statute had a period of limitations of forty years instead of twenty and an effective date of January 1, 1800.\textsuperscript{63}

While the birth of adverse possession is deeply rooted in New York's first statute of limitations, it was not until 1829, as part of New York's Revised Statutes, that New York codified the different characteristics of possession required for successful adverse possession. In addition to possessing the property for the requisite statutorily prescribed time, the Revised Statutes enumerated requisite characteristics of possession.\textsuperscript{64} Under this statute and related case-law, possession had to be (1) hostile and

\textsuperscript{59} See BUSWELL, \textit{ supra} note 39, at 556 (providing a full copy of James I's statute, \textit{An Act for Limitation of Actions, and for Avoiding of Suits in Law}).

\textsuperscript{60} All writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of, or for any manors, lands, tenements, or, hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued or taken within twenty years next after the end of this present session of Parliament: And after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements, or hereditaments . . .

\textit{Id.} (quoting 21 James I, c. 16 (1623)).

\textsuperscript{61} See Clarke, 9 N.Y. at 362.

\textsuperscript{62} See \textit{id.}; Ch. 43, 1788 N.Y. LAWS 683 (Weed). The statute provided in relevant part that:

\begin{quote}
[The people of the State of New York shall not, nor will . . . make any title, claim, challenge or demand . . . by reason of any right or title which hath not first accrued and grown, or which [shall] not thereafter first accrue and grow within the space of forty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission or other suit or proceeding . . . .
\end{quote}

\textit{Id.}

\textsuperscript{63} See 2 N.Y. REV. STAT., pt. 3, ch. 4, tit. 2, art. 1, §§ 1–17 (1829).
under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the statutorily required period of time. The Revised Statutes reduced the limitations period from forty to twenty years. Since 1829, the statutes underwent some minor aesthetic revisions, but the substance of the laws remained relatively unchanged until the 2008 amendments. "The most significant change adopted over the past century and a half . . . [was limited to] a reduction in the length of time required to establish a claim of adverse possession." After the Revised Statutes, the limitations period was reduced again in 1932 to fifteen years and further reduced in 1963 to the ten-year period in force today.

In 2006, two decisions from the Third Department of the New York Appellate Division and the New York Court of Appeals sparked the movement toward the biggest change in New York's adverse possession history. In Walling v. Przybylo, the court held that "conduct will prevail over knowledge." In other words, "adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed." In Walling, Plaintiffs' claim did not fail because they had "actual knowledge of the true owner at the time of possession." Instead, the court found that Plaintiffs' possession was in a manner consistent with all of the elements required to demonstrate successful adverse possession under the statute in effect at that time, and their title was upheld.

65 See id. § 8–13.
66 See id.
68 1 WILLIAM XENOPHON WEED, NEW YORK REAL PROPERTY § 5.01[1] (Matthew Bender 2010).
69 See id.
70 See id.
72 Id.
73 Id. at 232, 851 N.E.2d at 1169–70.
74 See id. at 233, 851 N.E.2d at 1170.
Just months later, in *Robinson v. Robinson*, the court made a similar ruling. In *Robinson*, Plaintiff subjectively believed that Defendant might have been the rightful owner of the property in dispute. Nonetheless, the court found that Plaintiff's subjective belief was irrelevant to the court's decision of whether Plaintiff satisfied the elements of adverse possession. Since Plaintiff satisfied all the requisite elements of the adverse possession statute in effect at the time, Plaintiff's title was upheld.

**B. The 2008 Amendments Were the Most Drastic Change to New York's Adverse Possession Laws Since 1829**

In response to *Walling* and *Robinson*, in 2008 the New York legislature passed the most dramatic substantive change in its adverse possession laws since their enactment. According to proponent Senator Elizabeth Little, *Walling* and *Robinson* "encourage[d] the offensive use of adverse possession." As a result, Senate Bill 7915-C—which was proposed to reduce "stealth" takeovers by persons acting in bad faith—was approved in 2008.

Amongst others, the 2008 amendments made three momentous changes. First, before 2008 a possessor's subjective belief about the ownership of the disputed property was irrelevant. Whether a possessor mistakenly believed that the property was his, or knew that it belonged to another, was immaterial and would not defeat his adverse possession claim. However, with the enactment of the 2008 amendments, an adverse possessor must now show that he had "a reasonable basis for the belief that the property belongs to the adverse possessor." Although New York courts have not yet interpreted this new element, it seems to require that the adverse possessor's
subjective belief be judged against an objective standard of reasonableness. Under the amendments, an adverse possession claim by a possessor who knew that the disputed property was not his would likely fail. Second, before 2008 none of a possessor’s acts were deemed permissive unless the original owner made a disclaimer to the possessor granting him permission to use the owner’s land. In contrast, the 2008 amendments make certain acts of routine maintenance permissive without requiring a disclaimer by the owner. Those acts include “lawn mowing or similar maintenance across the boundary line of an adjoining landowner’s property.” Finally, before 2008 no specific improvement was categorically considered permissive. However, with the passage of the 2008 amendments, de minimis and non-structural encroachments such as “fences, hedges, shrubbery, plantings, sheds[,] and non-structural walls... [are now categorically] deemed to be permissive and non-adverse.”

The legislature also included an instruction in the amendments about their scope and effective date. Section 9 of the amendments states in its entirety that the amendments “shall take effect immediately, and shall apply to claims filed on or after” July 7, 2008. The legislature did not provide any additional guidance on what type of claims should be governed by the amendments. Consequently, a literal reading of section 9 appears to permit courts to broadly apply the amendments to all claims filed on or after July 7, 2008. This broad interpretation conflicts with the legislative intent behind the amendments and

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83 See generally Greenberg, supra note 23, for a discussion on some of the ambiguities raised by the new claim of right element found in RPAPL Article 5 section 501.
85 See N.Y. REAL PROP. ACTS. LAW § 543(2) (McKinney 2011).
86 Id.
88 See N.Y. REAL PROP. ACTS. LAW § 543(1) (McKinney 2011); accord Walling, 7 N.Y.3d 228, 851 N.E.2d 1167, 818 N.Y.S.2d 816 (2006) (erecting shed, digging trench, mowing, planting and raking grassy area in question, constructing underground dog wire fence, and installing post for birdhouse were deemed adverse).
89 See ch. 269, § 9, 2008 N.Y. LAWS 892, 894 (McKinney).
the legal doctrine of adverse possession. However, many of New York's Supreme Courts have not engaged in statutory construction to interpret how the amendments should be applied. Instead, they have consistently relied solely on a literal reading of section 9—applying the 2008 amendments to all claims, irrespective of whether they involve vested rights. This raises serious constitutional and policy concerns for claims where a successful niche possessor became vested with title to property before the amendments' effective date. By not explicitly prohibiting retrospective application of the 2008 amendments to vested rights, the legislature created an opportunity for courts to misapply the amendments and divest niche possessors of their private property—an act that amounts to an unconstitutional taking in violation of the Fourteenth Amendment.

II. THE ISSUE OF RETROSPECTIVE APPLICATION OF THE 2008 AMENDMENTS REMAINS UNRESOLVED IN NEW YORK

The 2008 amendments to New York's adverse possession statute have raised critical policy and constitutional concerns as a result of their retrospective misapplication by New York Supreme Courts to the vested property rights of niche possessors. Many New York Supreme Courts have incorrectly relied solely on the literal interpretation of section 9 of the amendments in determining whether the amendments should be applied to a particular claim. As a result of failing to perform the requisite statutory analysis for new legislation, these courts are continuing to divest niche possessors of their property. Thus

90 See infra Part III.A (discussing the statutory construction of the amendments and the legislative intent behind legal doctrine of adverse possession).
91 See infra Part II.
92 See infra Part III.B–D.
93 See, e.g., infra Part II.
94 See U.S. CONST. amend. V. The Fifth Amendment's Takings Clause was incorporated into the Fourteenth Amendment and applies to states. See Kelo v. City of New London, 545 U.S. 469, 472 n.1 (2005); see also infra Part III.D (discussing how retrospective application of the 2008 amendments to vested property rights amounts to an unconstitutional taking of private property in violation of the Fourteenth Amendment).
95 As previously mentioned, this Note uses the term “niche possessor” to describe a possessor similar to Ms. Franz in Franz v. Olin, 73 A.D.3d 44, 897 N.Y.S.2d 804 (4th Dep't 2010), who would qualify as having successfully adversely possessed a piece of property under the old adverse possession statute, but not under the amended statute.
96 See, e.g., infra Part II.A–D.
far, only the Third and Fourth Departments of the New York Appellate Division have held that retrospective application of the 2008 amendments to the vested property rights of niche possessors is unconstitutional. However, the issue still remains unsettled in New York. Neither the First Department nor the New York Court of Appeals has addressed this issue. Further, a recent decision by the Second Department appears to leave open the possibility for retrospective application of the amendments in the Second Department. Until the New York Court of Appeals hears a case on point, the New York Legislature must either modify the language of section 9 to prohibit retrospective application of the 2008 amendments to vested rights or, in the alternative, justly compensate niche possessors deprived of their property in this manner.

A. Fourth Department of the New York Appellate Division Holds that the 2008 Amendments Cannot Be Retrospectively Applied

The Fourth Department of the New York Appellate Division was the first appellate court to reverse a lower court decision and hold that retrospective application of the 2008 amendments that would divest a possessor of their property is unconstitutional. In *Franza v. Olin*, the New York Supreme Court of Onondaga County, held that “there [was] no question that the amendments appl[ied]” since Franza sought to quiet title to the property six weeks after the effective date of the amendments. Franza was a niche possessor who had been adversely using and improving her neighbors’ property for over thirty years. According to the facts in Franza's verified complaint and supporting documentation, title to the property would have vested in Franza “long before the July 2008 amendments.” Nonetheless, the

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97 *See infra* Part II.A–B.
98 *See infra* Part II.C.
99 73 A.D.3d 44, 897 N.Y.S.2d 804 (4th Dep't 2010).
100 *Id.* at 46–47, 897 N.Y.S.2d at 806–07.
101 “Niche possessor” is used to describe an adverse possessor who would have qualified as having successfully adversely possessed a piece of property under the old statute, but not under the 2008 amendments.
102 *Compare supra* note 88 and accompanying text, with *Franza*, 73 A.D.3d at 46–48, 897 N.Y.S.2d at 807–08 (4th Dep't 2010) (discussing the type of acts and improvements that Franza’s adverse possession claim was founded upon).
103 *Franza*, 73 A.D.3d at 47, 897 N.Y.S.2d at 807.
lower court declined to apply "the version . . . in effect when [Franza's] claim to the disputed property allegedly ripened into title."\textsuperscript{104} Instead, the court relied exclusively on the literal interpretation of section 9 and applied the 2008 amendments to Franza's case.\textsuperscript{105} Franza's use of the property did not satisfy the new requirements, and her petition was dismissed.\textsuperscript{106}

The Fourth Department of the New York Appellate Division reversed.\textsuperscript{107} The Fourth Department held that "inasmuch as title to the disputed property would have vested in [Franza] prior to the enactment of the 2008 amendments . . . application of those amendments to [Franza was] unconstitutional."\textsuperscript{108} The declaration was vacated and the matter was remitted to the lower court for a determination of Franza's rights to the disputed property pursuant to the adverse possession laws in effect at the time her possession ripened into title.\textsuperscript{109}

B. Third Department of the New York Appellate Division also Holds that the 2008 Amendments Cannot Be Retrospectively Applied

About a year after the Fourth Department's decision in Franza, the Third Department of the New York Appellate Division reversed a lower court decision on the same grounds. In Barra v. Norfolk Southern Railway Co.,\textsuperscript{110} the New York Supreme Court of Tompkins County held that the 2008 amendments were applicable because Plaintiffs filed their claim to a prescriptive easement over Defendants' land after the effective date of the amendments.\textsuperscript{111} In Barra, Plaintiffs owned property on the eastern shore of a lake in Tompkins County— with a lake to the west and railroad tracks owned by Defendant to the east.\textsuperscript{112} In March of 2008, Defendant closed one of three railroad

\textsuperscript{104} Id. at 46, 897 N.Y.S.2d at 807.
\textsuperscript{105} See id.
\textsuperscript{106} See id.
\textsuperscript{107} See id. at 48, 897 N.Y.S.2d at 808.
\textsuperscript{108} Id. at 47–48, 897 N.Y.S.2d at 808.
\textsuperscript{109} See id. at 48, 897 N.Y.S.2d at 808.
\textsuperscript{111} See id. at 5–6.
\textsuperscript{112} See id. at 1.
\textsuperscript{113} See id.
crossings.114 A year later, Plaintiffs commenced an action claiming that they had a prescriptive easement of ingress and egress over the closed crossing.115 Defendant moved to dismiss Plaintiffs’ claim.116 Similar to the lower court in Franza, the court also relied on a literal interpretation of section 9 of the amendments and applied the 2008 amendments to Plaintiffs’ claim.117 In order to have a successful claim under the amendments, Plaintiffs had to establish that they used Defendant’s land under a claim of right with “a reasonable basis for the belief that the property belonged to them.”118 In response, Plaintiffs argued that the general appurtenance clauses in their deeds gave them a reasonable basis for the belief that they had a legal right to use the crossing.119 This argument was unsuccessful and Defendant’s motion to dismiss was granted.120

On appeal, the Third Department of the New York Appellate Division reversed.121 The Third Department held that since Plaintiffs’ prescriptive periods commenced and concluded prior to the effective date of the amendments, Plaintiffs’ alleged use ripened into ownership or an easement before the 2008 amendments.122 “Accordingly, notwithstanding the statutory language to the contrary, at trial, [P]laintiffs [were] entitled to have their claims measured in accordance with the law of prescription as it existed prior to the enactment of the 2008 amendments.”123

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114 See id.
115 See id. at 2.
116 See id. at 1.
117 See id. at 5–6.
118 Id. at 6 (quoting N.Y. REAL PROP. ACTS. LAW § 501(3) (McKinney 2011)).
119 See id. at 6.
120 See id. at 8.
122 See id. at 825–26, 907 N.Y.S.2d at 74.
123 Id. at 826, 907 N.Y.S.2d at 74.
C. The Second Department of the New York Appellate Division Leaves Open the Possibility of Retrospective Application of the 2008 Amendments

Dicta in a recent Second Department decision leaves open the possibility of retrospective application of the 2008 amendments in cases similar to Franza and Barra, even though decisions by lower courts are in conflict. Within the Second Department’s jurisdiction, there is a trend among the lower courts to follow the precedent of the Third and Fourth Departments and decline to retrospectively apply the 2008 amendments to niche possessors.\textsuperscript{124} If a niche possessor demonstrates successful adverse possession of contested property under the requirements of the law in effect at the time title allegedly ripened in the possessor, the lower courts have found themselves bound to apply that law.\textsuperscript{125} According to the lower courts, the 2008 amendments would be inapplicable to a claim filed after the effective date if title would have allegedly ripened prior to the effective date.\textsuperscript{126}

However, in the more recent case of Almeida v. Wells,\textsuperscript{127} the Second Department applied the law in effect at the time the action commenced, and not the law in effect at the time title would have allegedly ripened in the possessor.\textsuperscript{128} Almeida raises serious concerns that if the aforementioned lower court cases within the Second Department were appealed, decisions that were once correctly decided might be disturbed.\textsuperscript{129} In Almeida, Plaintiff sought to quiet title to property she claimed to have adversely possessed from 1955 to 1991.\textsuperscript{130} The court found that Plaintiff did not successfully demonstrate all of the elements of adverse possession.\textsuperscript{131} Plaintiff failed to prove that she

\footnotesize
\textsuperscript{125} See id.
\textsuperscript{126} See id.
\textsuperscript{127} 74 A.D.3d 1256, 904 N.Y.S.2d 736 (2d Dep't 2010).
\textsuperscript{128} See id. at 1258, 904 N.Y.S.2d at 738.
\textsuperscript{129} See id. at 1258, 904 N.Y.S.2d at 738–39.
\textsuperscript{130} See id. at 1257, 904 N.Y.S.2d at 738.
\textsuperscript{131} See id. at 1258, 904 N.Y.S.2d at 739.
"cultivated, improved, or substantially enclosed the land." The lower court's decision was reversed, and Defendant's motion for summary judgment was granted.133

In Almeida, Plaintiff's claim failed on an element of adverse possession that was required by both the old adverse possession statute as well as the 2008 amendments.134 Therefore, Plaintiff never could have successfully acquired title to the property under either law. Consequently, Plaintiff also could not be subsequently divested of that property by the Second Department. However, the reasoning used by the Almeida court in reaching their decision was flawed and could result in the deprivation of property in the case of a niche possessor.135 Despite the fact that Plaintiff's title would have ripened long before the 2008 amendments were enacted, the Second Department relied on a literal interpretation of section 9 and applied "the law in effect at the time [the] action was commenced." The court did not even acknowledge the constitutional issues raised in Franzia or Barra in its reasoning.

The court's decision in Maya's Black Creek, LLC v. Angelo Balbo Realty Corp.137 demonstrates the uncertainty in the Second Department as well as the court's unwillingness to take a firm position in this realm of adverse possession law. In Maya the court stated,

We note that the Appellate Division, Fourth Department, has held that the version of the law in effect at the time that the purported adverse possession allegedly ripened into title is the law applicable to the claim, regardless of whether the action was commenced before or after the effective date of the new legislation. However, we need not reach the issue decided by

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132 Id. at 1258, 904 N.Y.S.2d at 739 (quoting Walsh v. Ellis, 64 A.D.3d 702, 703, 883 N.Y.S.2d 563, 565 (2d Dep't 2009)) (internal quotation marks omitted).
133 See id.
136 Almeida, 74 A.D.3d at 1258, 904 N.Y.S.2d at 738 (emphasis added) (quoting Walsh, 64 A.D.3d at 703, 883 N.Y.S.2d at 565).
137 Maya's Black Creek, L.L.C. v. Angelo Balbo Realty Corp., 82 A.D.3d 1175, 920 N.Y.S.2d 172 (2d Dep't 2011).
the Fourth Department in *Franza v Olin* because the complaint states a cause of action under both the law as it exists today and the law as it existed prior to July 7, 2008.\(^{138}\) Therefore, the *Maya* court left the lower courts to fend for themselves and niche possessors without repose.

**D. Possible Erroneous Divestment of Property in the First Department of the New York Appellate Division**

Pending resolution of the issue of retrospective application of the 2008 amendments in the First Department of the New York Appellate Division, lower courts are continuing to apply the amendments to all claims, irrespective of whether they involve rights that vested before the amendments took effect. Thus far, the Supreme Courts of New York County and Bronx County have relied on a literal interpretation of the language of section 9 in deciding whether to apply the amendments.\(^{139}\)

In *Neighborhood Eighth Avenue, L.L.C. v. 454-458 W. 128th Street Co.*, the Supreme Court of New York County applied the law in effect at the time the action was commenced and dismissed Plaintiff's claim.\(^{140}\) In 1996, Defendants allegedly began adversely possessing a concrete strip of land owned by Plaintiff.\(^{141}\) In September 2008, Plaintiff sought a declaratory judgment that Defendants had no property interest in the contested strip of land.\(^{142}\) Defendants argued that title to the contested land had already vested in Defendants through successful adverse possession and Plaintiff was barred from bringing an action against them.\(^{143}\) The court concluded that as a

\(^{138}\) *Id.* at 1177, 920 N.Y.S.2d at 174 (citation omitted).


\(^{140}\) *Neighborhood, No. 113189/08, 2010 N.Y. Slip Op 31160(U), 2010 N.Y. Misc. LEXIS 2081, at 4. The remaining elements not analyzed by the court required possession to be: “(2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period of 10 years.” *Id.*

\(^{141}\) *See id.* at 2. Plaintiff and Defendants owned adjacent lots in the New York City area. *Id.* Defendants' adverse possession claim was founded on their erection of a shed and fence on the concrete strip, and their use of the property for storage. *See id.* at 3.

\(^{142}\) *See id.* at 3.

\(^{143}\) *See id.*
result of Defendants’ awareness that others owned the property, Defendants failed to establish that their possession was “hostile and under claim of right.”

In Neighborhood, because Defendants were niche possessors, whether the pre-2008 or amended adverse possession statute was applied could have been dispositive. For example, under the old statute, Defendants’ subjective belief about the ownership of the contested property would have been immaterial to their adverse possession claim. Had the court continued their analysis and determined that Defendants successfully demonstrated the remaining elements of adverse possession, title would have allegedly ripened in Defendants in 2006, long before the 2008 amendments. Accordingly, the First Department of the New York Appellate Division should have applied the law in effect in 2006 and not 2008. If this case turned on one of the three elements overhauled by the amendments, the First Department could have potentially divested Defendants of their property. Alarmingly, a recent decision by the Bronx County Supreme Court strongly suggests that in a similar situation it would do the same.

III. RETROSPECTIVE APPLICATION OF THE 2008 AMENDMENTS IS UNCONSTITUTIONAL AND DIVESTS SUCCESSFUL ADVERSE POSSESSORS OF THEIR PROPERTY WITHOUT JUST COMPENSATION

A literal interpretation of the scope of the 2008 amendments to New York’s adverse possession laws—as described in section 9 of the amendments—conflicts with the legislative purpose of the amendments and raises serious constitutional and policy concerns for niche possessor claims. Section A compares

144 Id. at 4.
146 See Neighborhood, No. 113189/08, 2010 N.Y. Slip Op 31160(U), 2010 N.Y. Misc. LEXIS 2081, at 3. Defendants began allegedly adversely possessing the disputed property in 1996. See id. at 2. Since the statute of limitations is ten years, title would have ripened in Defendants in 2006 if they met all the requirements for successful adverse possession. See N.Y. C.P.L.R. 212(a) (McKinney 2011).
147 See Serafin v. Dickerson, 25 Misc. 3d 1211(A), 901 N.Y.S.2d 910, at 5 n.19 (Sup. Ct. Bronx Cnty. 2009) (deciding that although the property rights at issue probably vested in the 1980s, it was because the petition was dated before the 2008 amendments took effect that the 2008 amendments were inapplicable to the case at hand).
section 9's literal meaning to its legislative history. A literal interpretation of its language appears to give courts permission to apply the 2008 amendments to all claims filed on or after their effective date, irrespective of whether they involve vested rights. However, legislative history suggests that the legislature did not intend for the amendments to be misapplied in this manner. Section B discusses the policies behind the statute of limitations for adverse possession claims and how retrospectively applying the 2008 amendment to vested rights impedes each of those policies. Section C enumerates the substantive and procedural characteristics of the statute of limitations for adverse possession. In contrast to the purely procedural statutes of limitations that New York has revived and upheld as constitutional in the past, the statutory period for adverse possession is more than a mere proceduralism and deserves greater protection. Section D argues that retrospectively applying the 2008 amendment to vested rights violates the Fourteenth Amendment as an unconstitutional taking of property without just compensation.

A. Statutory Analysis of the 2008 Amendments

A statutory analysis of the 2008 amendments demonstrates that the scope of the amendments according to a literal reading of section 9 is starkly different from what the legislature intended. A literal reading of section 9 permits courts to apply the amendments to all claims filed on or after the effective date.\textsuperscript{148} However, this broad application conflicts with both the legislative purpose behind the 2008 amendments and the doctrine of adverse possession in New York.\textsuperscript{149} Legislative history shows that the amendments were not intended to retroactively divest successful adverse possessors of property rights that vested before the amendments became effective.\textsuperscript{150} Instead, the 2008 amendments were meant to apply only to those rights not fully vested at the effective date and to those that accrued on or after the effective date.\textsuperscript{151}

\textsuperscript{148} See infra Part III.A.1.
\textsuperscript{149} See infra Part III.A.2.
\textsuperscript{150} See infra Part III.A.2.
\textsuperscript{151} See infra Part III.A.2.
In cases of statutory construction, the threshold inquiry is "how to discern the legislative intent."152 When an enactment displays a plain meaning, the courts construe the legislatively chosen words so as to give effect to that Branch's utterance.153 However, courts must avoid "blindly apply[ing] the words of a statute to arrive at an unreasonable or absurd result."154 Where a literal interpretation would resort to a constitutional deprivation, the statute should be strictly construed to avoid the statute's invalidity.155 Instead, the court should apply the statute according to "the purpose of the statute and . . . the intention of the [l]egislature."156

1. A Literal Interpretation of Section 9 of the 2008 Amendments Allows Broad Application to All Claims Filed on or After Their Effective Date

In effectuating the literal meaning of "legislatively chosen words," all New York courts that have assessed the scope of the 2008 amendments have found that section 9 permits their application to all claims filed on or after their effective date—irrespective of whether the claim involves a vested right.157 Amongst many others, the New York Supreme Court, County of Tompkin agrees.158 According to a literal translation of its language, Justice Mulvey found that, "[T]he [2008] amendment[s] . . . effective on July 7, 2008, appl[y] to this action inasmuch as the [Plaintiff's] claim was filed after the effective

153 Id.
157 See Brown, 93 N.Y.2d at 522, 715 N.E.2d at 481, 693 N.Y.S.2d at 477; see also Adam Leitman Bailey & John M. Desiderio, Adverse Possession Changes Make Results Less Certain, N.Y. L.J., Feb. 11, 2009, at 5 ("S.7915-C is now the law in New York and applies to all cases filed after July 8, 2008.... [E]ffectively end[ing] adverse possession in New York after July 8, 2008.").
date."\(^{159}\) Without further inquiry into the legislative purpose of the amendments, Justice Karalunas reached the same result in *Franza v. Olin.*\(^{160}\) The facts in *Franza*’s verified complaint and supporting documentation indicated that title to the disputed parcel would have vested in *Franza “long before the July 2008 amendments.”*\(^{161}\) Nonetheless, the court applied the amendments because *Franza* sought to quiet title six weeks after their effective date.\(^ {162}\) The amendments were retrospectively applied and *Franza*’s conduct was evaluated under the new requirements of the amendments.\(^ {163}\) This raises the question of whether a literal—and therefore retrospective—application complies with the “general rule...that statutes are to be construed as prospective only.”\(^ {164}\) In wrestling with whether a statute should have a retrospective or prospective effect, New York courts have insisted on “a clear expression of the legislative purpose to justify...retroactive application.”\(^ {165}\) And where a literal interpretation of a statute would needlessly render a statute unconstitutional, the statute should be strictly construed according to its legislative purpose in order to avoid the statute’s invalidity.\(^ {166}\)

2. Legislative Purpose of Adverse Possession and 2008 Amendments Does Not Justify Retrospective Application of the Amendments to Vested Property Rights

The 2008 amendments do not demonstrate a “clear expression of the legislative purpose to justify...retroactive application” to claims where title ripened in the adverse possessor before the effective date of the amendments.\(^ {167}\) New York’s adverse possession laws were amended in reaction to

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\(^{159}\) *Id.* at 5; see also *Asher v. Borenstein,* 76 A.D.3d 984, 986, 908 N.Y.S.2d 90, 92 (2nd Dep’t 2010) (“The amendments applied solely to those actions commenced after July 7, 2008.”).


\(^{161}\) *Franza v. Olin,* 73 A.D.3d 44, 47, 897 N.Y.S.2d 804, 807 (4th Dep’t 2010).

\(^{162}\) *See supra* note 12 and accompanying text.

\(^{163}\) See, e.g., *Franza,* 73 A.D.3d at 46, 897 N.Y.S.2d at 807.


\(^{165}\) *Id.*


\(^{167}\) *Shielcrawt,* 294 N.Y. at 188, 61 N.E.2d at 439.

In Walling, the court held that “[c]onduct will prevail over knowledge.” In other words, “adverse possession will defeat a deed even if the adverse possessor has knowledge of the deed.” In Walling, Plaintiffs’ claim did not fail because they had “actual knowledge of the true owner at the time of possession.” Instead, the court found that Plaintiffs’ possession was in a manner consistent with all of the elements required to demonstrate successful adverse possession under the statute in effect at that time and their title was upheld.

Just months later, the Robinson court made a similar ruling. In Robinson, Plaintiff subjectively believed that Defendant might have been the rightful owner of the property in dispute. Nonetheless, the court found that Plaintiff’s subjective belief was irrelevant to the court’s decision of whether Plaintiff satisfied the elements of adverse possession. Since Plaintiff satisfied all the requisite elements of the adverse possession statute in effect at the time, Plaintiff’s title was upheld.

Thereafter, Senator Little sponsored Senate Bill 7915-C to “curtail[]” the incentive created by Walling, Robinson, and analogous cases where individuals “attempt[] to possess land that [the individual] know[s] all too well does not belong to [him].” Citing the proposal as “legislation [that] is all about good faith,” Senator Little urged the legislature to bar adverse possession claims unless the claimant demonstrates a claim of

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169 34 A.D.3d 975, 825 N.Y.S.2d 277 (3d Dep’t 2006).
171 Walling, 7 N.Y.3d at 232, 851 N.E.2d at 1170.
172 Id. at 233, 851 N.E.2d at 1170.
173 Id. at 232, 851 N.E.2d at 1169–70.
174 See id. at 233, 851 N.E.2d at 1170.
176 See id.
177 See id. at 977, 825 N.Y.S.2d at 280.
178 Senate Bill 7915-C was the proposed bill for the 2008 amendments to New York’s adverse possession laws. See Introducer’s Memorandum in Support, Bill Jacket, ch. 269, L. 2008.
179 Id.
right in addition to the other requirements of adverse possession.\textsuperscript{180} This "claim of right" requirement would eventually be enacted as part of the 2008 amendments and defined as "a reasonable basis for the belief that the property belongs to the adverse possessor."\textsuperscript{181} In addition to this new element, the legislature also made two other substantial changes by making de minimus encroachments and acts of routine maintenance permissive and non-adverse.\textsuperscript{182}

Neither Senator Little's bill, nor Governor Paterson's memorandum approving that bill, directly nor indirectly addressed how the 2008 amendments should be applied.\textsuperscript{183} There are detailed records on why the statute was enacted and careful crafting of the language of all of the other amended sections, except for section 9.\textsuperscript{184} If the legislature considered the repercussions of section 9 on vested property rights along with the aforementioned amendments, they left no trail of those concerns. Instead, section 9 appears to be more of a product of poor drafting, and not a "clear expression" of the legislature's intention to expand the scope of the amendments to all claims. The legislature did not purposely craft the language of section 9 to include claims where title ripened in the adverse possessor before the amendments took effect.

A clear expression of purpose, however, can be deduced from the legislature's two-century-long trend in contracting, rather than expanding, the statute of limitations for adverse possession.\textsuperscript{185} The statute of limitations for adverse possession was initially fixed at forty years in 1788,\textsuperscript{186} reduced to twenty years in 1829,\textsuperscript{187} fifteen years in 1932,\textsuperscript{188} and then was further reduced in 1963 to the ten year period in force today.\textsuperscript{189} A shortening of limitation periods has been said to indicate

\footnotesize{
\textsuperscript{180} See id.
\textsuperscript{181} N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2011).
\textsuperscript{182} See id. § 543.
\textsuperscript{185} See infra notes 186–89.
\textsuperscript{186} See Ch. 43, 1788 N.Y. LAWS 683 (Weed).
\textsuperscript{187} See 2 N.Y. REV. STAT., pt. 3, ch. 4, tit. 2, art. 1, §§ 1, 5, 7 (1829).
\textsuperscript{188} See ch. 264, 1932 N.Y. LAWS 264, 264 (J. B. Lyon Co.).
\textsuperscript{189} See N.Y. C.P.L.R. 212(a) (McKinney 2011).
}
"political or legislative hostility to certain types of claims." More specifically, an effort to reduce the number of claims filed against certain classes of defendants. And in the case of real property actions, the legislature has seemingly intended to promote the adverse possessors.

Among other things, this trend acknowledges the legislature's endorsement and encouragement of the productive use of real property by adverse possessors. In a desire to protect an adverse possessor's expectations and investments, the legislature has consistently shortened the limitations period and allowed possessors to quiet title to property more quickly. By bringing finality to claims of potential litigation, the legislature has also increased the security of land holdings for this class of defendants.

It is possible—though dubious—that the legislature intended to expand the limitations period under the guise of section 9 in hopes that it would not provoke notice or debate. But, this is nonsensical in light of the current public trend to end adverse possession, rather than have it preserved. Ending adverse possession is not politically unpopular, nor would it provoke controversy or outrage. So, if the legislature wanted to expand the limitations period for real property actions, it could have just amended New York's civil rule that enumerates the limitations period.

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191 See id at 499–500.
192 See Gregory M. Silverman, Dualistic Legal Phenomena and the Limitations of Positivism, 86 COLUM. L. REV. 823, 845 n.82 (1986) ("Such principles [of private property and ownership] might be commitments to promoting the efficient use of land and its free transferability in the marketplace. These commitments may in turn lead to others such as stabilizing uncertain boundaries and quieting uncertain titles."); see also Lee Anne Fennell, Efficient Trespass: The Case for "Bad Faith" Adverse Possession, 100 NW. U. L. REV. 1037, 1059 (2006).
193 See Silverman, supra note 192.
194 See id.
195 See, e.g., Ochoa & Wistrich, supra note 190 (discussing how statutes of limitations are sometimes changed instead of substantive law so as to not provoke notice or debate where those substantive changes might be politically unpopular or likely to provoke controversy or outrage).
196 See, e.g., END ADVERSE POSSESSION NOW, END ADVERSE POSSESSION NOW ENDorses NEW WASHINGTON STATE BILL TO STOP LEGALIZED LAND THEFT: LANDMARK LEGISLATION, HOUSE BILL 1479, STANDS TO ABOLISH REPUGNANT LAW OF ADVERSE POSSESSION (Sept. 15, 2009), http://www.eapnow.org/Supports%20HB%201479.pdf [hereinafter End Adverse Possession].
197 See, e.g., id.
period directly.\textsuperscript{198} It did not have to dress up an expansion of the statutory period in section 9's clothing. As the legislature has done several times before, it had the power and opportunity to alter the limitations period if it so desired. Its failure to do so speaks concretely to the legislative purpose of section 9: to simply provide an effective date for the new amendments and not to abrogate vested rights by permitting, in some instances, retrospective application of the 2008 amendments.

B. \textit{Retrospective Application of the 2008 Amendments to Vested Property Rights Seriously Impedes the Fundamental Policies Behind Statutes of Limitations for Real Property Actions}

Retrospective application of the 2008 amendments to vested property rights distorts one of the most fundamental purposes of statutes of limitations: promoting repose.\textsuperscript{199} "[R]epose includes . . . [a few] distinct but overlapping concepts\textsuperscript{200} such as: "(a) to allow peace of mind; [and] (b) to avoid disrupting settled expectations."\textsuperscript{201} Retrospective application of the 2008 amendments to niche possessors' vested property rights directly impedes each of the two aforementioned principles.

1. \textit{Retrospective Application of the 2008 Amendments to Vested Property Rights Disturbs any Peace of Mind Created by Vesting Title in the Niche Possessor}

Retrospective application of the 2008 amendments to vested property rights would unnecessarily disturb any peace of mind the legislature sought to promote with adverse possession. Statutes of limitations provide peace of mind because they require finality. And, as the product of the expiration of a statutory period, adverse possession is similarly predicated on finality.\textsuperscript{202} Retrospective application of the 2008 amendments to vested property rights abrogates the limitations period entirely for niche possessors. This undermines the security the legislature intended to create with a statutory period for real property actions by making niche possessors vulnerable to title challenges long after its expiration.

\textsuperscript{198} See N.Y. C.P.L.R. 212(a) (McKinney 2011).
\textsuperscript{199} See Ochoa & Wistrich, supra note 190, at 460.
\textsuperscript{200} Id. (internal quotation marks omitted).
\textsuperscript{201} Id.
\textsuperscript{202} See N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2011).
On several occasions the legislature has expressed that statutes of limitations play a critical role in quieting titles and reducing uncertainty. For example, Governor Spitzer—in vetoing Senate Bill 5364-A, which sought similar changes as were later approved by the legislature in enacting the 2008 amendments—stated that, “[G]iven the frequency with which property is sold and transferred, the imposition of strict time limits on the ability of owners . . . to eject possessors of property is the only way to give homeowners . . . the comfort of knowing that their homes cannot be taken away from them.” The legislature also made their objective of promoting peace of mind and reducing uncertainty evident by consistently shortening the limitations period for actions in ejectment. After several amendments, the legislature contracted the original forty-year period for real property actions to the ten-year period in force today. Retrospective application of the 2008 amendments would unilaterally defeat the peace of mind and security created by this limitations period for niche possessors by making them vulnerable to the possibility of losing of their property for an indeterminate period of time.

Some do not have any qualms about creating uncertainty in this area of law. Opponents of adverse possession often argue that this doctrine encourages the modern day “stealing” of property, and they argue it should be curtailed and abrogated. However, this argument only addresses one specific group of cases. Adverse possession can only be viewed as encouraging “stealing” where a possessor knew that the property was not his and was therefore not under a claim of right, as is now required by the 2008 amendments. Where a possessor did not know that the property belonged to someone else, the doctrine of adverse possession could not have served as the underlying incentive to possessing the property. For example, consider where a possessor built a house on property he knew belonged to his neighbor. Under the laws in effect before the 2008 amendments and after the requisite statutory period, he

204 See infra Part III.A.2.
205 See ch. 43, 1788 N.Y. LAWS 683, 683–84 (Weed); N.Y. C.P.L.R. 212(a) (McKinney 2010).
206 See, e.g., End Adverse Possession, supra note 196.
207 N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2011).
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successfully acquired title to the property. Twenty years later, the possessor dies and leaves the house to his daughter. In 2009, after the daughter has lived in that house for eight years, the original owner tries to eject the daughter because her father was not under a claim of right when he possessed the property. If the 2008 amendments were retrospectively applied the original owner would probably be successful in ejecting the daughter.

In addition, consider an individual who had a claim of right to his neighbor's property. Assume a possessor installed a top of the line fence and hired an expensive landscaper to create a garden of exotic plants on land he thought was his but actually belonged to his neighbor. The cost of these improvements was in the tens of thousands of dollars. In 2009, after twenty years of successful adverse possession, according to the laws in effect before the 2008 amendments, the neighbor-owner tries to eject the possessor. If the 2008 amendments were retrospectively applied the neighbor-owner would probably be successful because the improvements would fall into the category of de minimis encroachments and would be deemed permissive and non-adverse. Thus, retrospective application of the 2008 amendments does not only disturb the peace of mind of possessors who acted without a claim of right, but also has the potential to disturb the piece of mind of all niche possessors.

2. Retrospective Application of the 2008 Amendments to Vested Property Rights Disrupts Settled Expectations

Retrospective application of the 2008 amendments unsettles settled expectations. It is undisputed that an action in ejectment is a reactive and remedial measure—a means by which the victim of another's wrongdoing can regain and protect what is rightfully theirs. Nonetheless, as in most cases, there are two sides to every story, and eventually "what is apparently [a] mere matter of remedy in some circumstances . . . touches the substance of the controversy, [and] becomes [a] matter of

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208 See id.
209 See id. § 543.
210 Cf. Ochoa & Wistrich, supra note 190, at 464.
212 See Ochoa & Wistrich, supra note 190, at 464–65.
right." For example, a person may have begun possessing a parcel of land, perhaps mistakenly, and as time elapses the person makes decisions or investments under the assumption that he or she will continue to own that parcel. And, thus, the interminable battle of interests between the adverse possessor and the property owner arises: the interest in gaining title versus the interest in not losing title. “At some point, the psychological—and perhaps even moral—balance begins to tip in favor of the” possessor. Instead of viewing the owner and possessor as “victim and wrongdoer,” the two parties eventually become competitors for an asset, and “the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser.”

But, such settled expectations are not created solely through the passage of time. In 1829, when New York legislature crafted its first adverse possession laws, it enumerated the type of behavior that a possessor would have to demonstrate in conjunction with the lapse of the statute of limitations in order to gain title to disputed property. Essentially recognizing the aforementioned shift of interests that may occur over the passage of time, the legislature codified the type of behavior by a possessor that justified the divestment of an owner’s title. Allowing the 2008 amendments to apply to all claims would serve to disrupt two centuries of settled expectations that the legislature has enforced through the enactment of a statutory limitations period and substantive requisites to acquiring title via adverse possession.

213 Pritchard, 106 U.S. at 132.
214 See Ochoa & Wistrich, supra note 190, at 464.
215 Id.
216 “[T]he foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. . . . A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.” Id. (quoting Oliver W. Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 476–77 (1897)) (alteration in original).
217 Id. at 465.
219 See N.Y. REAL PROP. ACTS. LAW § 522 (McKinney 2011).
220 See WEED, supra note 68, § 5.01[1].
3. Disrupting Settled Expectations Discourages Productivity and Promotes Unjust Enrichment

The consequences of unsettling settled expectations are twofold. First, productivity is stifled as a result of uncertainty, and waste is encouraged. Second, unsettling settled expectations allows original owners to reap the rewards of improvements by possessors resulting in unjust enrichment.\(^{221}\)

\(a\). **Uncertainty Discourages Productivity**

"[N]othing so much retards the growth or prosperity ... as insecurity of titles to real estate; and labor is paralyzed ... [because] the enjoyment of its fruits is uncertain."\(^{222}\) New York's statutes recognize that where a possessor uses and preserves land for a certain length of time, he has benefitted the community and he deserves and should be awarded title to the property he used.\(^{223}\) Adverse possession codifies this policy consideration. Productivity of land for a statutorily determined period of time will vest the possessor with title.\(^{224}\) However, as a result of the uncertainty raised by recent New York cases in defining the scope of the 2008 amendments, a niche possessor cannot rely on this premise in confidence. The fear of subsequent litigation and divestment of title created by the courts in construing section 9 according to its literal meaning will discourage niche possessors from expending their efforts and money on property if it could be stripped from them at any time.\(^{225}\)

New York's legislature and courts must take the clear position that retrospective application of the amendments to vested property rights is prohibited, or risk stifling productivity of more than the niche possessor. If retrospective application is not struck down, any adverse possessor going forward will face the risk that a subsequent change to New York's adverse possession laws will render the character of their possession permissive. Today New York qualifies de minimis

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\(^{221}\) See Restatement (First) of Restitution § 1 (1937).

\(^{222}\) Buswell, supra note 39, at 8.

\(^{223}\) See Axel Teisen, Adverse Possession—Prescription, 3 A.B.A. J. 126, 126 (1917).


\(^{225}\) Land also typically remains untouched, unimproved, and wasted during the litigation of a disputed title. See Buswell, supra note 39, at 8.
encroachments like fences as permissive. Tomorrow, New York might make certain types of structural improvements like a garage, permissive. The possibilities are endless, and only create more uncertainty for the adverse possessor. Where uncertainty exists, productivity will be stifled.

b. Reinstating Title in the Original Owner Results in Unjust Enrichment

Unsettling settled expectations results in unjust enrichment because it allows an original owner to reap the rewards of improvements by niche possessors. Niche possessors by their very nature have expended some level of effort, money, or both in the contested property. Retrospective application of the 2008 amendments would allow an original owner to strip a niche possessor of those efforts an indeterminate number of years after title vested in the possessor. Thus, along with title to the property, the original owner would also be rewarded with the benefits of the possessor's labor and expenditures.

Proponents of retrospective application of the 2008 amendments might argue that New York already has a solution for cases of unjust enrichment in real property actions: Real Property Actions and Proceedings Law ("RPAPL") section 601. For over eighty years, New York has statutorily required that in an action to recover real property the plaintiff may recover damages for the defendant's occupation of the property. Recovery includes damages for withholding the property, rents and profits, or use and occupancy of the property for a term not exceeding six years. Rents and profits are not to include any value added by improvements made by the defendant. Further, if the defendant has made permanent improvements on the property, this value is to be deducted from any damages owed to the plaintiff but not beyond the amount of those damages.

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226 See RESTATEMENT (FIRST) OF RESTITUTION § 1 (1937).
227 See N.Y. REAL PROP. ACTS. LAW § 522 (McKinney 2011).
228 See N.Y. REAL PROP. ACTS. LAW § 601 (McKinney 1963).
229 See id.
230 See id.
231 See id.
232 See id.
Under section 601, a defendant would lose any pour-over value if he made permanent improvements that were valued at more than the amount of damages owed to the plaintiff.\(^\text{233}\)

However, this statute has traditionally been used in cases involving holdover tenants where there is a strong public policy to punish trespassers.\(^\text{234}\) While retrospective application of the 2008 amendments essentially labels all possessors as trespassers—niche possessors as well as those who never acquired title—niche possessors were not trespassers after the expiration of the limitations period.\(^\text{235}\) Thus, when a niche possessor expended his efforts, monies, and time in making improvements to a parcel of land during a time when he owed the property and was not acting as a trespasser, the justifications behind section 601 are no longer valid. While section 601 allows a trespasser to lose any pour-over value of permanent improvements beyond the value of use and occupancy, section 601 would similarly allow an original owner to be unjustly enriched if there were any pour-over value of permanent improvements made by a niche possessor. However, a niche possessor could have made those improvements while owning the property, and not while trespassing. Therefore, section 601 does not address the potential unjust enrichment issues created by retrospective application of the 2008 amendments to vested property rights.

C. Statute of Limitations for Adverse Possession: Substantive and Procedural

The limitations period in adverse possession is both procedural and substantive and therefore creates rights requiring greater constitutional protection than those created by purely procedural limitations. New York courts have held, as a

\(^{233}\) See id.


\(^{235}\) In Miceli v. Riley, 79 A.D.2d 165, 436 N.Y.S.2d 72 (2d Dep't 1981), an adverse possessor, in good faith, built six houses on a disputed parcel of land without a vested right in the property. See id. at 169, 436 N.Y.S.2d at 75. The court applied RPAPL section 601 and declined to afford him an equitable remedy. Id. Instead, the court enunciated that the plaintiff owner had an absolute interest in the property and the defendant's only recourse would be to deduct the cost of the improvements from the damages owed to the plaintiff for the use and occupancy of the land. See id. at 170, 436 N.Y.S.2d at 75.
general rule, that "[s]tatutes of [l]imitation do not create vested or substantive rights; they deal merely with a remedy and are available only as a defense." However, the statute of limitations for adverse possession enumerated in Civil Practice Law and Rules ("CPLR") section 212(a) is more than a "mere proceduralism" that abrogates a party's "privilege to litigate." It also creates "a substantive eligibility requirement." Although New York courts have commonly upheld the revival of statutes of limitations in cases involving procedural statutes of limitations as constitutional, section 212(a) also creates substantive rights and deserves a higher degree of constitutional protection.

1. More than a Mere Proceduralism, the Statute of Limitations for Adverse Possession Creates Substantive Rights

The statute of limitations for adverse possession does not merely affect the remedy. It is so inextricably tied with the requirements of adverse possession as enumerated in the 2008 amendments that they qualify the statute of limitations.

Adverse possession may be both a sword and a shield; substantive rights may be built upon it; and by fiction of law...it is a source of title upon which remedies may be enforced and substantial rights asserted; hence, a statute of

236 People v. Hagan, 138 Misc. 771, 775, 247 N.Y.S. 374, 379 (N.Y.C. Spec._sess. N.Y. Cnty. 1931) (citations omitted); see also House v. Carr, 185 N.Y. 453, 460, 78 N.E. 171, 173 (1906) (Vann, J., dissenting) ("It is a general principle that the Statute of Limitations may be used as a shield but not as a sword. The party attacked may use it to defend himself, but he cannot use it for aggressive action or as the means of getting property from the other party. Courts of equity, under ordinary circumstances, do not open their doors to a plaintiff who can produce no evidence in support of his claim for affirmative relief except the lapse of time and the Statute of Limitations.").


239 Tanges, 93 N.Y.2d at 58, 710 N.E.2d at 254, 687 N.Y.S.2d at 608.

240 See N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2011).
limitation, considered as a statute of repose, destroys or extinguishes property rights, while adverse possession creates such rights . . . .

It would be inaccurate, therefore, to pigeonhole section 212(a) into this rigid dichotomy because it "defies characterization as either purely procedural or purely substantive."[242]

A comparison of the New York demand and refusal requirement for adverse possession of personal property to section 212(a) illustrates that the limitations period in real property actions accomplishes more than the simple barring of stale claims.[243] In several cases dealing with stolen or misappropriated artwork, New York courts have had to decide whether the "demand and refusal" element required to bring an action against the possessor of the property is procedural or substantive for the purposes of deciding if "demand and refusal" should trigger the tolling the statute of limitations.[244] Dispositive to the characterization of "demand and refusal" as either the former or the latter was whether "demand and refusal" was a prerequisite to commencing an action to recover the property.[245] Finding it to be a prerequisite, the New York Court of Appeals held that the time to commence an action to recover personal property begins to toll from the time the property is demanded by the true owner and the possessor refuses its return.[246] Without "demand and refusal," a true owner cannot maintain an action against the possessor.[247]

Similarly, expiration of the statutory period is a prerequisite to successfully acquiring title to real property via adverse possession. Section 501 of the 2008 amendments states, "An adverse possessor gains title to the occupied real property upon the expiration of the statute of limitations for an action to recover real property pursuant to" section 212(a).[248] Possession for any period short of ten years does not transfer title to the

245 Id.
246 See id.
247 Id.
248 N.Y. REAL PROP. ACTS. LAW § 501(2) (McKinney 2011) (emphasis added).
Accordingly, while section 212(a) serves the procedural function of barring the original owner's remedy to recover his real property after the statutory period, it is also incorporated into New York's adverse possession statute as another required characteristic of possession. Possession must be "adverse, under claim of right, open and notorious, continuous, exclusive, and actual" for the statutory period prescribed in section 212(a). Therefore, section 212(a) is more than a "mere proceduralism." It is also a substantive element of adverse possession.

The manner in which New York courts deal with subsequent disclaimers of title further demonstrates that section 212(a) is not merely procedural. It is well established that a disclaimer of title by the occupant of property made before the statute of limitations has expired makes possession permissive—unless possession at some point became hostile again. It defeats any claims of adverse possession, stays the statute of limitations, and protects the owner's title. In contrast, a disclaimer of title by the occupant of property made after the statutory period will not transfer title back to the original owner. In this case, the disclaimer "is only evidence tending to show the character of the previous possession." New York courts recognize that expiration of the statutory period does not just procedurally bar

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249 See id.
251 See N.Y. REAL PROP. ACTS. LAW § 501(2) (McKinney 2011).
252 Id.
254 See Knapp v. Hughes, 25 A.D.3d 886, 891, 808 N.Y.S.2d 791, 796 (3d Dep't 2006) (noting that since Defendants use of land was with Plaintiffs' express permission, Plaintiffs' motion for summary judgment dismissing Defendant's adverse possession should be granted).
255 See id.
256 Van Valkenburgh v. Lutz, 304 N.Y. 95, 103, 106 N.E.2d 28, 32 (1952) (quoting Smith v. Vt. Marble Co., 133 A. 355, 358 (1926)) (internal quotation marks omitted). "[T]he recognition of the owner's title must occur during the running of the statute, and not after it has run; for a title by adverse possession, once it is acquired, is as full and complete as any other title, and no verbal transfer or declaration can divest one of it." Smith, 133 A. at 358 n.12. And, in Russo v. Stoma, "evidence submitted by the appellants regarding their alleged maintenance of the garden area subsequent to the time when ownership of the garden area already had vested in the plaintiff failed to raise a triable issue of fact." 67 A.D.3d 769, 770, 887 N.Y.S.2d 865, 866 (2d Dep't 2009) (emphasis added).
the original owner from bringing an action in ejectment against the possessor, but that it also prevents that owner from attempting to regain title to property that has already vested in the possessor—also bolstering the premise that the statutory period is substantive. Otherwise, subsequent disclaimers would make possession permissive, irrespective of the antecedent rights affected. By prohibiting this result, New York courts declare section 212(a) as something more than a procedural mechanism that bars the remedy, but does not affect the right. Instead, it is a legal hybrid of substantive and procedural, and it creates rights that deserve more constitutional protection than those created by purely procedural limitations.

2. Rights Created by Statute of Limitations for Adverse Possession Deserve a Higher Degree of Constitutional Protection than Rights Created by Purely Procedural Statutes of Limitations

In contrast to the hybrid limitation period in adverse possession, New York courts have only upheld purely procedural revival statutes of limitations as constitutional. For example, some of New York’s most common constitutional challenges to revival statutes have been in the realm of toxic torts. Traditionally, limitations periods related to toxic substances began tolling from the time of exposure to the substance. The problem with this exposure-based system was that injuries caused by toxic substances “may not appear until years after exposure [and] long after the expiration of the period within

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257 See Van Valkenburgh, 304 N.Y. at 103, 106 N.E.2d at 32 (Fuld, J., dissenting).

258 Toxic torts are “civil actions asserting a demand for recovery of damages that arose from exposure to a chemical substance, emission or product, where that exposure allegedly caused physical and/or physiological harm.” Michael C. Anibogu, The Future of Electromagnetic Field Litigation, 15 PACE ENVTL. L. REV. 527, 570 (1998) (quoting 1 JAMES T. O’REILLY, 1 TOXIC TORTS PRACTICE GUIDE § 2.01 (2d ed. 1995)).

259 See Hymowitz v. Eli Lilly & Co., 136 Misc. 2d 482, 484, 518 N.Y.S.2d 996, 998, (1987) (stating that the purpose of revival statutes and discovery-based statutes of limitations is to address the deficiencies in redress created by exposure-based statutes of limitations).
which [the] action[ ] may [have] be[en] instituted." In response the legislature revived statutes of limitations to afford parties an opportunity to seek redress for these latent injuries.

Defendants in toxic torts actions usually argue that a tolled limitations period creates a substantive right that deserves constitutional protection. Defendants claim that "the passage of the applicable time bar" creates a right to be free from any future claims of liability. Since revival statutes attempt to abrogate those rights, they should be analyzed under a strict or intermediate standard of scrutiny, rather than under a rational basis review. Nonetheless, courts do not find this argument persuasive and have traditionally upheld revival statutes under a rational basis level of scrutiny.

Unlike the purely procedural nature of revival statutes in the realm of toxic torts, the substantive rights created by the limitations period in adverse possession deserve more than minimal scrutiny. A toxic tort revival statute "does not eliminate a cause of action but rather suspends the court's power to grant a remedy." Essentially, whether or not a plaintiff brings an action against a defendant, the plaintiff still suffered a recognized injury under New York's laws that, but for the statute of limitations, would be actionable forever. The only role of the statute of limitations is to prevent the plaintiff from seeking redress for those injuries past a certain date. In contrast, after the expiration of the statutory period in section 212(a), the original owner has no basis to sue the adverse possessor because he no longer has title to the property. The right of a possessor to be free from suit after the tolling of the statutory period in

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261 See, e.g., Hymowitz, 136 Misc. 2d at 483–84, 518 N.Y.S.2d at 998.
262 Id. at 485, 518 N.Y.S.2d at 999.
263 See id.
264 See id. at 486, 518 N.Y.S.2d at 1000 (noting that the "[l]egislature acted within permissible objectives relating to health, safety and welfare by reviving causes of action based upon latent effects of exposure to toxic substances").
265 Id. at 485, 518 N.Y.S.2d at 999 (discussing actions enforcing debts, and finding that statutes of limitations are only statutes of repose that suspend the remedy, but do not cancel the debts); see also House v. Carr, 185 N.Y. 453, 458, 78 N.E. 171, 172 (1906) ("[T]he Statute of Limitations in [New York] never pays or discharges a debt, but only affects the remedy,...[and] it would be within the constitutional power of the legislature to repeal the Statute of Limitations and revive claims, the enforcement of which have been barred by the statute for a generation.").
266 See Franza v. Olin, 73 A.D.3d 44, 47, 897 N.Y.S.2d 804, 807 (4th Dep't 2010).
adverse possession is therefore drastically different than the right of defendants in toxic tort actions. Assessing the abrogation of the former using rational basis scrutiny would therefore be improper and would not adequately protect the rights of niche possessors.

D. Divesting Adverse Possessors of Their Antecedent Rights

Without Just Compensation Violates the Fourteenth Amendment

Application of the 2008 amendments to a niche possessor’s vested property rights violates the Fifth Amendment, as incorporated into the Fourteenth Amendment, as a regulatory taking of private property without just compensation. The Fifth Amendment assures that “private property [shall not] be taken for public use, without just compensation.” Adverse possession confers a right to private property and is therefore of the kind protected under the Fifth Amendment. Use of the 2008 amendments to divest niche possessors of this right requires that they be justly compensated, as to not run afoul of the Fifth Amendment.

The United States Supreme Court has described at least two categories of regulatory action that are compensable without a fact specific inquiry into the public interest advanced by the regulation. The first includes regulations that “compel the property owner to suffer a physical ‘invasion’ of his property... no matter how minute the intrusion, and no matter how weighty the public purpose behind it.” The second circumstance enunciated by the Court is “where regulation

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267 U.S. CONST. amend. V.
269 U.S. CONST. amend. V.
270 See Franza, 73 A.D.3d at 46–47, 897 N.Y.S.2d at 807.
271 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). When faced with a takings challenge, the Supreme Court has traditionally engaged in a fact specific inquiry, rather than apply a set formula for determining whether a specific legislation constitutes a regulatory taking. See id. But, the court has expressed two discrete categories of regulatory action, which is compensable without inquiry into the specific facts. See id.
272 Id.
denies all economically beneficial or productive use of land," recognizing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."274

Successful adverse possession vests the possessor with title to property that is entitled to protection against regulatory takings. It is well settled that where a statute of limitations "touches the substance of the controversy, [it] becomes a matter of right."275 Specifically, "the adverse possession of property for the statutory period vests title to the property in the adverse possessor"276—a title to private property that is "as strong as one obtained by grant."277 Both New York Supreme Courts and the New York Court of Appeals have held that such a vested property right cannot be abrogated by statute278 unless such divestment is for a public use and upon just compensation.279

Retrospective application of the 2008 amendments falls squarely within both of the aforementioned categories, and requires niche possessors divested of their rights to be justly compensated. First, where a court fails to recognize a successful adverse possessor's title to property, but instead revives the original owner's title, the possessor suffers a "physical invasion of his property."280 This invasion is more intrusive than those

272 Id.
273 Id. at 1017.
274 Id. at 1017.
277 Id. at 47, 897 N.Y.S.2d at 807.
279 See Landgraf v. USI Film Prods., 511 U.S. 244, 253 (1994). The Supreme Court has also held that a vested property right cannot be abrogated by statute unless there are mitigating considerations involved. See id.; see also Niagara Recycling, Inc. v. Town of Niagara, 83 A.D.2d 316, 326, 443 N.Y.S.2d 939, 946 (4th Dep't 1981).

[In an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property has become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.]


recognized by the Court in the past.\textsuperscript{281} For example, the Court found that a New York law requiring landlords to allow television cable companies to put cable facilities in their apartment buildings, which occupied at most only one-and-a-half cubic feet, was a physical invasion of their property and required just compensation.\textsuperscript{282} Where an adverse possessor is stripped of his title, it follows that he also loses all rights derived from such title, including the right to use the land. Instead, the true owner regains this right, and can use the property in any way a record owner could. Excluding the adverse possessor from using the property essentially equates to a physical invasion of the entire property. In almost all cases, this physical invasion would probably be much greater than the intrusion of less than two cubic feet as in the aforementioned case. Therefore, retrospective application of the 2008 amendments to vested property rights falls within the first category of regulatory action, which is compensable without a fact specific inquiry into the public interest advanced by the regulation.

Application of the 2008 amendments to vested rights also falls within the second circumstance enunciated by the Court and is analogous to the legislation enacted in \textit{Lucas v. South Carolina Coastal Council}.

\textsuperscript{283} In \textit{Lucas}, the South Carolina legislature enacted legislation that had the direct effect of barring Lucas from erecting a house on his two parcels of land.\textsuperscript{284} The Court held that where “regulation that deprives land of all economically beneficial use ... it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”\textsuperscript{285} Since Lucas acquired the two parcels at a time prior to the enactment of the legislation for the sole purpose of

\begin{itemize}
\item \textsuperscript{281} See id.
\item \textsuperscript{282} See id.
\item \textsuperscript{283} See id.
\item \textsuperscript{284} See id. at 1007.
\item \textsuperscript{285} Id. at 1027.
\end{itemize}
erecting single-family residences, the Court found that the regulation effectively rendered Lucas’s land valueless.286 Accordingly, he was entitled to just compensation.287

Similar to Lucas, a successful adverse possessor has the right to use the acquired property in any manner that a record owner could.288 By retrospectively divesting the possessor of his title, and consequently his rights, the property is rendered valueless to the possessor. He no longer has any of the sticks in the bundle of rights of ownership and cannot possess, exclude, use, dispose, transfer, enjoy, or destroy the property.289 Retrospective application of the 2008 amendments to vested rights thereby deprives the possessor of “all economically beneficial or productive use of land”290 and entitles him to just compensation for his property.

IV. JUSTLY COMPENSATE NICHE POSSESSORS OR PROHIBIT RETROSPECTIVE APPLICATION OF THE 2008 AMENDMENTS TO VESTED PROPERTY RIGHTS

The unconstitutional deprivation of private property and the abrogation of the policy underpinnings of statutes of limitations and adverse possession demonstrate that retrospective application of the 2008 amendments must be prohibited, or a remedy must be provided to those injured by its misapplication. This Note proposes three solutions: (1) New York compensates each individual property owner harmed by the misapplication of the 2008 amendments; (2) the New York Court of Appeals hears and decides a case on point and prohibits retrospective application of the 2008 amendments; or (3) the legislature modifies the language of section 9 of the 2008 amendments to clearly prohibit its application to rights that vested prior to its effective date.

286 See id. at 1008–09. Only if, on remand, the state enunciated principles of nuisance or other property law that prohibits the use Lucas intended could the state succeed in its claim that it was taking nothing from Lucas with the Act. See id. at 1031–32.
287 See id. at 1015.
290 Lucas, 505 U.S. at 1015.
A. *Niche Possessors Should Be Justly Compensated for Their Divested Property*

New York should justly compensate possessors divested of their property as a result of retrospective application of the 2008 amendments as required by the Fifth Amendment. Where a regulatory taking has occurred, the United States Supreme Court has traditionally held that an adversely affected property owner is entitled to the fair market value of the property taken. Accordingly, niche possessors should receive the fair market value of their property on the day they are divested.

B. *Court of Appeals Precedent Needed*

The New York Court of Appeals should grant permission to appeal to a case on point and render retrospective application of the 2008 amendments unconstitutional. Such a decision would bind all departments in the Appellate Division, namely the Second and First Departments, which have yet to declare a definitive position on the issue. As a result of the lack of clarity within the First and Second Departments, unconstitutional deprivations are continuing at the Supreme Court level. A decision by the New York Court of Appeals, similar to the decision in *Franza*, would create the precedent required across the New York Appellate Division to curtail the injuries being suffered by New York property owners as a result of the legislature’s inadequately drafted statute.

C. *Modify Language of Section 9 To Clearly Prohibit Retrospective Application of the 2008 Amendments to Vested Rights*

In crafting the language for section 9, the New York legislature should defer to the framework it created in dealing with the transitional period between using the fifteen-year statute of limitations for adverse possession and effectuating the ten-year period in force today. Simultaneously with the

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291 See U.S. CONST. amend. V.
293 See id.
enactment of section 212(a) that prescribes a ten-year statutory period for adverse possession, the legislature enacted the transitional provision of section 218. Section 218 provides:

Nothing in this article shall authorize any action to be commenced which is barred when this article becomes effective . . . . Where a cause of action accrued before, and is not barred when this article becomes effective, the time within which an action must be commenced shall be the time which would have been applicable apart from the provisions of this article, or the time which would have been applicable if the provisions of this article had been in effect when the cause of action accrued, whichever is longer. 294

In the notes following section 218, the Advisory Committee further articulated that "[i]t is not intended that causes which are barred prior to the effective date of the legislation be revived." 295 Following the enactment of section 212(a) and 218, if a possessor adversely possessed property for ten years ending the day before September 1, 1963—the effective date of the new limitations period—they would not have a vested interest in the disputed property. In order to have a vested property right prior to section 212(a), possession had to be continuous for twenty-five years. Accordingly, if on September 1, 1963, an owner was not barred from bringing an action in ejectment against the possessor, the owner would get the benefit of the longer of either the old limitation period or section 212(a) to sue. In this example, the owner would have another fifteen years under the old limitation period and ten under the new rule. If, however, the possessor had acquired title to the property through twenty-five years of adverse possession prior to September 1, 1963, then the new limitations period would be irrelevant, and the original owner would still be barred from bringing an action in ejectment. 296

295 Id. advisory committee's note.
296 See BUSWELL, supra note 39, at 10–11 (citing Cole v. Irvine, 6 Hill 634, 637 (Sup. Ct. N.Y. Cnty. 1844)).
The transition between the old adverse possession statute and the 2008 amendments should be approached in an analogous manner to the transition between limitations periods in 1963. Section 9 should be modified to shadow the structure of rule 218 as such:

"This act shall take effect immediately, and shall apply to claims filed on or after such effective date."\(^{297}\) "Nothing in this article shall authorize any action to be commenced which is barred when this article becomes effective."\(^{298}\) Where title allegedly ripened in the possessor before the effective date of this act, possession should be assessed according to the requirements for adverse possession that were in effect at the time of vesting. "Where a cause of action accrued before [the effective date of this act], and is not barred when this article becomes effective, the [requisite elements to prove adverse possession]... shall be... the provisions of this article..."\(^{299}\)

Under this proposed section 9, the vested property rights of niche possessors would not fall within the scope of the 2008 amendments. The Franzas of New York, and the like, would be safe from an unconstitutional deprivation of property as permitted by the literal interpretation of section 9. For example, in *Franza*, Sharon allegedly acquired title to the Olins' property via adverse possession in 1985—after the ten-year statutory period lapsed.\(^{300}\) Thus, Sharon's claim accrued before the effective date of the amendments.\(^{301}\) Simultaneous with gaining title to the property in 1985, however, the Olins became barred from bringing an action in ejectment against Sharon to recover that property.\(^{302}\) Under the suggested language for section 9, the Olins could not commence an action in ejectment against Sharon because they were barred when the 2008 amendments became effective. Also, Sharon's claim would be assessed under the law in effect at the time she allegedly acquired the property: 1985. If Sharon did not satisfy the elements of adverse possession under the laws of 1985, then Sharon never successfully acquired title to the property and could not be unconstitutionally divested of it. If

\(^{297}\) Ch. 269, § 9, 2008 N.Y. LAWS 894 (McKinney).
\(^{298}\) N.Y. C.P.L.R. 218 (McKinney 2011).
\(^{299}\) Id.
\(^{300}\) See *Franza v. Olin*, 73 A.D.3d 44, 46, 897 N.Y.S.2d 804, 807 (4th Dep't 2010).
\(^{301}\) See ch. 269, § 9, 2008 N.Y. LAWS 894 (McKinney).
Sharon did satisfy the elements, the court would recognize her title. In this manner, the suggested language for section 9 would protect niche possessors from being improperly divested of their property while still requiring them to demonstrate that they properly acquired the property.

CONCLUSION

In 2008, New York legislature amended over one hundred and seventy-five years of adverse possession law with three momentous changes. Under the amended statute, possession must be under a claim of right, and de minimus encroachments as well as acts of routine maintenance are deemed permissive and non-adverse. The legislature coarsely defined the scope of these changes in section 9 of the amendments by stating that, "This act shall take effect immediately, and shall apply to claims filed on or after such effective date." Many New York courts are construing section 9 according to its literal interpretation without engaging in the requisite statutory construction. As a result, courts are applying the 2008 amendments to all claims irrespective of whether they involve a vested property right. However, retrospective application to the vested property rights of niche possessors not only directly conflicts with legislative history, but it raises serious policy and constitutional concerns. Inquiry into the legislative purpose behind the amendments, the doctrine of adverse possession, and the purpose of the statute of limitations in real property actions reveals that the legislature did not intend for the 2008 amendments to divest niche possessors of their antecedent rights in violation of the Fourteenth Amendment.

Although the Third Department of the New York Appellate Division joined the Fourth Department in declining to apply section 9 where it would permit the retrospective application of the 2008 amendments to vested property rights, the issue still remains unresolved in New York. Neither the New York Court of

303 Compare 2 N.Y. REV. STAT., pt. 3, ch. 4, tit. 2, art. 1, §§ 1–17 (1829), with Ch. 269, 2008 N.Y. LAWS 894 (McKinney).
304 See supra note 303.
306 Ch. 269, § 9, 2008 N.Y. LAWS 894 (McKinney).
307 See supra Part II.
308 See supra Part III.A.
309 See U.S. CONST. amend. XVI.
Appeals nor the First Department has addressed how section 9 should be interpreted and consequently how the amended statute should be applied. And dicta from the Second Department suggests that if confronted with facts similar to *Franza*, the court might interpret section 9 according to its literal meaning and misapply the amendments retrospectively.310 While this issue remains unsettled, New York faces an indeterminate period of future litigation in this area, coupled with the abrogation of vested property rights without just compensation in violation of the Fourteenth Amendment.

This Note proposes that either (1) New York justly compensates each individual property owner harmed by the misapplication of the 2008 amendments; (2) the New York Court of Appeals hears and decides a case on point and prohibits retrospective application of the 2008 amendments; or (3) the legislature modifies the language of section 9 to clearly state that the act does not apply to property rights vested prior to the effective date of July 7, 2008. Using the framework created by New York's legislature in dealing with past changes in limitations periods for adverse possession, the 2008 amendments should only apply to those rights not fully vested at the effective date and to those that accrued on or after the effective date.311 “[A]s there could be no remedy” for original owners who lost their property “without a corresponding right” to oust successful niche possessors, “it was useless for the legislature to [facially] restore the former, so long as it was prohibited by the constitution from interfering or meddling with the latter.”312

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311 See U.S. CONST. amend. V.
312 Knox v. Cleveland, 13 Wis. 245, 249 (1860).