

EXISTING USES AND THE LIMITS OF LAND USE REGULATIONS

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This Article identifies property law's special protection for existing uses, explores possible justifications for this protection, and argues that none can support the strong protection that existing uses currently enjoy. Various land use doctrines—from zoning to the vested rights doctrine to amortization rules for prior nonconforming uses—assume that the government cannot eliminate existing uses without paying compensation. The Article asks whether this result is compelled either by constitutional rules or by normative considerations. Neither the Takings Clause nor the Due Process Clause requires this level of protection for existing uses. Normatively, many obvious-seeming justifications dissolve on closer inspection. Objections grounded in underlying principles of fairness and reliance are not conceptually different for regulations prohibiting future uses than for regulations of existing uses. Nor is the extent of economic loss necessarily greater for one than for the other, even though regulations of existing uses create out-of-pocket costs whereas regulations of future uses only implicate forgone profits. In fact, none of the possible explanations for the special treatment of existing uses actually justifies their protection. This Article ultimately concludes that existing uses should not be entitled to any special judicial protection but instead should be subject to the same takings and due process analyses that apply to all regulation and governmental action.

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INTRODUCTION

Existing uses occupy a special place in property law. A use, once established, is imbued with an expectation that it may continue to exist, even in the face of regulatory change. Once built, a building becomes all but immune from subsequently enacted zoning rules. Indeed, courts often reason that existing uses are constitutionally protected from government regulations.¹ A number of land use doc-

¹ See, e.g., *Hooper v. City of St. Paul*, 353 N.W.2d 138, 140 (Minn. 1984) (referring to “constitutional protection afforded existing uses” (citing *County of Freeborn v. Claussen*, 203 N.W.2d 323, 325 (Minn. 1972))); *Rudolf Steiner Fellowship Found. v. De Luccia*, 685 N.E.2d 192, 197 (N.Y. 1997) (Bellacosa, J., dissenting) (“It is the law of this state that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance.” (citing *People v. Miller*, 106 N.E.2d 34, 35 (N.Y. 1952))); *Harbison v. City of Buffalo*, 152 N.E.2d 42, 44 (N.Y. 1958) (“When zoning ordinances are initially adopted to limit permissible uses of property, or when property is rezoned . . . to prevent uses of property previously allowed, a degree of protection is constitutionally required to be given owners of property then using their premises in a manner forbidden by the ordinance.”); *Snake River Brewing Co. v. Town of Jackson*, 39 P.3d 397, 403 (Wyo. 2002) (“When a zoning ordinance is enacted, it cannot outlaw previously existing non-conforming uses. This right to continue a non-conforming use is a vested property right, protected by statute, and by both federal and state constitutions.” (citations and internal quotation marks omitted)).

trines, from vested rights to amortization of prior nonconforming uses, are based fundamentally on an unarticulated but firm assumption that the government cannot interfere with existing uses, subject only to some specific exceptions.² There is, in short, a strong background rule running throughout the law of property that existing uses are entitled to protection from the government. This Article argues that the law actually overprotects existing uses and that neither constitutional doctrine nor normative considerations justify the protection courts currently provide.

The legal literature has largely assumed that existing uses are entitled to protection and has almost wholly failed to examine the basis for that assumption.³ At first glance, this is hardly surprising. Most people share an intuition that existing uses should be protected, and the law generally complies. Consider zoning first. A local government enacting a new zoning ordinance must almost always grandfather existing uses.⁴ The grocery store in a newly zoned residential area is allowed to stay in business.⁵ New height, area, or use restrictions are imposed prospectively only. Try even to imagine what it would mean for a local government to force preexisting houses to conform to new setback requirements. Nonconforming homes would either have to be picked up and moved back or simply torn down. It

² For discussion of these doctrines, see *infra* Part I.

³ Some specific doctrines related to existing uses have received serious study, however. For example, the doctrines governing the treatment of prior nonconforming uses, which are the subject of Part I.B, *infra*, have received significant attention.

⁴ See, e.g., MASS. GEN. LAWS ANN. ch. 40A, § 6 (West 2004) (forbidding zoning ordinances to apply to structures “lawfully in existence or lawfully begun” before first notice of new law, but requiring their application to “any change or substantial extension of such use”); N.J. STAT. ANN. § 40:55D-68 (West 2008) (“Any nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”); *Rourke v. Rothman*, 859 N.E.2d 821, 822 n.5 (Mass. 2007) (citing statute that “sets the floor for ‘grandfather’ protection in local zoning bylaws”); see also *Ferraro v. Bd. of Zoning Adjustment*, 970 So. 2d 299, 310 (Ala. Civ. App. 2007) (“Generally, nonconforming uses of property are ‘grandfathered’ under zoning ordinances and not lost unless the owner abandons that use.”); *Manhattan, Inc. v. Shelby County*, No. W2006-02017-COA-R3-CV, 2008 WL 639791, at *7 (Tenn. Ct. App. Mar. 11, 2008) (noting that local zoning ordinances “specifically permit a lawful use in existence at the time of any zoning change to continue after the change, i.e., ‘grandfathered’ nonconforming use, with certain restrictions”).

⁵ See *Ex parte Ala. Alcoholic Beverage Control Bd.*, 819 So. 2d 50, 52–53 (Ala. 2001) (upholding Control Board’s denial of expansion of nonconforming use but recognizing store as valid nonconforming use allowed to operate); *Brewster v. Fayette County Bd. of County Comm’rs*, No. W2003-01842-COA-R3-CV, 2005 WL 873224, at *1 (Tenn. Ct. App. Apr. 14, 2005) (holding that previously “grandfathered” grocery store on property could not reopen without demonstrating continuous use of property). This rule is subject to various techniques—like amortization—that local governments can, in fact, use to eliminate existing uses. See *infra* Part I.B (discussing amortization).

is easy to understand the intuition that such a regulation must be somehow unconstitutional.⁶

The calculus is not all so one-sided, however. The costs of protecting existing uses are extremely high. Working around existing uses can severely limit the efficacy of zoning and other comprehensive land use planning, potentially transforming prospective planning into a mere description and codification of existing conditions.⁷ The original justification for zoning was to separate incompatible uses of property; the inapplicability of a new zoning ordinance to prior nonconforming uses can preserve incompatible neighbors.⁸ Moreover, as explored in an extensive literature on legal transitions, protecting people from regulatory change may create perverse investment incentives.⁹ The

⁶ For a more emotional example, consider a co-op board seeking to enforce a new no-pets policy. There is little doubt in most jurisdictions that such policies are permissible prospectively, but it is another matter entirely to apply the policy against existing pets. See, e.g., *Winston Towers 200 Ass'n v. Saverio*, 360 So. 2d 470, 470–71 (Fla. Dist. Ct. App. 1978) (holding invalid attempt to fine condo owner for keeping puppy of dog grandfathered into co-op's no-pet policy), cited in ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 597 (3d ed. 2005); *Young v. Savinon*, 492 A.2d 385, 390 (N.J. Super. Ct. App. Div. 1985) (invalidating no-pets provision in lease renewal as applied to existing dogs). For a particularly funny examination of no-pet policies, see *The Daily Show with Jon Stewart: Rent Claws* (Comedy Central television broadcast Mar. 29, 2004), available at <http://www.thedailyshow.com/video/index.html?title=rent-claws&videoId=124322>.

⁷ See 7 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 41.01[2], at 41–47 (2009) (“If the goal of [zoning] regulations was to ensure uniformity of all uses in a particular district, dissimilar existing uses would detract from that purpose as much as new uses.”); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 940 (2007) (“The extent of existing development in developed cities means that changes in applicable zoning must either include an enormous number of nonconforming uses—potentially undermining the efficacy of the zoning regime—or come with some plan for eliminating the nonconforming uses over time.”); see also *Cohen v. Duncan*, No. Civ.A.2002-599, Civ.A.2001-380, 2004 WL 1351155, at *15 (R.I. Super. Ct. June 9, 2004) (“The restrictive provisions of the [o]rdinance properly recognize that [n]onconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary.” (second alteration in original) (internal citation omitted)).

⁸ The Supreme Court originally justified zoning as separating incompatible neighbors, noting that a “nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.” *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); see also David P. Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 771–72 (1977) (describing use of variances as “especially dangerous because they jeopardize zoning’s primary purpose: separating incompatible land uses”).

⁹ See *infra* note 40 and Part IV.A (discussing transitions literature). Academic writing on legal transitions has tended to focus both on changes in tax rules and on changes in property rules, with the latter squarely implicating the Takings Clause and the extent of protection from regulatory change. See generally, e.g., DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* (2000) (discussing changes to tax rules); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 (1986) (discussing changes to property rules).

questions therefore arise whether zoning and other land use controls could apply to existing uses and, if so, when.

The stakes here are very high. Existing use protection is bound up intimately with the problem of grandfathering, a central issue in environmental policy. Grandfathering existing uses can dramatically limit the effectiveness of new environmental regulations.¹⁰ Protecting existing uses can allow the dirtiest factories to keep polluting and the worst offenders to avoid application of the new rules.¹¹ The Clean Air Act,¹² which regulates stationary sources of air pollution, distinguishes explicitly between preexisting and new sources of air pollution and does not require the former to comply with its new emission standards.¹³ Interestingly, however, a stationary source that is subsequently modified within the meaning of the Act must then comply with the new source performance standards—as if certain modifications transform it from a preexisting use into a prospective, future use.¹⁴ The Clean Water Act,¹⁵ while taking a slightly different approach, also applies differently to existing and new sources of pollution.¹⁶

Other such examples are not confined to land use and environmental law. Many statutes incorporate protection for existing uses, often by imposing different requirements for uses that predate enactment.¹⁷ For example, the Americans with Disabilities Act¹⁸ applies a

¹⁰ See generally, e.g., Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 Nw. U. L. REV. 1677 (2007) (discussing harms of grandfather clauses in recent legislation).

¹¹ See *id.* at 1729 (discussing how Bush administration policies exacerbated this problem).

¹² 42 U.S.C. §§ 7401–7671q (2006).

¹³ 42 U.S.C. § 7411(a)(3) (2006) (defining stationary source). Existing uses are subject only to state implementation of ambient air quality requirements and not to the stricter emissions reduction requirements for new sources, which are set by the federal government. See Deepa Varadarajan, Note, *Billboards and Big Utilities: Borrowing Land-Use Concepts To Regulate “Nonconforming” Sources Under the Clean Air Act*, 112 YALE L.J. 2553, 2558 (2003).

¹⁴ 42 U.S.C. § 7411(a)(2), (4) (2006) (defining new source as any source “the construction or modification of which is commenced after publication of regulations” and defining modification as “any physical change in, or change in method of operation of, a stationary source which increases the amount of air pollutant emitted”). This is like the converse of the vested rights doctrine, discussed in Part I.C, *infra*.

¹⁵ 33 U.S.C. §§ 1251–1387 (2006).

¹⁶ 33 U.S.C. § 1316(d); see also Nash & Revesz, *supra* note 10, at 1728–29 (discussing grandfathering provisions in Clean Water Act).

¹⁷ See Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental “Grandfather Clauses” and Their Role in Environmental Inequity*, 45 CATH. U. L. REV. 131, 132–33 & nn.8–15 (1995) (providing examples of grandfather clauses from various legal contexts); Steven Shavell, *On Optimal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 69–70 (2008) (same).

¹⁸ 42 U.S.C. § 12101–12213 (2006).

less restrictive accessibility standard to existing buildings than to new ones.¹⁹ Similarly, the Wilderness Act²⁰ grandfathers in a substantial number of existing uses—grazing rights in particular.²¹ In 1995, Florida enacted a new statute in response to a perceived failure of the courts to afford sufficient protection to private property under the state and federal takings clauses.²² That statute explicitly offers additional protection to existing uses, providing a new cause of action when a government “has inordinately burdened an *existing use* of real property or a vested right to a specific use of real property.”²³ Other, more targeted, examples are also easy to find.²⁴

As a descriptive matter, much existing use protection can be explained in purely political terms. It is a necessary concession to an entrenched interest group—owners of existing uses—and is required to secure a law’s passage.²⁵ In fact, however, the politics do not always line up so neatly in favor of protecting existing uses, especially

¹⁹ See 28 C.F.R. § 36.304 (2008) (implementing Title III of Americans with Disabilities Act; requiring existing buildings to “remove architectural barriers in existing facilities” but only “where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense”); see also John Grady & Damon Andrew, *Legal Implications of the Americans with Disabilities Act on Recreation Services: Changing Guidelines, Structures, and Attitudes in Accommodating Guests with Disabilities*, 13 J. LEGAL ASPECTS SPORT 231, 235 (2003) (describing application of ADA to new and existing facilities).

²⁰ 16 U.S.C. §§ 1131–1136 (2006).

²¹ See Mitchel P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 858 (1990) (“A short-lived proposal to eliminate existing grazing, made during the initial legislative process, was only an anomaly in an otherwise continuous history of grandfathering most grazing management structures and practices as acceptable nonconforming uses in wilderness.”).

²² See Bert J. Harris, Jr., Private Property Rights Protection Act, FLA. STAT. ANN. § 70.001 (West 2006); see also Nicole S. Sayfie & Ronald L. Weaver, *1999 Update on the Bert J. Harris Private Property Rights Protection*, 73 FLA. B.J. 49 (1999) (discussing application of and alternatives to Florida statute).

²³ FLA. STAT. ANN. § 70.001(2) (emphasis added). The statute defines an existing use, in relevant part, as “an actual, present use or activity on the real property . . . or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses.” *Id.* § 70.001(3)(b).

²⁴ For example, Montana voters passed by referendum a law eliminating the use of open pit mining with a cyanide reagent, but it grandfathered existing mines that already had a permit. See MONT. CODE ANN. § 82-4-390 (2007). In 1980, Arizona adopted a new law governing the use of groundwater that explicitly grandfathered existing uses of groundwater. See ARIZ. REV. STAT. ANN. § 45-462 (2003) (“The right to withdraw or receive and use groundwater pursuant to this article is a grandfathered right.”).

²⁵ See Robertson, *supra* note 17, at 132 (discussing grandfather clauses and observing that “when a tough new law is proposed, affected industry lobbyists fight, often successfully, to exempt the existing industry from the new, presumably more stringent requirements”). *But cf.* Elizabeth Bogley Roth, *Environmental Considerations in Hydroelectric Licensing: California v. FERC (Dynamo Pond)*, 23 ENVTL. L. 1165, 1183 (1993) (“One possible, but unarticulated, reason for the grandfather clause might be that Congress felt a hydroelectric license represents some sort of property right.”).

at the local level.²⁶ There, and particularly in the context of land use controls, local governments do sometimes seek to regulate away existing uses. In response, courts have developed a variety of land use doctrines to protect existing uses, many of which purport to be based on constitutional limitations.²⁷ This Article uses the specific context of these local land use decisions to examine the underlying constitutional and normative justifications for the judicial protection of existing uses.

Part I examines how current land use law strongly defends existing uses, although this protection often lies below the surface and is not immediately apparent. For example, amortization is an exception to the protection of existing uses that nevertheless clearly demonstrates the existence of the underlying rule.²⁸ The doctrine of amortization allows a local government to eliminate an existing use without paying compensation so long as the use is allowed to remain in place for some amount of time.²⁹ But no amortization rule allows the elimination of an existing use immediately, and, indeed, the duration of the amortization period is a matter of constitutional concern.³⁰ The doctrine therefore implicitly assumes that existing uses cannot be eliminated outright. Focusing only on the constitutionality of the duration of an amortization provision is like debating the jail time before deciding whether conduct was criminal. Other doctrines are similarly influenced by excessive deference to existing uses.³¹ In fact, the protection of existing uses runs like an underground current throughout the law of property. Its likely source is either doctrinal or normative, but both turn out to be unsatisfying.

Part II explores the doctrinal claim: that property law protects existing uses because the Constitution requires it. This is at least

²⁶ This point is considered in detail in Part III.D, *infra*.

²⁷ Those doctrines are the subject of Part I, *infra*.

²⁸ See *Vill. of Valatie v. Smith*, 632 N.E.2d 1264, 1266–67 (N.Y. 1994) (“Though the amortization period is typically discussed in terms of protecting the owners’ financial interests, it serves more generally to protect ‘an individual’s interest in maintaining the present use’ of the property.” (quoting *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 261 (N.Y. 1977))).

²⁹ For a discussion of amortization, see *infra* Part I.B.

³⁰ See, e.g., *Mayor and Council of New Castle v. Rollins Outdoor Adver., Inc.*, 475 A.2d 355, 359 (Del. 1984) (holding that “reasonable, required amortization of such nonconforming uses as sign boards may be accomplished with due process of law, and that such form of regulation does not necessarily constitute a compensable taking”); *Friends of East Fork v. Clark County*, No. 33422-4-II, 2006 WL 1745032, at *1 n.1 (Wash. Ct. App. June 27, 2006) (“Lawful nonconforming uses may continue but, subject to constitutional limits, the government may regulate or even terminate the use after a period of nonuse or a reasonable amortization period that allows the owner to recoup on investment.”).

³¹ These include, notably, the vested rights doctrine and the nuisance exception, both of which are discussed at length in Part I.C–D, *infra*.

partly true. However, there is hardly consensus about the constitutional source of the protection. In reviewing regulations of existing uses, many courts fail to specify the precise constitutional basis for their holdings.³² Often, courts simply assume that an existing use is protected from regulation without further explanation.³³

Today, the Takings Clause is the most likely source of protection, but it cannot fully account for courts' treatment of existing uses. According to the Supreme Court in *Penn Central*, the Takings Clause compels compensation when the government interferes with a property owner's investment-backed expectations.³⁴ The principal expectation to protect, according to the Supreme Court, is the existing use of the property.³⁵ In the years since *Penn Central*, however, courts generally have not used this test to protect existing uses; instead, they typically have used it to inquire whether a property owner's expectations about a *future* use were reasonable.³⁶ The other relevant basis for liability under *Penn Central* is the diminution in value test, which limits the amount a regulation can reduce property values before requiring compensation.³⁷ So long as some alternative use of the

³² See, e.g., *Sterngass v. Woodbury*, 433 F. Supp. 2d 351, 355 (S.D.N.Y. 2006) ("His only right is to continue a pre-existing non-conforming use, without expansion or change."); *Dublin v. Finkes*, 615 N.E.2d 690, 692 (Ohio Ct. App. 1992) (finding that federal and state constitutions both "recognize a right to continue a given use of real property if such use is already in existence at the time of the enactment of a land use regulation forbidding or restricting the land use in question"); *State v. Thomasson*, 378 P.2d 441, 443 (Wash. 1963) ("[W]e have recognized that property owners are not without some rights in the continuance of a legitimate business on their property despite a change in zoning.").

³³ See, e.g., *City of Annapolis v. Waterman*, 745 A.2d 1000, 1015 (Md. 2000) ("[I]nsofar as the ordinance required the reduction, removal, or destruction of existing property at the owners' expense, it was a taking . . ."); see also *Terminals Equip. Co. v. City & County of San Francisco*, 270 Cal. Rptr. 329, 335 (Cal. Ct. App. 1990) (rejecting takings claim because regulation was "only operating to restrict *new* uses of the subject [p]roperty, not to eliminate existing ones"); *Taylor v. Zoning Bd. of Appeals*, 783 A.2d 526, 531 (Conn. App. Ct. 2001) ("The right to continue an established nonconforming use of one's property is securely grounded, both in statutes and in previous decisions of this court and our Supreme Court.").

³⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

³⁵ *Id.* at 136.

³⁶ See, e.g., *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 638 (Minn. 2007) (holding that owner of option to purchase golf course had no reasonable investment-backed expectations to support claim that city's denial of amendment to comprehensive plan to permit residential development of property constituted taking); *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 103 (N.Y. 2005) ("The word 'investment' may seem awkward in discussing the expectations of a not-for-profit entity, but I think the meaning of 'investment-backed expectations' in this context is simply [claimant's] reasonable expectations as to the future use of [its] property."). The evolution of *Penn Central*'s investment-backed expectations prong is discussed in Daniel R. Mandelker, *The Notice Rule in Investment-Backed Expectations*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 21, 21–29 (Thomas E. Roberts ed., 2002).

³⁷ *Penn Central*, 438 U.S. at 124 (describing multifactor test for takings liability).

property remains, however, eliminating an existing use should not necessarily trigger takings liability. More problematically, *Penn Central* postdates the development of zoning and the protection of existing uses by almost half a century. If anything, *Penn Central* uncritically incorporates the same underlying assumption about existing uses without providing any strong constitutional or theoretical underpinnings. The Due Process Clause, the other primary constitutional source for protecting property, fares no better.³⁸

Part III examines possible normative justifications for existing use protection and finds them all lacking. Existing uses seem to deserve special protection, but it is surprisingly difficult to articulate exactly why. At first blush, obvious possible rationales include a general sense of fairness and the desire to protect property owners' reliance on existing regulations. Looking more carefully, however, neither rationale clearly justifies distinguishing between existing uses and prospective future uses. True, it seems unfair for a government to change the regulatory rules in the middle of the game, thereby interfering with owners' reasonable reliance on preexisting rules. But these fairness concerns are at issue whenever the government regulates—whether the regulation affects existing uses or not. The expectations of an owner who purchased undeveloped property planning to build a large development are also undermined by a downzoning of the property, even though it affects only her intended use and not an existing one. Arguments in favor of protecting existing uses assume that there is something different, truly different, about the unfairness associated with regulating existing as opposed to future uses. But merely invoking fairness or reliance does not explain what this difference is.

Other superficially appealing justifications for existing use protection also lose their sheen on closer inspection. Extent of loss, for example, does not turn on the existence of a use. Compare the harm to a developer prevented from building a new condominium development with the harm of eliminating a decrepit shack in the woods. The loss from the former may be in the millions of dollars, the loss from the latter in the thousands, and yet it is the latter that the law more vigorously protects. Other possible justifications are similarly unconvincing.³⁹

Finally, Part IV critiques a broader functional justification: that the protection of existing uses is useful as an easy-to-administer

³⁸ For a discussion of the Due Process Clause, see *infra* Part II.C.

³⁹ The other possible justifications for existing use protection considered in this Article include the endowment effect, political economy, waste prevention, owner expectations, and the stability of the status quo. See *infra* Part III.

bright-line rule for property protection. However, even deciding what counts as an existing use turns out to be no easy task, undercutting this administrability justification. There are, moreover, offsetting pressures that militate against protecting existing uses. In addition to general concerns about limiting the government's ability to regulate, the legal transitions literature suggests that protecting existing uses can lead to inefficient investments in property by inducing owners to race to lock in a use in anticipation of a rule change.⁴⁰ While this is a familiar insight from the transitions literature, it has particular force in the land use context precisely because of the previously unexamined ubiquity of existing use protection.

As a result, this Article concludes that courts should not protect existing uses any differently than they protect prospective future uses. The categorical difference in the treatment of existing and prospective future uses is not compelled by either constitutional or normative considerations, and it comes with substantial costs.

Legislatures or policymakers may well have good reason to protect existing uses in any particular situation. Concerns about transition costs, fairness, political opposition, and the like may well cut in favor of some existing use protection. It may often make good sense for land use regulations to treat existing uses differently, grandfathering them into zoning regulations and offering compensation for their elimination. But this will not always be true, and where it is not, legislatures should be free to act, or at least more free than courts' current assumptions about existing use protection will allow. Quite simply, existing uses should not receive the kind of categorical protection from courts that property and land use law currently offer.

This is not to say that existing uses should receive no protection at all. Instead, this is an argument for symmetry: that existing and prospective uses should be subject to the same takings and due pro-

⁴⁰ See, e.g., David A. Dana, *Natural Preservation and the Race To Develop*, 143 U. PA. L. REV. 655, 677–95 (1995) (describing how natural preservation regulation encourages development); Kaplow, *supra* note 9, at 527–31 (analyzing risks and incentives created by government regulation); see also SHAVIRO, *supra* note 9, at 104–15 (discussing norm against nominally retroactive taxes and implications of this norm); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 582–84 (2001) (illustrating effect of future regulatory takings on investment decisions); Saul Levmore, *Changes, Anticipations, Reparations*, 99 COLUM. L. REV. 1657 (1999) (exploring incentives created by changes in law); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Process*, 13 J. CONTEMP. LEGAL ISSUES 211, 216–18 (2003) (arguing for transition policies for regulatory takings of private property as type of “government-provided insurance”). For a leading account of moral hazard, see generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996). Moral hazard in the land use context is considered in detail in Part IV.A, *infra*.

cess analyses. The Constitution, in other words, should not distinguish between the two.

I

EXISTING USES IN THE LAW

The protection of existing uses is on display across a wide cross-section of law. From important state land use doctrines to various statutes, the law contains a strong background rule protecting existing uses from government regulation. Many doctrines explicitly invoke constitutional restrictions on the government's ability to regulate existing uses, although the exact source and content of the constitutional protection are unclear.⁴¹ This Part explores significant land use concepts and doctrines—retroactive zoning, nonconforming uses and amortization, vested rights, and nuisance exceptions—that either explicitly protect or implicitly assume the protection of existing uses.⁴²

A. *Retroactive Zoning*

Zoning is perhaps the most obvious context in which the problem of existing uses regularly arises. The issue can be traced directly back to the Standard State Zoning Enabling Act (SZEA).⁴³ Promulgated in the 1920s, the SZEA represented an effort by the Commerce Department to provide a blueprint for states to grant municipalities the power to zone.⁴⁴ It was drafted as model legislation, intended to be adopted in its entirety by individual states.⁴⁵ By the 1930s, a

⁴¹ See *infra* Part II.

⁴² The list is not exhaustive. The protection of existing uses is found in other areas too. According to a leading casebook, for example, local governments may be more likely to grant variances for structures that already exist than for those yet to be built. See ELLICKSON & BEEN, *supra* note 6, at 293 (“[P]eople who built first and sought variances later were more successful in obtaining variances than those who proceeded lawfully.”).

⁴³ STANDARD STATE ZONING ENABLING ACT (Advisory Comm. on Zoning, U.S. Dep’t of Commerce 1926), available at <http://myapa.planning.org/growingsmart/pdf/SZENablingAct1926.pdf> [hereinafter SZEA]; see Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 58 (1981) (finding that “most zoning ordinances” either completely or partially exempt “land uses that pre-date the ordinance” and remarking that “there was some feeling on the part of the drafters of the SZEA that any attempt to apply zoning to existing land uses and structures without compensation would have been found unconstitutional”). The issue goes back further than that. The famous case *Hadacheck v. Sebastian*, involving a municipality eliminating an existing use, dates back to 1915. 239 U.S. 394 (1915).

⁴⁴ Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295, 297 (2000).

⁴⁵ The SZEA itself provides:

3. *Modify this standard act as little as possible.*—It was prepared with a full knowledge of the decisions of the courts in every case in which zoning acts have been under review, and has been carefully checked with reference to sub-

majority of states had adopted some form of the SZEA, and in the subsequent decades almost every state followed suit.⁴⁶

The SZEA recognized and wrestled with the problem of existing uses and ultimately allowed zoning to apply to them. Paragraph 9 of the explanatory notes to the SZEA, with an illuminating double negative, provides:

No declaration that act is not retroactive.—Some laws contain a provision to the effect that “the powers by this act conferred shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.” While the almost universal practice is to make zoning ordinances nonretroactive, it is recognized that there may arise local conditions of a peculiar character that make it necessary and desirable to deal with some isolated case by means of a retroactive provision affecting that case only. For this reason it does not seem wise to debar the local legislative body from dealing with such a situation.⁴⁷

This provision acknowledges that the overwhelming convention—indeed, the “almost universal practice”—is to have zoning apply only prospectively, that is, only to future uses but not to existing ones. The SZEA therefore recognizes that there is something special about existing uses but it does not exempt them from zoning. It also reflects an implicit assumption that the Constitution does not compel their protection either.

Not all states followed the SZEA; some state zoning enabling acts explicitly forbade application of zoning to existing uses.⁴⁸ Meanwhile, even in states that followed the SZEA, courts struck down as unconstitutional some zoning ordinances that applied to existing uses.⁴⁹ In

sequent decisions. A safe course to follow is to make only those changes necessary to have the act conform to local legislative customs and modes of expression.

SZEA, *supra* note 43, at 1.

⁴⁶ Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 848 & n.29 (1983).

⁴⁷ SZEA, *supra* note 43, at 2.

⁴⁸ The zoning enabling acts of Illinois, Kansas, Massachusetts, New Hampshire, Ohio, and Wisconsin provided that zoning could not apply to existing uses. See Comment, *Retroactive Zoning Ordinances*, 39 YALE L.J. 735, 735 & n.6 (1930) (citing statutes). But see MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* 81 (1987) (describing Los Angeles ordinance predating zoning that permitted application of land use restrictions to existing businesses).

⁴⁹ See, e.g., *Jones v. City of Los Angeles*, 295 P. 14, 18–19, 22 (Cal. 1930) (striking down ordinance and citing, inter alia, *A.C. Blumenthal & Co. v. Cryer*, 236 P. 216 (Cal. Dist. Ct. App. 1925), *Frank J. Durkin Lumber Co. v. Fitzsimmons*, 147 A. 555, 558 (N.J. 1929), *Alfred Bettman, Constitutionality of Zoning*, 37 HARV. L. REV. 834, 853 (1924), and J.S.

Jones v. City of Los Angeles, the California Supreme Court heard a challenge to a provision in the Los Angeles zoning ordinance that made it illegal to operate or maintain a sanitarium outside of certain limited areas.⁵⁰ The ordinance did not distinguish between existing and future sanitariums.⁵¹ After finding the zoning ordinance constitutional as applied prospectively, the court asked whether the same reasoning could justify the destruction of *existing* businesses.⁵² It held that “[o]nly a paramount and compelling public necessity could sanction so extraordinary an interference with useful business.”⁵³ Finding none in that case, the court struck down the zoning ordinance as applied to existing sanitariums.⁵⁴ As another court later articulated, “It is fundamental that a zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning regulation cannot deprive the owner of a use to which his property was put before the zoning regulation became effective.”⁵⁵

Commentators from the 1920s and 1930s, writing about the SZEAs, also doubted the validity of a zoning ordinance that applied to existing uses.⁵⁶ A comment in the *Yale Law Journal* from 1930 noted that “it has been generally assumed that any attempt to make zoning ordinances retroactive would meet with the opposition of the courts and might result in their declaring the ordinances as a whole unconstitutional.”⁵⁷ As is typical, however, the comment did not explain the nature or source of the constitutional limitation.

Young, *City Planning and Restrictions on the Use of Property*, 9 MINN. L. REV. 593, 628 (1925)).

⁵⁰ 295 P. 14 (1930).

⁵¹ *Id.* at 15.

⁵² *Id.* at 17.

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 22.

⁵⁵ *Bd. of County Comm'rs v. Petsch*, 109 N.W.2d 388, 390 (Neb. 1961); *see also* Wayne McCormack, Lochner, *Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 459–60 & n.153 (2005) (finding in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), “some slight suggestion that failure to grandfather existing uses when enacting a new zoning provision might be a problem”).

⁵⁶ *See, e.g.*, Bettman, *supra* note 49, at 853 (noting that application of zoning to existing uses would present same constitutional problem as retroactive laws more generally); Young, *supra* note 49, at 628 (“Retroactive zoning is not to be recommended except in very unusual cases [when] public protection imperatively demands it.”).

⁵⁷ Comment, *supra* note 48, at 737; *see also* Newman F. Baker, *Zoning Legislation*, 11 CORNELL L.Q. 164, 174–75 (1926) (“The Standard Act does not declare that the zoning ordinances shall not be retroactive. . . . [B]ut the practice would cause many cases of individual hardship if tried in a comprehensively zoned city which would result in raising the issue of the constitutionality of zoning in general.”).

B. *Prior Nonconforming Uses and Amortization*

Since the promulgation of the SZEA, rules have developed around the protection of prior nonconforming uses—that is, preexisting uses that are not in conformity with new land use regulations.⁵⁸ These separate rules and doctrines governing the treatment of prior nonconforming uses further reveal the law's special solicitude toward existing uses.

Initially, the SZEA contemplated that prior nonconforming uses would simply die out over time.⁵⁹ The assumption was that either their incompatibility with surrounding uses would make them economically unsustainable or they would be lost to fire, abandonment, or some other event, without government interference.⁶⁰ That assumption has proven false. For some uses, their very nonconformity is what makes them particularly valuable—in effect assuring their survival.⁶¹ In response, local governments have sought proactive ways, short of outright condemnation, to speed the demise of noncon-

⁵⁸ See Eric J. Strauss & Mary M. Giese, *Elimination of Nonconformities: The Case of Voluntary Discontinuance*, 25 URB. LAW. 159, 160 (1993) (defining nonconforming use as “the lawful use of a building or premises, existing at the time of the adoption or amendment of a zoning ordinance, although such use does not conform to the provisions of the ordinance” (quoting WIS. STAT. § 62.23(7)(h) (1988))). Courts and particularly commentators distinguish between nonconforming structures and nonconforming uses, although essentially the same reasoning applies to both. See *id.* at 161.

⁵⁹ See *City of Los Angeles v. A.I. Gage*, 274 P.2d 34, 40 (Cal. Dist. Ct. App. 1954) (“Until recently zoning ordinances have made no provision for any systematic and comprehensive elimination of the nonconforming use. The expectation seems to have been that existing nonconforming uses would be of little consequence and that they would eventually disappear. The contrary appears to be the case.” (internal citations omitted)); Osborne M. Reynolds, Jr., *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 WASH. U. J. URB. & CONTEMP. L. 99, 99–100 (1988) (noting that courts also believed that nonconforming uses would die out and that courts have often assumed, where ordinance did not specify, that ordinance did not apply retroactively).

⁶⁰ See Varadarajan, *supra* note 13, at 2556 (“Zoning regulators believed that these restrictions would cause the gradual disappearance of such nonconforming uses.”); see also *Huntington Props., LLC v. Currituck County*, 569 S.E.2d 695, 700 (N.C. Ct. App. 2002) (“Moreover, ‘non-conforming uses are not favored by the law. Most zoning schemes foresee elimination of non-conforming uses either by amortization, or attrition or other means.’” (quoting *CG & T Corp. v. Bd. of Adjustment*, 411 S.E.2d 655, 659–60 (N.C. Ct. App. 1992))). This view traditionally justifies laws limiting improvements or expansions of nonconforming uses. See, e.g., *County Council v. E.L. Gardner, Inc.*, 443 A.2d 114, 119 (Md. 1982) (recognizing that “the purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence”).

⁶¹ See Reynolds, *supra* note 59, at 109 (“[N]onconforming uses thrived due to the protection from new competition given them by the zoning laws.”); Strauss & Giese, *supra* note 58, at 163 (“Unfortunately, nonconforming uses were not phased out because the restriction on the development of similar uses in the area created a virtual monopoly, which allowed the nonconforming use to flourish.”).

forming uses.⁶² These efforts have spawned robust and varied rules about when a property owner is entitled to expand, adapt, or rebuild such a use.⁶³ Also, in many states local governments can affirmatively eliminate prior nonconforming uses without paying compensation by allowing an affected property owner to continue her use long enough to amortize her investment.⁶⁴ Fundamentally, amortization is “a technique for the removal of non-conforming uses after the value of a non-conforming use has been recovered—or amortized—over a period of time. . . . Since the value of the use has been amortized, no compensation is payable after the expiration of the period.”⁶⁵

The use of amortization strikes many as unfair, and courts disagree about its constitutional basis and its limits. Some state courts have held that amortization in lieu of compensation is simply impermissible.⁶⁶ Other courts have held that amortization is a constitutional means of eliminating prior nonconforming uses, so long as the amortization period is sufficiently long.⁶⁷ Much has been written

⁶² These include precluding any expansion of a nonconforming use and terminating a nonconforming use if the use is abandoned, changed, or destroyed. See Craig A. Peterson & Claire McCarthy, *Amortization of Legal Land Use Nonconformities as Regulatory Takings: An Uncertain Future*, 35 WASH. U. J. URB. & CONTEMP. L. 37, 39–41 (1989) (summarizing early approaches to eliminating existing uses); see also Reynolds, *supra* note 59, at 101–04 (describing limitations on growth and repair); Strauss & Giese, *supra* note 58, at 163–67 (summarizing all available methods).

⁶³ For a summary and analysis of these rules, see Eunice A. Eichelberger, Annotation, *Alteration, Extension, Reconstruction, or Repair of Nonconforming Structure or Structure Devoted to Nonconforming Use as Violation of Zoning Ordinance*, 63 A.L.R. 4th 275 (1988).

⁶⁴ See Peterson & McCarthy, *supra* note 62, at 37 (“[S]tate courts have generally upheld amortization provisions since the 1950s.”); Reynolds, *supra* note 59, at 109 (“[M]ost courts held that amortization provisions are valid if they are reasonable in nature. This is currently the majority view in America.”). The actual use of amortization may be quite limited, however. See Margaret Collins, *Methods of Determining Amortization Periods for Non-conforming Uses*, 3 WASH. U. J.L. & POL’Y 215, 216 (2000) (“A survey of 489 cities showed that, although planners in 159 cities had access to amortization programs, only 27 cities had actually used them.”).

⁶⁵ Collins, *supra* note 64, at 216. Amortization is related to the depreciation of an asset for tax purposes. See *id.* at 223–24 (explaining various depreciation methods).

⁶⁶ See, e.g., *City of Oakbrook Terrace v. Suburban Bank & Trust Co.*, 845 N.E.2d 1000, 1011 (Ill. App. Ct. 2006) (holding that municipal ordinance providing amortization period for nonconforming signs violated State Eminent Domain Act, which required just compensation); *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965) (“Of course, every comprehensive zoning ordinance limits and thereby regulates the use of property prospectively. But we cannot embrace the doctrine espoused by advocates of the amortization technique that there is no material distinction between regulating the future use of property and terminating pre-existing lawful nonconforming uses.”); *PA Nw. Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991) (holding that amortization provisions are unconstitutional because they take property without just compensation).

⁶⁷ See, e.g., *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1032 (Ind. 1998) (holding that amortization provisions that require owner to discontinue nonconforming use after

about the amount of time that governments must give property owners before an existing use can be eliminated and about when amortization statutes can and should be applied.⁶⁸ In general, courts considering the elimination of a prior nonconforming use weigh the harm to the property owner against the benefit to the public.⁶⁹ The test sounds primarily in due process.⁷⁰

These doctrinal nuances can be set aside for now, however, in order to focus on the underlying assumptions on which existing use doctrine rests. The background rule, even in jurisdictions that allow amortization, is that governments cannot eliminate existing uses

certain period of time are not per se unconstitutional); *Trip Assocs. v. Mayor and City Council of Baltimore*, 898 A.2d 449, 457 (Md. 2006) (“So long as it provides for a reasonable relationship between the amortization and the nature of the nonconforming use, an ordinance prescribing . . . amortization is not unconstitutional.”); *Red Roof Inns, Inc. v. City of Ridgeland*, 797 So. 2d 898, 902 (Miss. 2001) (“The weight of authority supports the conclusion that a reasonable amortization provision would not be unconstitutional.” (citation omitted)). The inquiry into duration is also a source of controversy, with some courts holding that amortization must be sufficiently long to allow the value of the buildings on the property to depreciate fully, and others holding that the adequacy of the duration must be evaluated by comparing the burden to the property owner with the burden to the public of allowing the use to continue. *Compare Lone v. Montgomery County*, 584 A.2d 142, 153 (Md. Ct. Spec. App. 1991) (“We hold that the ten-year amortization period in the case at bar is reasonable because within that time, the multi-family housing owners could recoup any lost investment . . .”), with *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 262 (N.Y. 1977) (“If an owner can show that the loss he suffers as a result of the removal of a nonconforming use at the expiration of an amortization period is so substantial that it outweighs the public benefit gained by the legislation, then the amortization period must be held unreasonable.”).

⁶⁸ *Cf. Reynolds*, *supra* note 59, at 108 (describing constitutional concern about duration of amortization period). *See generally* Collins, *supra* note 64.

⁶⁹ *See Modjeska Sign Studios*, 373 N.E.2d at 262 (“In essence, however, we believe the critical question which must be asked is whether the public gain achieved by the exercise of the police power outweighs the private loss suffered by owners of nonconforming uses.”); Collins, *supra* note 64, at 217 (“The process of determining amortization periods is . . . a ‘balancing test’ weighing the private cost against the public gain.”). *But see* Peterson & McCarthy, *supra* note 62, at 72–79 (applying *Penn Central* test to as applied challenge to amortization provisions).

⁷⁰ *See Lingle v. Chevron*, 544 U.S. 528, 540 (2005) (describing due process test). In fact, if the test for amortization of prior existing uses is not more protective than substantive due process, it threatens to become superfluous. In a dissenting opinion, a judge on the Washington Court of Appeals recognized this point:

The majority’s flaw is its failure to make the distinction between continuation of a nonconforming use which is exempt from police power regulation on the one hand, and imposition of the police power without exemption, subject only to the usual requirements of due process, on the other. If the latter be the rule, the nonconforming use doctrine is robbed of its reason for existence, and is no more than the usual due process test.

Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 959 P.2d 1024, 1036 (Wash. 1988) (en banc) (Sanders, J., dissenting).

immediately.⁷¹ Even where amortization is permissible, then, it is a narrow and constrained exception to the general rule that the government cannot eliminate existing uses without paying compensation. The source of that underlying and fundamental restriction, however, is left unstated.

C. *The Vested Rights Doctrine*

Outside of the zoning context, one of the easiest places to discern the special protection of existing uses is in the vested rights doctrine, which defines when a property owner has taken sufficient steps to lock in existing land use regulations.⁷² The doctrine is usually implicated when a property owner has begun but not yet completed some project before the government changes the applicable regulations. In its most general form, the vested rights doctrine defines when, and under what circumstances, an incomplete project can count as an existing use.⁷³ The doctrinal details determining when a right vests are the subject of frequent commentary.⁷⁴ It is the implicit assumption motivating the doctrine that is of particular interest here, however, not the niceties of the doctrine itself.

The vested rights doctrine assumes that if a right has vested—that is, if a project is sufficiently far along—then it is entitled to protection from subsequently enacted land use regulations (at least those not falling within the other exceptions described below).⁷⁵ Under the

⁷¹ Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 623, 660–61 (1978) (“Early cases and treatises contain numerous admonitions based on reasons at once philosophical, practical, and legal that zoning must be prospective in nature. The assumption has not changed dramatically and continues to be of paramount importance in many modern land regulatory statutes.”); Peterson & McCarthy, *supra* note 62, at 39 (finding that “pre-existing uses and aspects of development are always to some extent ‘grandfathered’”); Reynolds, *supra* note 59, at 104 (“Supporters of [amortization] have generally agreed that constitutional limitations, or considerations of fairness require that existing uses be allowed to continue until the user has had a reasonable opportunity to amortize his investment.” (footnotes omitted) (internal quotation marks omitted)).

⁷² See Cunningham & Kremer, *supra* note 71, at 625–26 (summarizing vested rights doctrine).

⁷³ For a typical hypothetical raising this problem, see CHARLES L. SIEMON ET AL., VESTED RIGHTS 2 (1982) (introducing book with stylized hypothetical of developer affected by zoning regulations passed after significant investment).

⁷⁴ See generally Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test To Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1069–71 (2000) (endorsing Washington State’s vested rights rule in part because it provides “date certain” when development rights will vest); E.A. Prichard & Gregory A. Riegle, *Searching for Certainty: Virginia’s Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983 (1999) (describing complex history of vested rights issue in Virginia).

⁷⁵ See, e.g., *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 194 P.2d 148, 152 (Cal. Dist. Ct. App. 1948) (holding that valid permit “ripens into a vested property right which

vested rights doctrine, then, property rights are subject to a kind of tipping point. Before a right vests, property receives one level of protection. But as soon as an owner has done enough to establish a particular use, the property becomes entitled to much greater protection.

Consider, for example, *Prince George's County v. Sunrise Development Ltd. Partnership*.⁷⁶ There, the developer of a proposed twelve-story apartment building sued to prevent a downzoning. The parties all agreed that if the developer had actually begun construction of the building, the downzoning could not have applied to the property.⁷⁷ The question in the case was whether pouring a footing for a single column to support a proposed portico counted as a sufficient start to the building process to vest the development rights.⁷⁸ The court described how the footing had been covered with plastic and straw and so was not visible to building inspectors,⁷⁹ how a ten-inch by ten-inch by one-inch steel plate had not been affixed to the top of the footing,⁸⁰ and how the footing ultimately occupied only four square feet on the site.⁸¹ The Maryland Court of Appeals ultimately reversed the lower court and held that this footing was not enough to vest development rights.⁸² Had the construction progressed past that point, perhaps by building enough above ground to be visible to building inspectors—then the development rights would have vested and the government suddenly would have been powerless to downzone the property without compensation.

The vested rights doctrine can therefore best be explained as incorporating an assumption that existing uses receive special protec-

may not be taken from him against his will other than by proceedings in eminent domain with the payment of just compensation"). According to Black's Law Dictionary, a vested right is "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." BLACK'S LAW DICTIONARY 1349 (8th ed. 2004).

⁷⁶ 623 A.2d 1296 (Md. 1993).

⁷⁷ *Id.* at 1301.

⁷⁸ *Id.* at 1297 ("The developer's vested rights argument ultimately rests on a single footing, one that was placed in the ground . . . for a proposed column at a proposed outside corner of a proposed portico.").

⁷⁹ *Id.* at 1298–99.

⁸⁰ *Id.* at 1298–99 n.3.

⁸¹ *Id.* at 1302.

⁸² Specifically, the court reinstated an administrative board's finding that development rights had not vested, holding:

From the standpoint of a member of the general public who is either viewing the property from its boundaries or is consensually on the property, the footing is not so clearly the commencement of construction as to render the Board's finding to the contrary arbitrary, capricious or without substantial evidence on the entire record.

Id. at 1305.

tion from government regulation. The focus of the vested rights inquiry is on whether the property owner has done enough—i.e., has taken sufficient affirmative steps—to be entitled to put her property to an intended use.⁸³ Once a use has been legally established, it is entitled to protection as an existing use. In other words, the line between a vested right and a mere expectancy accords with the line between an existing and a prospective future use.

D. *The Nuisance Exception*

A broad but problematic exception to the protection of existing uses is the so-called “nuisance exception” to the Takings Clause.⁸⁴ Applying the nuisance exception, the government can regulate away a hazardous or injurious activity without paying compensation. Usually left unstated, however, is the implicit assumption that non-harmful uses cannot be eliminated without compensation. Framed as an exception to takings liability, the nuisance inquiry again assumes and reinforces the background rule that existing uses cannot be eliminated *unless* they are nuisances.

Most famously, in *Hadacheck v. Sebastian*, the Supreme Court upheld a statute that eliminated an existing brickyard from a residential neighborhood.⁸⁵ Similarly, two early twentieth-century cases from Louisiana upheld a zoning ordinance that required existing businesses to liquidate or move out of residential neighborhoods within one year on grounds of harm prevention.⁸⁶ Colorfully, in 1919 the Supreme Court of California upheld an ordinance that prohibited keeping

⁸³ See, e.g., John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL’Y 603, 607 (2000) (“At least 30 state courts have used the issuance of a building permit as the principal benchmark for [vested rights], but virtually all of these courts also require that other actions be taken in reliance upon the permit, such as construction or expenditure of funds to implement the permit.”).

⁸⁴ See Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 674 (2007) (“[T]he Supreme Court has typically, although not universally, allowed government to regulate broadly against nuisance activities and thereby lower private property value without compensation, especially where the regulation provided reciprocal benefits to the affected property owner.”); Christine A. Klein, *The New Nuisance: An Antidote to Wetland Loss, Sprawl, and Global Warming*, 48 B.C. L. REV. 1155, 1195 (2007) (“In theory, traditional takings law has long recognized a nuisance exception under which landowners are not entitled to compensation when they are precluded from using their land to create a nuisance.”).

⁸⁵ 239 U.S. 394 (1915). *Mugler v. Kansas*, 123 U.S. 623 (1887), is similar, rejecting a constitutional challenge to prohibition in Kansas on the basis of a harm-prevention rationale. More perniciously, in 1911 the California Supreme Court upheld legislation eliminating 110 Chinese laundries on finding that they caused a harm. See *Ex Parte Quong Wo*, 118 P. 714 (Cal. 1911), discussed in Young, *supra* note 49, at 627.

⁸⁶ Comment, *supra* note 48, at 736–37 (citing *State v. McDonald*, 121 So. 613 (La. 1929), and *State ex rel Dema Realty Co. v. Jacoby*, 123 So. 314 (La. 1929)).

mules in residential neighborhoods.⁸⁷ Finding the ordinance reasonable, that court wrote:

[W]e know of no heaven-sent maxim to invent a silencer for this brute, that one beholding him, neck outstretched and jaws distended wide, could persuade himself that he but heard from the depths of the beast's crimson coated cavern . . . a sound so fine there's nothing lives '[t]wixt it and silence.⁸⁸

Similar, if less colorful, cases are now legion.⁸⁹

Instead of repudiating robust protection for existing uses, these cases are part of a distinct and more limited doctrine that permits eliminating existing uses for nuisance or harm prevention.⁹⁰ In other words, harm prevention is an exception to the implicit background rule that the government cannot simply regulate away an existing use. Where a regulation eliminating an existing use is not preventing a harm, courts have held the regulation invalid in the absence of compensation.⁹¹ Of course, as many have observed, it is hard to find a limiting principle that distinguishes between a regulation preventing a harm and a regulation conferring a benefit,⁹² but that such a line even

⁸⁷ *Boyd v. City of Sierra Madre*, 183 P. 230 (Cal. 1919), *quoted in* *Young*, *supra* note 49, at 616.

⁸⁸ *Id.* at 232 (ellipsis in original) (internal quotation marks omitted).

⁸⁹ *See, e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (upholding regulation banning excavations below water table despite effect of eliminating gravel mining operation in existence for thirty years); *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35 (Fla. 1990) (holding that destruction of trees exhibiting bacterial disease did not constitute taking); *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 555 (Minn. 1996) (denying compensation where landlord's rental dwelling license was revoked after tenants received multiple disorderly conduct citations because ordinance "serves a public harm prevention purpose").

⁹⁰ *See* *Young*, *supra* note 49, at 627 ("Some cities have made their ordinances retroactive for industries [that are] more or less offensive."); Comment, *supra* note 48, at 737 ("It is a common occurrence, where there are zoning ordinances in effect, for the exclusions to begin with nuisances and near-nuisances, over which municipalities have always had extensive control."). Moreover, *Hadacheck* triggered a backlash against Los Angeles's early twentieth-century land use regulations that applied to existing uses: Following *Hadacheck*, many land use statutes exempted existing uses. WEISS, *supra* note 48, at 86.

⁹¹ *See, e.g.*, *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 773 (Wash. 1992) ("[R]egulations which enhance public interests, and go beyond preventing harmful activity, may constitute a taking. The regulatory scheme here goes beyond preventing harm."); *see also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–30 (1992) (holding that regulations which prohibit all economically beneficial use of land are unconstitutional without compensation to burdened property owners unless that regulation is proscribing use under established property and nuisance principles); *Robinson v. City of Seattle*, 830 P.2d 318, 328 (Wash. 1992) ("[I]f the regulation . . . goes beyond mere harm prevention to require a property owner to provide a public benefit, then that regulation is susceptible to a constitutional taking challenge.").

⁹² *See, e.g.*, Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 *FORDHAM ENVTL. L. REV.* 433, 475–78 (1995); *see also* *Lucas*, 505 U.S. at 1024 (observing that difference between preventing harm and conferring benefit is "often in the eye of the beholder").

needs to be drawn demonstrates that existing uses are normally protected.

II

CONSTITUTIONAL PROTECTION FOR EXISTING USES

As Part I demonstrated, a strong current running through land use law protects existing uses from being regulated away without compensation. This protection is usually based upon perceived constitutional requirements whose nature and content are defined only vaguely. Looking closely at the supposed doctrinal underpinnings for existing use protection reveals how startlingly weak they are. Courts frequently invoke the Constitution as compelling a higher level of protection for existing uses but fail to articulate precisely why and how this level of protection applies. Instead of a coherent set of doctrines based on sound constitutional footing, existing use protection is generally an unexamined assumption that courts blindly follow.

*Hansen Bros. Enterprises v. Board of Supervisors*⁹³ is representative. In that case, the Supreme Court of California wrote:

Zoning ordinances and other land use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses. "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected."⁹⁴

In its general discussion of zoning's application to existing uses, the *Hansen Brothers* court cited *Penn Central*,⁹⁵ the foundational modern Takings Clause case, as well as *Euclid v. Ambler Realty Co.*,⁹⁶ the case that upheld zoning against a facial Due Process Clause challenge.⁹⁷ The court, however, went no further either in analyzing the Takings Clause or the Due Process Clause or in explaining why or how either Clause protects existing uses. This is quite typical.⁹⁸

It is therefore no simple task even to identify the supposed constitutional basis for the land use doctrines discussed in Part I. The next

⁹³ 907 P.2d 1324 (Cal. 1996).

⁹⁴ *Id.* at 1335 (quoting *Edmonds v. Los Angeles County*, 255 P.2d 772, 777 (Cal. 1953)).

⁹⁵ *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978)).

⁹⁶ *Id.* (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

⁹⁷ *Euclid*, 272 U.S. at 397.

⁹⁸ *See, e.g.*, *Calvert v. County of Yuba*, 145 Cal. App. 4th 613, 623 (2006) ("In light of the state and federal constitutional takings clauses, when zoning ordinances or similar land use regulations are enacted, they customarily exempt existing land uses (or amortize them over time) to avoid questions as to the constitutionality of their application to those uses."); *Prince George's County v. Sunrise Dev. Ltd.* 623 A.2d 1296, 1303–04 (Md. 1993) (stating, without elaboration, that vested rights doctrine has "constitutional foundation"). For other examples, see *supra* notes 1, 32, and 33.

section undertakes this necessary first step; the sections that follow examine more fully how takings and due process law actually apply to existing uses.

A. *Constitutional Underpinnings*

The constitutional basis for protecting existing uses is not at all clear. Looking first at zoning, early cases challenging zoning ordinances were contemporaneous with *Pennsylvania Coal Co. v. Mahon* (*Penn Coal*) but predate any conception of the Takings Clause as providing robust property protection from land use regulations.⁹⁹ It is therefore not surprising that the early limits on zoning power appear to come from general limits on the police power and from the Due Process Clause more broadly.¹⁰⁰ Courts often demanded an important or compelling government reason for zoning existing uses and stood ready to invalidate zoning ordinances that did not have one.¹⁰¹ As zoning authorities have grown more sophisticated, however, they have come to employ more targeted techniques to eliminate existing uses. These techniques implicate a more specific but still unsettled constitutional inquiry.

Courts' treatment of amortization statutes highlights the doctrinal confusion surrounding existing uses generally and prior nonconforming uses in particular. A number of courts have held that an amortization period is nothing but a deferred taking of property.¹⁰² They reason that eliminating an existing use immediately would be an unconstitutional taking of property and that putting off eliminating the use until tomorrow (or for a fixed amortization period) is no more constitutional.¹⁰³ Allowing a business or use to remain in existence

⁹⁹ *Penn Coal*, the case that famously identified the possibility of regulatory takings, was decided in 1922. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). The Supreme Court did not invalidate or even address the constitutionality of a land use regulation under the Takings Clause until *Penn Central* in 1978. *See* 438 U.S. 104 (1978).

¹⁰⁰ Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 838–51 (2006).

¹⁰¹ *See* cases cited *supra* note 49.

¹⁰² *E.g.*, *Hoffmann v. Kinealy*, 389 S.W.2d 745, 754–55 (Mo. 1965) (finding that elimination of prior nonconforming use of land for open storage of lumber and other building materials and equipment would trigger takings liability under Missouri Constitution—"a taking not to be justified as an exercise of the police power which is always subject to, and may never transcend, constitutional rights and limitations"); *PA Nw. Distribs., Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991) (finding amortization of lawful preexisting use violative of Pennsylvania Constitution); *cf.* *Collins*, *supra* note 64, at 217 ("The amortization technique, as applied to non-conforming uses, has been described as more of a postponement than a solution."); *Reynolds*, *supra* note 59, at 105 & n.24 (listing cases where court did not distinguish between immediate and delayed cessation).

¹⁰³ *Hoffmann*, 389 S.W.2d at 753 (stating that "no one has, as yet, been so brash as to contend that . . . a pre-existing lawful nonconforming use might be terminated *immedi-*

for a while—even for a few years—is no substitute for the compensation the Takings Clause requires.¹⁰⁴

Other courts have struck down amortization provisions after applying a substantive due process analysis.¹⁰⁵ These courts reason that land use regulations eliminating existing uses are generally arbitrary or unreasonable. As with all police powers, the zoning power is limited by the Due Process Clause, and this limit requires an inquiry into the public benefit and private harms of a zoning ordinance.¹⁰⁶ Since, according to these courts, the private harm of eliminating an existing use is very high, amortization is impermissible unless there is an even more compelling public purpose.¹⁰⁷

The majority of courts, however, have upheld amortization statutes—but only after applying a takings analysis. Some have reasoned that the amortization period itself serves as a kind of implicit compensation sufficient to satisfy the Takings Clause's requirement of just compensation.¹⁰⁸ Other courts have adopted similar reasoning, holding that the revenue earned during the amortization period can be included in regulatory takings analysis in order to decide whether

ately," and further arguing that "the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a 'reasonable' time").

¹⁰⁴ See *PA Nw. Distributions*, 584 A.2d at 1376 (finding amortization period violative of Pennsylvania Constitution); see also 83 AM. JUR. 2D *Zoning and Planning* § 622 & n.5 (2003) (collecting cases invalidating amortization rules under Takings Clause); Reynolds, *supra* note 59, at 105–06 (same).

¹⁰⁵ See, e.g., *Concord Twp. v. Cornogg*, 9 Pa. D. & C.2d 79, 86 (1956) (striking down zoning ordinance with amortization provision of six months on basis of constitutional ground "that no citizen can be deprived of his property without due process of law"); see also *Ailes v. Decatur County Area Planning Comm'n*, 448 N.E.2d 1057, 1060 (Ind. 1983) ("[A]n ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power."), *overruled by Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026 (Ind. 1998).

¹⁰⁶ See, e.g., *Sun Oil Co. of Pa. v. City of Upper Arlington*, 379 N.E.2d 266, 271 (Ohio Ct. App. 1977) (determining that amortization provisions are valid only where they eliminate nuisances); see also Reynolds, *supra* note 59, at 108 (describing Due Process protection).

¹⁰⁷ See *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255, 262 (N.Y. 1977) (finding amortization reasonable only when "the public gain achieved . . . outweighs the private loss suffered by owners of nonconforming uses"); cf. *Austin v. Older*, 278 N.W. 727, 730 (Mich. 1938) ("An ordinance requiring an immediate cessation of a nonconforming use may be held to be unconstitutional because it brings about a deprivation of property rights out of proportion to the public benefit obtained . . .").

¹⁰⁸ See, e.g., *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 695 (8th Cir. 1996) (including benefits obtained during amortization period in regulatory takings analysis); see also Varadarajan, *supra* note 13, at 2573–76 (discussing amortization as substitute for just compensation).

the regulation has “go[ne] too far.”¹⁰⁹ Still other courts have held that amortization is actually an alternative to just compensation that nevertheless satisfies the Takings Clause.¹¹⁰ Ultimately, it is unclear whether amortization is to be evaluated under the Takings Clause, the Due Process Clause, or both.

This same bifurcated constitutional approach applies, with even greater complexity, to the vested rights doctrine. Many courts locate the basis for protection of vested rights in the Takings Clause.¹¹¹ Confoundingly, the phrase “vested rights” is used in at least two distinct ways.¹¹² Some cases define vested rights as protected property interests and distinguish them from mere expectations that do not even implicate the Takings Clause.¹¹³ Used this way, vested rights have a limiting character; courts will not even apply takings analysis to rights that are not vested. The term is, in essence, synonymous with a property right, making the word “vested” superfluous.¹¹⁴ Other cases,

¹⁰⁹ See *Naegele Outdoor Adver., Inc. v. City of Durham*, 803 F. Supp. 1068, 1078 (M.D.N.C. 1992) (finding no taking because earnings during amortization period exceeded investment in property).

¹¹⁰ *E.g.*, *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565, 572 (N.M. 1982) (finding amortization period satisfied requirement of just compensation). In theory, one principal justification for amortization is that it is pegged to the useful economic life of the underlying structure. If the value of an asset has fully depreciated for tax purposes, then the courts will uphold its elimination without payment of just compensation. See *Collins*, *supra* note 64, at 227.

¹¹¹ *E.g.*, *Sand Key Assocs. v. Bd. of Trustees of Internal Improvement Trust Fund*, 458 So. 2d 369, 370–71 (Fla. Dist. Ct. App. 1984) (“[P]roperty rights are vested and cannot be taken away without just compensation.”); *Bye v. Giarrusso*, 321 So. 2d 58, 60 (La. Ct. App. 1975) (“‘[V]ested rights’ shall not be divested except for purposes of public utility and then only on payment of just compensation.” (quoting *Quartemont v. Aroyelles Parish Police Jury*, 228 So. 2d 199, 201 (La. Ct. App. 1969))); *Padgett v. Mason County Zoning Comm’n*, Nos. 236458, 236459, 2003 WL 22902878, at *5 (Mich. Ct. App. Dec. 9, 2003) (“[T]he prohibition of taking property without just compensation extends only to vested rights in property.”).

¹¹² Others have noted the use of the phrase “vested rights” as a substitute for real analysis. See *Cunningham & Kremer*, *supra* note 71, at 628 (“One common approach is to presume that a perfunctory reference to vested rights explains the legal theory involved and the reason for its application to the facts of the case.”).

¹¹³ See, *e.g.*, *Shrader v. United States*, 38 Fed. Cl. 788, 796–97 (1997) (“[R]egarding a possible takings claim by Mr. Shrader, plaintiff’s interest[s] . . . were neither vested rights, nor were they more than a ‘mere expectancy, and therefore not entitled to protection as a property right.’” (quoting *Alberico v. United States*, 783 F.2d 1024, 1027 (Fed. Cir. 1986))); *Att’y Gen. v. Mich. Pub. Serv. Comm’n*, 642 N.W.2d 691, 699 (Mich. Ct. App. 2002) (“One who asserts an uncompensated taking claim must first establish that a vested property right is affected.” (quoting *Fun ‘N Sun RV, Inc. v. Michigan*, 527 N.W.2d 468, 478 (Mich. 1994))); *Tracy v. City of Deshler*, 568 N.W.2d 903, 907 (Neb. 1997) (contrasting “vested property right” with “mere privilege”); see also *Cunningham & Kremer*, *supra* note 71, at 639–40 (distinguishing between privilege and right).

¹¹⁴ In this sense, the term “vested right” is synonymous with the term “protected property interest” and, as such, its use is entirely circular. See *Cunningham & Kremer*, *supra* note 71, at 640 (“[‘Vested’] is frequently applied in a circular fashion to describe any

however, define vested rights as rights that are immune from government regulation absent just compensation (or the application of one of the other exceptions discussed above).¹¹⁵ Here, the phrase “vested right” is a legal conclusion that the property right at issue is protected from regulation unless compensation is paid.¹¹⁶ In other words, finding a “vested right” is sometimes used to begin the takings inquiry and other times to end it.¹¹⁷

This confusion about the meaning of “vested rights” exists in uneasy tension with the vested rights doctrine and the Takings Clause. It is simply not the case that the Takings Clause applies only to development projects that have progressed past a certain stage. Indeed, an owner of undeveloped land who has made no effort to develop her property may nevertheless have a takings claim if the government dramatically downzones the property and sharply reduces its market value.¹¹⁸ On the other hand, finding that a vested right is protected property under the Fifth Amendment would not seem to end the inquiry of whether a particular government action is an unconstitu-

interest that is protected by the law. Hence, to assert that a person has a vested right is merely to announce the conclusion that a court will protect that interest.”). Any property right, not just a vested property right, is potentially protected by the Takings Clause. John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Taking Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 31 (1996) (“In fact, many state courts use the words ‘vested right’ and ‘property right’ interchangeably.”); cf. 26 AM. JUR. 2D *Eminent Domain* § 150 (2004) (“For purposes of just compensation in an eminent-domain proceeding, ‘property’ includes every sort of interest the citizen may possess.”).

¹¹⁵ See, e.g., *Landgraf v. USA Film Prods.*, 511 U.S. 244, 266 (1994) (“The Fifth Amendment’s Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a ‘public use’ and upon payment of ‘just compensation.’”); see also Kenneth R. Kupchak et al., *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai’i*, 27 U. HAW. L. REV. 17, 38 (2004) (quoting *County of Kauai v. Pac. Standard Life Ins. Co.*, 653 P.2d 766, 780 & n.129 (Haw. 1982) and describing it as “equat[ing] establishing a vested right with establishing a regulatory taking”); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1023–24 (2006) (“The vested label . . . often seems conclusory.”).

¹¹⁶ According to Cunningham and Kremer, “[t]he term instead should be recognized as the end product of a process that weighs and analyzes a private interest to determine whether it is of sufficient status to receive legal protection.” Cunningham & Kremer, *supra* note 71, at 641.

¹¹⁷ For a historical explanation for the confusion about vested rights, see James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 104–14 (1993).

¹¹⁸ See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (holding that regulation prohibiting building on beachfront lot, thus depriving landowner of virtually all economically viable use, constitutes compensable government taking).

tional taking. Yet courts consistently reason as though a vested right simply cannot be regulated away.¹¹⁹

Other courts and commentators have located the protection for vested rights in the Due Process Clause, invoking concerns of fundamental fairness¹²⁰ or identifying the vested rights doctrine as balancing the power of government to control land use with the substantive rights of property owners.¹²¹ This hodgepodge of justifications all support the underlying rule that once a right has vested it is generally immune from government interference without compensation, but the confusion about the source of the rule makes the precise content of the protection difficult to discern.¹²²

¹¹⁹ See, e.g., *Colo. Ground Water Comm'n v. North Kiowa-Bijou Groundwater Mgmt. Dist.*, 77 P.3d 62, 81 (Colo. 2003) (finding that plaintiff's groundwater right was vested right and "[a]s such it cannot be taken away by subsequent legislative action"); *First of Am. Trust Co. v. Armstead*, 664 N.E.2d 36, 40 (Ill. 1996) ("[T]his court has defined a vested right as an expectation that is so far perfected that it cannot be taken away by legislation."); *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 501 (Kan. 1995) ("We, like many courts, have used the term 'vested rights' to describe rights which cannot be taken away by retroactive legislation."); *Powell v. Calvert County*, 795 A.2d 96, 102 (Md. 2002) ("[Vested rights] doctrine . . . rests upon the legal theory that when a property owner . . . completes substantial construction on [his] property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations." (quoting *Prince George's County v. Equitable Trust Co.*, 408 A.2d 737, 741 (Md. Ct. Spec. App. (1979))).

¹²⁰ See Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 61, 76 n.71 (2000) (collecting cases demonstrating that municipality's revocation of building permit from property owner with vested right in permit constitutes violation of substantive due process); see also, e.g., *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 358 (Ga. 1997) ("A property interest protected by the due process clauses of the federal and state constitutions meets our definition of 'vested rights.'"); *Hayes v. Howell*, 308 S.E.2d 170, 175 (Ga. 1983) (noting that "vested rights" is generally used to imply interests which "may not be interfered with by retrospective laws," which "it is proper for the state to recognize and protect, and of which the individual cannot be deprived arbitrarily without injustice." (quoting *Am. States Water Serv. Co. of Cal. v. Johnson*, 88 P.2d 770, 774 (Cal. Dist. Ct. App. 1939))); *Overstreet & Kirchheim*, *supra* note 74, at 1071–72 ("Some cases couch the constitutional purpose of the Washington rule in terms of how vesting provides citizens with 'fundamental fairness,' which is a due process concept.").

¹²¹ See, e.g., *Waikiki Marketplace Inv. Co. v. Honolulu*, 949 P.2d 183, 193–94 (Haw. Ct. App. 1997) ("[D]ue process principles protect a property owner from having his or her vested property rights interfered with and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate." (citation omitted)); *Michael Weimann Assocs. Gen. P'ship v. Town of Huntersville*, 555 S.E.2d 342, 345 (N.C. Ct. App. 2001) ("At common law, the vested rights doctrine evolved as a balancing mechanism" between "the State's constitutional authority over land-use" and property owners' "constitutional entitlement to due process of law"); *Weyerhaeuser v. Pierce County*, 976 P.2d 1279, 1284 (Wash. Ct. App. 1999) ("The doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests.").

¹²² Kainen, *supra* note 117, at 120–22 (discussing vested rights in land use). According to Kainen, whether a right has vested should not determine whether the right is subject to

Finally, the constitutional inquiry at the heart of the nuisance exception is different still. Some courts apply a relatively straightforward takings analysis, in essence finding that harm prevention provides a safe harbor from takings liability. These courts reason that the government can regulate away a nuisance or harm because the owner never had a property right to create the nuisance or harm in the first place.¹²³ Such a regulation is not a taking simply because it is not taking a property right that the owner ever possessed. Other courts, however, appear to rely on a substantive due process analysis. They reason that harm prevention is a valid exercise of a state's police power and that, since all property is owned subject to the police power, no such harm prevention can trigger a compensation requirement.¹²⁴ Fundamentally, the inquiry in these latter opinions is whether the regulation is an invalid exercise of the police power—that is, whether it is irrational or arbitrary.

Underlying all of these courts' opinions is a firm conviction that regulations of existing uses raise constitutional issues. Which issues, however, and how they arise, remains remarkably up for grabs. There is no doubt that courts invoke both the Takings Clause and the Due Process Clause to protect existing uses. The question, then, is the extent to which these constitutional doctrines actually compel that protection. Unpacking current takings and due process law only reveals more confusion around the nature and extent of the protection.

subsequent regulation. As he succinctly concludes, "Establishing that development expectations are 'vested rights' is neither a necessary nor a sufficient condition to their constitutional protection." *Id.* at 122.

¹²³ See, e.g., *Lucas*, 505 U.S. at 1029 ("[The limitation imposed by] regulations that prohibit all economically beneficial use of land . . . must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

¹²⁴ See, e.g., *City of Minot v. Freeland*, 426 N.W.2d 556 (N.D. 1988) (holding that demolition of house to stop nuisance does not violate Takings Clause); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (upholding wetlands regulation as preventing harm). *But see* *Dep't of Agric. & Consumer Servs. v. Polk*, 568 So. 2d 35, 48 (Fla. 1990) (Barkett, J., concurring) ("Although this Court has applied the harm-benefit distinction to determine liability, I now believe that analysis is inappropriate in 'takings' cases." (citations omitted)). The relationship between the police power and the Takings Clause is enormously contested. See Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 70 (1986) (discussing this relationship in context of Supreme Court efforts to define Takings Clause's 'public use' requirement); James E. Krier & Christopher Serkin, *Public Ruses*, 2004 *MICH. ST. L. REV.* 859, 862–63 (2004) (discussing Merrill, *supra*, and arguing that if public use were coterminous with police power it would not eliminate compensation inquiry).

B. *The Takings Clause*

There are two principal bases for takings liability that are relevant to existing uses.¹²⁵ The first is the per se rule from *Lucas v. South Carolina Coastal Council*.¹²⁶ The second, and the more important, is the ad hoc balancing test from *Penn Central*.¹²⁷ Both implicate the protection of existing uses but neither provides for their categorical protection.

The *Lucas* rule is narrow in scope and easy to state. According to the Supreme Court, “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if . . . the proscribed use interests were not part of [the owner’s] title to begin with.”¹²⁸ Provocatively, the test focuses on *use* rather than market value, implicating the protection of existing uses.¹²⁹ Of course, the *Lucas* test does not create per se takings liability whenever the government eliminates *an* existing use, but only when it eliminates *all* economically beneficial uses. While the test acknowledges the importance of use as opposed to value, it does not provide any kind of comprehensive protection for existing uses.

Penn Central provides more protection for existing uses. In fact, as originally formulated by the Supreme Court, the *Penn Central* test appears to be principally concerned with existing uses, although subsequent iterations of the test have lost this focus. In *Penn Central*, the Supreme Court identified three factors for evaluating whether a regulation amounts to a taking: (1) the extent of the diminution in property value it caused, (2) its interference with reasonable investment-backed expectations, and (3) its character.¹³⁰ The first and second factors are at least potentially relevant to the protection of existing uses and are most usefully considered in reverse order.¹³¹

¹²⁵ This assumes that existing uses are not eliminated through permanent physical occupations, proscribed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), nor eliminated through government exactions, the permissible limits of which are defined in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

¹²⁶ 505 U.S. 1003, 1015 (1992) (deeming “categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land”).

¹²⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

¹²⁸ *Lucas*, 505 U.S. at 1027.

¹²⁹ See STEVEN J. EAGLE, REGULATORY TAKINGS §7-3(b)(5) (3d ed. 2005) (discussing *Lucas* Court’s emphasis on economically beneficial use of property).

¹³⁰ *Penn Central*, 438 U.S. at 124.

¹³¹ The third factor might also be relevant to this analysis, at least as interpreted by Professor Eagle. Traditionally, the character of the regulation implicated only a distinction between a physical invasion and regulation merely affecting economic interests. Steven J. Eagle, “Character” as “Worthiness”: A New Meaning for *Penn Central*’s Third Test?, 27 ZONING & PLANNING L. REP. 1, 2 (2004). Professor Eagle notes, however, that more

The diminution in value test has become the focus of most takings analysis, but it may be *Penn Central*'s second factor—the interference with investment-backed expectations—that provides the most significant protection for existing uses.¹³² The facts of the *Penn Central* case are well known; nevertheless, a quick reminder is important to understand the original application of the second factor.

In 1967, New York City designated Grand Central Terminal a landmark and therefore subject to its Landmarks Preservation Law.¹³³ This designation prevented Penn Central, the owner of Grand Central, from developing an office tower on top of the terminal.¹³⁴ Rejecting Penn Central's regulatory takings claim, the Court focused on the fact that the landmark designation did not interfere with Penn Central's existing use of the building but only with prospective plans. As the Court held:

[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.¹³⁵

In fact, the Court expressly distinguished other cases on grounds that they involved an interference with the present existing use of property.¹³⁶ According to the Supreme Court, then, the existing use of property constitutes an owner's "primary expectation" about the use of that property.¹³⁷

recently, some courts have expanded the inquiry to include the purpose and benefits of the government action, specifically looking at whether the government regulation is retroactive or targeting an individual. *Id.* at 4–5. This reading of the third *Penn Central* factor is very interesting but does not represent a consensus view of the content of the test.

¹³² See Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RESOURCES & ENVTL. L. 1, 38 (2005) ("[T]he only clear case for a taking under *Penn Central* would be where the investment reflects actual development expenditures, such as constructing facilities or homes, rather than speculation on future uses."); Michael B. Kent Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVT. L.J. 63, 97–98 (2008) (identifying "subjective" aspects of investment-backed expectations, such as extent and characteristics of property owner's actual investment, and noting similarity to vested rights inquiry).

¹³³ *Penn Central*, 438 U.S. at 115–16.

¹³⁴ *Id.* at 116–18.

¹³⁵ *Id.* at 136.

¹³⁶ See *id.* (distinguishing *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), *Miller v. Schoene*, 276 U.S. 272 (1928), *United States v. Causby*, 328 U.S. 256 (1946), *Griggs v. Allegheny County*, 369 U.S. 84 (1962), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915)).

¹³⁷ See *id.* The Court's presumption about existing uses, however, may not be accurate. Existing uses can be speculative uses, and despite their lack of immediate utility or function they may simply be creative methods of land speculation. Parking lots in urban cen-

Over time, the inquiry into investment-backed expectations has changed and lost its focus on the existing use of the property. In *Kaiser Aetna v. United States*,¹³⁸ the Supreme Court subtly but profoundly changed the *Penn Central* language from “distinct investment-backed expectations”¹³⁹ to “reasonable investment backed expectations.”¹⁴⁰ Partly as a result, this factor is now principally used to distinguish a property owner’s reasonable expectations from pie-in-the-sky development dreams.¹⁴¹ There is no taking, for example, if a developer buys a small lot in a residential area and is prohibited from building a large strip mall or gas station, because that expectation was unreasonable.¹⁴² The Takings Clause will not protect unreasonable expectations about the use of property, even if prohibiting that use results in a significant diminution in value.¹⁴³ In other words, the test today focuses more on the reasonableness of a property owner’s

ters are one such example. See Jane Jacobs, Remarks, *Random Comments*, 28 B.C. ENVTL. AFF. L. REV. 537, 541 (2001) (“Land in potentially lucrative and productive locations that is being kept in low-value parking lots is a symptom of land speculation: land remaining almost idle in hope that its very emptiness will increase its value to some future buyer.”).

¹³⁸ 444 U.S. 164 (1979).

¹³⁹ *Penn Central*, 438 U.S. at 124 (emphasis added).

¹⁴⁰ *Aetna*, 444 U.S. at 175 (emphasis added). For further analysis of this transformation, see Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 560 (2002) (characterizing transformation as move from subjective to objective standard).

¹⁴¹ See J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?*, 38 URB. LAW. 81, 85 (2006) (“Together, these decisions redirected the expectations inquiry away from the impact of regulation and toward the appropriateness of the landowners’ land use expectations”); Mandelker, *supra* note 36, at 21 (“[T]he investment-backed expectations factor has become . . . a shield for government that protects land use regulations from the Takings Clause.”). The term “expectations” suffers from some of the same problems as “vested rights.” “[C]ourts often use ‘expectation’ to refer to an interest less deserving of protection than a ‘right.’ . . . By the same token, however, the Court has also used the word ‘expectations’ to refer to protected property interests.” Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 108 (1995).

¹⁴² Cf. Oswald, *supra* note 141, at 111–12 (discussing property owner’s expectations as bound up with ability to anticipate future government regulation).

¹⁴³ See, e.g., *Nat’l Viatical, Inc. v. Oxendine*, No. 1:05-CV-3059-TWT, 2006 WL 1071839, at *4 (N.D. Ga. Apr. 20, 2006) (dismissing complaints based on allegations that statute lowered prices of life insurance policies on secondary market because plaintiff failed “to demonstrate how this regulation interferes with their reasonable investment-backed expectations”); *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 215–16 (D. Mass. 2006) (holding that prohibition against owning interest in more than three liquor stores did not interfere with franchisee’s reasonable investment-backed expectations); *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1030 (Ind. 1998) (noting that “the Supreme Court has ‘uniformly reject[ed] the proposition that diminution in property value, standing alone, can establish a taking’” and opining that “[i]n particular, the forfeiture of [plaintiff’s] nonconforming use caused no interference with their reasonable investment-based expectations” (internal citation omitted)).

expectations, not on her investments, and therefore focuses on future uses and not existing ones.¹⁴⁴

Nowhere is the confusion about the meaning of investment-backed expectations more immediately apparent than in the Supreme Court's decision in *Palazzolo v. Rhode Island*.¹⁴⁵ There, the Court wrestled with the question whether the transfer of property after enactment of a regulation eliminates any takings claim because the regulation becomes part of the new owner's reasonable expectations.¹⁴⁶ The majority held that takings claims survive postenactment transfer of the property.¹⁴⁷ In concurrence, Justice O'Connor argued that the inquiry into investment-backed expectations is ad hoc and multifaceted and that preexisting regulations are one factor among many for courts to consider.¹⁴⁸ In contrast, Justice Scalia concurred separately to write that preexisting regulations should have no impact on a property owner's investment-backed expectations.¹⁴⁹ Justice Stevens, dissenting, argued exactly the opposite: that preexisting regulations should be dispositive as to the takings claim.¹⁵⁰ The content and significance of reasonable investment-backed expectations are not easily defined.

The application of investment-backed expectations specifically to existing uses is similarly up for grabs. Some have suggested that it should be used to limit protection for property acquired by gift or inheritance because of the absence of investment, an interpretation completely removed from existing use protection.¹⁵¹ Professor Mandelker has argued that investment-backed expectations might be

¹⁴⁴ *E.g.*, 26 AM. JUR. 2D *Eminent Domain* § 14 (2004) (“[I]nvestment-backed expectation must be reasonable.”).

¹⁴⁵ 533 U.S. 606 (2001).

¹⁴⁶ *See id.* at 626 (characterizing State's position as argument that “by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value” because they “purchased or took title with notice of the limitation”).

¹⁴⁷ *Id.* at 629–30.

¹⁴⁸ *See id.* at 634–36 (O'Connor, J., concurring) (“[T]he state of regulatory affairs at the time of acquisition is not the only factor that may determine the extent of investment-backed expectations. . . . Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any ‘set formula.’”).

¹⁴⁹ *See id.* at 637 (Scalia, J., concurring) (“[T]he fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.”).

¹⁵⁰ *See id.* at 641 (Stevens, J., dissenting in part) (“If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted.”).

¹⁵¹ *See, e.g.*, Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993) (suggesting “investment-backed

entitled to protection only against substantial and unforeseeable regulations.¹⁵² Professor Epstein has argued that “investment-backed expectations” is an unfortunate turn of phrase, actually synonymous with “reasonable expectations” or even with “private property.”¹⁵³ Some commentators have suggested that it is not particularly different from diminution in value—*Penn Central*’s first factor.¹⁵⁴ Courts have fared no better at providing coherent content to this test.¹⁵⁵ All this is to say that *Penn Central*’s focus on investment-backed expectations may, at least under some interpretations, protect existing uses some of the time. However, because the content and application of this factor is ad hoc at best and hopelessly confused at worst, its actual application to existing uses is less than conclusive.¹⁵⁶

The first *Penn Central* factor, diminution in value, provides even less doctrinal justification for protecting existing uses. This test has, over time, become the cornerstone of takings jurisprudence.¹⁵⁷ Applying this factor, a regulation is a compensable taking if it reduces

expectations” may be term excluding property received by gift); Oswald, *supra* note 141, at 116–17 (discussing *Hodel v. Irving*, 481 U.S. 704 (1987)).

¹⁵² See Mandelker, *supra* note 36, at 25.

¹⁵³ See Epstein, *supra* note 151, at 1370 (“All in all, we should be deeply suspicious of the phrase ‘investment-backed expectations’ because it is not possible to identify even the paradigmatic case of its use.”).

¹⁵⁴ See, e.g., Oswald, *supra* note 141, at 101–06 (examining history of investment-backed expectations). It appears that Professor Michelman was the first person to use the phrase, “investment-backed expectations” in the takings context. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1213 (1967). He discussed the concept in the context of examining diminution in value. *Id.* at 1229–34.

¹⁵⁵ See Breemer, *supra* note 141, at 82 (“Trying to determine when land use expectations are reasonable in state courts is an experience akin to a dog chasing its own tail.”); see also, e.g., Dana, *supra* note 40, at 661 (“[C]ourts provide very little explanation for their holdings as to when it is and is not reasonable for a property owner to expect that she will be subject to uncompensated regulation in the future.”).

¹⁵⁶ See Epstein, *supra* note 151, at 1370 (“All in all, we should be deeply suspicious of the phrase ‘investment-backed expectations’ because it is not possible to identify even the paradigmatic case of its use.”); Oswald, *supra* note 141, at 107 (“[T]he meaning of the phrase remains uncertain, rendering its effectiveness as a legal doctrine questionable at best.”); see also Breemer, *supra* note 141, at 81–82 & n.6 (citing sources and describing investment-backed expectations as “certainly the least understood” *Penn Central* factor).

¹⁵⁷ See Oswald, *supra* note 141, at 130 (“Over the past sixteen years, the Supreme Court has increasingly committed itself to a regulatory takings analysis that focuses extensively, if not exclusively, upon the economic effects of the regulation upon the property owner.”); Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE L.J. 149, 151 (1971) (“[T]he criterion for recognizing a particular economic injury which follows from government action as a taking is the extent of economic loss.”). *But see* *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) (identifying focus of *Penn Central* as “the extent to which the regulation has interfered with distinct investment-backed expectations”); Eagle, *supra* note 140, at 561 (“[A]t least in the minds of some courts, ‘investment-backed expectations’ would crowd out the other prongs of the three-factor test.”).

the value of the property by too much.¹⁵⁸ Under this test, a regulation of an existing use is more likely to be a compensable taking than a regulation of a prospective future use. Imagine two parcels of land identical but for the fact that the first has a building on it and the second does not. Imagine further that the government passes a new regulation that requires eliminating the building on the first parcel and prevents a building from ever being built on the second. The owner of the first parcel has suffered a more significant economic impact—the regulation reduced the value of his land more than it reduced the value of his neighbor's land.¹⁵⁹

Diminution in value therefore goes some way towards protecting existing uses, but it is wholly inadequate to support the kind of comprehensive protection that property law exhibits. Depending on the residual value remaining in the regulated property, many existing uses could still be eliminated without triggering liability. Because the *Penn Central* test is applied in reference to the value of the property as a whole,¹⁶⁰ it serves only to prevent the government from eliminating valuable existing uses on parcels of land that have little other value. Where the existing use either does not add much to the financial value of the underlying property—imagine run-down, low-income housing in a gentrifying neighborhood—or where an existing use is but one part of a much larger property, the diminution in value test provides little protection.

Of course, eliminating an existing use would always trigger liability under the diminution in value test if the property at issue is defined as the use itself. This presents the familiar conceptual severance problem about how to define the relevant property.¹⁶¹ Professor

¹⁵⁸ What counts as too much has been a source of constant controversy, but the percentage diminution required appears to be quite high. Cordes, *supra* note 132, at 39 (surveying cases and finding that “diminution in value must substantially exceed 50%, and should be closer to 90%, before any serious consideration is given of a . . . taking”).

¹⁵⁹ Before the regulation, the first lot might have been worth \$1,000,000 and the second lot worth \$250,000 (reflecting the absence of a building). After the regulation, they are both worth the same amount, say \$50,000 (excepting the transition costs of removing the existing building, which this stylized hypothetical excludes, but which are considered in detail below). The diminution in value of the first lot is 95% and of the second is only 80%. Perversely, however, a regulation that has a fixed economic impact is more likely to be a taking when applied to undeveloped property because the denominator will be smaller; a regulation imposing a \$50,000 loss may be a taking of property worth \$60,000, but is unlikely to be a taking of property worth \$200,000.

¹⁶⁰ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978) (“In deciding whether a particular governmental action has effected a taking, this Court focuses [on] . . . the parcel as a whole . . .”).

¹⁶¹ For a discussion of conceptual severance, see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (“This strategy I shall call ‘conceptual severance.’ It consists of

Michelman, whose incomparably influential article on the Takings Clause provided a blueprint for the *Penn Central* test, observed precisely this point in anticipating the special protection for existing uses:

What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.¹⁶²

By singling out the use as a protectable stick in the bundle of property rights, Michelman seems to have been responding to this same central intuition that existing uses are entitled to property protection. Nevertheless, most courts take a much broader view when defining the property at issue.¹⁶³ The Supreme Court itself has held that diminution in value is to be applied to the parcel as a whole.¹⁶⁴ While this

delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.”); see also Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 64 (2003) (discussing Radin, *supra*).

¹⁶² Michelman, *supra* note 154, at 1233. Michelman's article, usually cited for his proposed utilitarian formulation of takings liability, remains the single most influential article on the Takings Clause. A number of people have observed that it provided the blueprint for *Penn Central*. See Oswald, *supra* note 141, at 104 (“Michelman's analysis clearly influenced Justice Brennan as he wrote the majority opinion in *Penn Central*.”); Radin, *supra* note 161, at 1684 (describing *Penn Central* test as “created under the salutary influence of Frank Michelman's famous article”); Gregory M. Stein, *The Effect of Palazzolo v. Rhode Island on the Role of Reasonable Investment-Backed Expectations*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES, *supra* note 36, at 41–42 (“The Court relied heavily on Professor Frank Michelman's influential 1967 essay . . .”).

¹⁶³ See *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006) (“When a court considers a large piece of land of which only a small portion has lost value due to regulation, it is less likely to conclude that a taking has occurred. If a court considers a smaller parcel of land, most of which has been affected by a regulation, then the economic impact is more likely to appear large enough to constitute a taking.”); see also *City of Coeur d'Alene v. Simpson*, 136 P.3d 310, 319 (Idaho 2006) (“Courts typically reject the so-called ‘conceptual severance’ theory—the notion that whole units of property may be divided for the purpose of a takings claim.”); *Smith v. Town of Mendon*, 822 N.E.2d 1214, 1220 n.12 (N.Y. 2004) (evaluating “effect of the government action on the value of the property as a whole, rather than . . . its effect on discrete segments of the property”); *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 768 (Pa. 2002) (applying *Penn Central*'s mandate to consider the “parcel as a whole”).

¹⁶⁴ See *Penn Central*, 438 U.S. at 131 (focusing on “parcel as a whole”); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002) (rejecting temporal division of property); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (“At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”).

definition has defied efforts at precise line drawing, it nevertheless severely limits the protection that diminution in value affords to existing uses.

It is important to point out, too, that the Court decided *Penn Central* in 1978. The various land use doctrines discussed in Part I predate *Penn Central* by as much as 50 years. To the extent they assume that existing uses are generally immune from government regulation, this assumption does not come from *Penn Central*, nor, even, from the Takings Clause, which had very limited scope throughout the early part of the twentieth century.¹⁶⁵ Instead, the same background intuition about existing uses animates both land use doctrine and the Takings Clause while its original source remains unclear.

C. *The Due Process Clause*

The Due Process Clause is the other principal source of constitutional protection for private property. Substantive due process, in particular, includes some degree of protection for existing uses, although the story here is quite complex.¹⁶⁶ After the fallout from

¹⁶⁵ See Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 HASTINGS L.J. 1245, 1247 (2002) ("[T]he idea that courts had the power to supervise legislative expropriations would have been unfamiliar to the members of the Congress who drafted the so-called Takings Clause."); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057 n.23 (1992) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government" (citing William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985))). But see Nicole Stelle Garnett, "No Taking Without a Touching?" *Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 762-64 (2008) (questioning historical accounts of Takings Clause).

¹⁶⁶ See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 267 n.292 (2004) ("In addition to the Takings Clause, the [New York Court of Appeals] has also invoked substantive due process to protect landowners from actions by local zoning authorities."); Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 899 (2001) ("The Due Process Clauses provide protections against unfair laws, both those that take property as well as those that merely regulate it. The Due Process Clause, not the Takings Clause, protects citizens from state laws that are overbroad, arbitrary, insufficiently justified, or unfair."); Robert Ashbrook, Comment, *Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1257 (2002) (noting in land use context alone "federal courts have allowed economic substantive due process . . . to escape extinction (and in some instances even to flourish)"); see also Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 640 (2007) (describing post-*Lingle* "sequencing between the analyses under the two clauses, with substantive due process questions to be raised first and, assuming the statute in question withstands due process scrutiny (a safe assumption for economic regulation), takings scrutiny to follow"). See generally Mandelker, *supra* note 120 (arguing for more frequent use of substantive due process analysis because of inadequacy of takings law).

Lochner v. New York,¹⁶⁷ courts have had little appetite for striking down economic regulations on substantive due process grounds.¹⁶⁸ After that case was overruled, substantive due process protection for most economic rights all but ended.¹⁶⁹ Curiously, land use is an area where courts have consistently remained willing to invalidate regulations under substantive due process.¹⁷⁰

As the Supreme Court recently explained, the Due Process Clause prevents government regulations that are arbitrary or irrational, including regulations that have an insufficient means-ends fit.¹⁷¹ This rule, in turn, requires courts to judge the government's action against its goals.¹⁷² Due process analysis will therefore prohibit the government from imposing harms that are disproportionately high compared to the benefits created. Considerable confusion remains.¹⁷³ Due process review is highly deferential, and land use controls enacted pursuant to the government's police power are entitled to a

¹⁶⁷ 198 U.S. 45 (1905).

¹⁶⁸ See Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 104 (2006) ("Judges across the ideological spectrum now try to outdo each other in denouncing *Lochner*, marking a broad consensus that principles whereby courts use federal law to cut down state economic regulation should not originate in the judicial branch."); Tunick, *supra* note 166, at 899 n.59 ("Since the demise of *Lochner*, the Court has been reluctant to strike down economic legislation on due process grounds . . .").

¹⁶⁹ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729–31 (1963) ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." (internal quotation marks and citations omitted)).

¹⁷⁰ See, e.g., *Marks v. City of Chesapeake*, 883 F.2d 308, 313 (4th Cir. 1989) (holding that withholding permit for palm reading business is arbitrary and capricious and violates due process); *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986) (holding that prohibiting occupancy of new home that meets building code violates due process); see also Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 927–36 (1999) (citing land use decisions); Anthony B. Sanders, *The New "Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 469 (2005) ("Instead of a deferential rational basis test, where the regulation at issue is heavily presumed to be constitutional, courts often apply a mere 'clear and convincing evidence' presumption when deciding land use zoning cases.").

¹⁷¹ *Lingle v. Chevron*, 544 U.S. 528, 542 (2005) ("[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."). Other courts have made similar statements. See, e.g., *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 593 (3d Cir. 1995) ("[I]n the context of land use regulation, a property owner states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached."). For further discussion of *Lingle*, see *infra* notes 192–94 and accompanying text.

¹⁷² See, e.g., *Lingle*, 544 U.S. at 541 (describing means-ends test).

¹⁷³ See, e.g., *Ashbrook*, *supra* note 166, at 1260–61 ("The precise legal standard varies by circuit. The District of Columbia Circuit merely requires a showing of 'grave unfairness.' More commonly, however, courts require some variation on arbitrariness and/or capriciousness." (footnotes omitted)).

presumption of validity.¹⁷⁴ Nevertheless, some courts have found land use regulations irrational simply by dint of their impact on existing uses.¹⁷⁵

More typically, however, the due process inquiry into means-ends fit is only tangentially related to existing uses. Indeed, it is easy to imagine many situations in which a municipality's decision to eliminate an existing use is both perfectly rational and likely to succeed in achieving its goals. Consider, for example, a town that wants to apply its zoning ordinance to prior nonconforming uses, say to eliminate existing businesses from a neighborhood newly zoned residential. The goal of separating uses is decidedly rational, and imposing that separation on existing uses will be even more effective at achieving this goal.¹⁷⁶

Therefore, the due process inquiry itself does not appear to provide particularly strong protection for existing uses. Its balancing of benefits and burdens is effective at proscribing arbitrarily short amortization periods or arbitrary distinctions in the development process that determine whether rights vest. But it does not explain why amortization periods are required at all or why vested rights are entitled to protection against legislative change.

D. *The Relationship Between Takings and Due Process*

Undoubtedly, part of the problem of identifying any constitutional basis for the protection of existing uses is the historically complicated relationship between the Takings Clause and the Due Process Clause.¹⁷⁷ Courts and commentators traditionally distinguished between valid exercises of the police power, on the one hand, and impermissible takings of private property, on the other.¹⁷⁸ Under this

¹⁷⁴ See, e.g., Amnon Lehavi, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 937 (2006) ("Courts deem [land use regulations] to be presumptively valid, and place the burden of proof on those making substantive due process claims to show that the regulation is arbitrary and unreasonable.").

¹⁷⁵ See, e.g., *Eger v. Levine*, 545 N.Y.S.2d 618, 619 (App. Div. 1989) (finding denial of use variance to be irrational where use predated effective date of zoning ordinance). For an example of a court rejecting a due process challenge to a regulation eliminating an existing use, see *Hartland Sportsman's Club, Inc. v. Town of Delafield*, 35 F.3d 1198 (7th Cir. 1994).

¹⁷⁶ See *supra* note 8 and accompanying text (noting that original justification of zoning was to separate incompatible uses of property).

¹⁷⁷ For a fascinating and thoroughgoing analysis of this history, see Karkkainen, *supra* note 100, at 838–51.

¹⁷⁸ See, e.g., *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209, 210 (N.Y. 1920) ("In a great metropolis like New York, in which the public health, welfare, convenience, and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since, it was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good

view, property is owned subject to the state's police power, which includes the power to redefine the content of property rights.¹⁷⁹ The principal constitutional inquiry is therefore focused on the validity of the state's exercise of its police power and not on the impact of a regulation on property. In other words, courts evaluating the constitutionality of state land use laws or regulations need only decide whether the government acted within the scope of its permissible police powers, and if so, there is no taking.

As a result, cases from the early part of the twentieth century interpreting the extent of state and local governments' power to zone focused almost exclusively on the justification for the regulation and the means the government employed to accomplish those ends.¹⁸⁰ Courts would invalidate regulations that they found were arbitrary or irrational.¹⁸¹ Often, this involved a court's judgment about whether or not the regulation was somehow unfair.¹⁸² Fundamentally, however, this inquiry was rooted in the Due Process Clause and not the Takings Clause.¹⁸³

Despite some foreshadowing in 1922,¹⁸⁴ the Takings Clause did not come into its own until 1978 in *Penn Central*.¹⁸⁵ The *Penn Central*

judgment of the municipal authorities"); see also Merrill, *supra* note 124, at 69–70 (describing relationship between police power and public use); cf. Bettman, *supra* note 49, at 835 ("The constitutional limitations upon eminent domain, such as the requirement that compensation be paid, have no relevance where an ordinance is an exercise of the police power.").

¹⁷⁹ See Karkkainen, *supra* note 100, at 841 ("Thus a legitimate exercise of the police power could never give rise to a compensable taking" (footnote omitted)).

¹⁸⁰ See, e.g., *In re Opinion of the Justices*, 127 N.E. 525, 527 (Mass. 1920) ("An ordinance or by-law which segregates manufacturing and commercial buildings on the one side, from homes and residences on the other, is justified by the broad conceptions of the police power").

¹⁸¹ See, e.g., *City of Tucson v. Ariz. Mortuary*, 272 P. 923, 927 (Ariz. 1928) (referring to *Euclid* and noting that ordinance is unconstitutional if it is "clearly arbitrary and unreasonable, and has not any substantial relation to the public health, safety, morals, or general welfare"); *Longley v. Rumsey*, 224 N.Y.S. 165, 167 (Sup. Ct. 1927) (holding zoning ordinance invalid because of its failure to act in accordance with comprehensive plan and "because of the arbitrary method by which the character of the so-called districts is determined"); *Luse v. City of Dallas*, 131 S.W.2d 1079, 1084 (Tex. Civ. App. 1939) (holding that, to be unconstitutional and therefore void, "[an] ordinance . . . must itself be clearly arbitrary, unreasonable and without any substantial relation to the public health, safety, morals, or general welfare"); *Geisenfeld v. Vill. of Shorewood*, 287 N.W. 683, 686 (Wis. 1939) (declaring ordinance "unconstitutional and void because 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'" (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))).

¹⁸² See Bettman, *supra* note 49, at 836 ("[I]n actual practice in constitutional cases, 'reasonable' often signifies little more than that . . . the balance of considerations of private and public interests has been fairly maintained.").

¹⁸³ See Karkkainen, *supra* note 100, at 841–42 (defining content of due process review).

¹⁸⁴ See *supra* note 99 and accompanying text.

¹⁸⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

test, as described above, focuses entirely on the impact of the regulation on property rights.¹⁸⁶ Two years later, however, in 1980, the due process and takings tests came together in the Supreme Court's decision in *Agins v. City of Tiburon*.¹⁸⁷ In *Agins*, the Court held that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."¹⁸⁸ As many commentators noted, this language appeared to incorporate a substantive due process means-ends test into the Takings Clause.¹⁸⁹ For twenty-five years, courts wrestled with the relationship between substantive due process and takings, often applying a more searching inquiry under the latter than traditional due process analysis would have required.¹⁹⁰ They can therefore be excused for invoking both the Takings Clause and substantive due process in the same breath.¹⁹¹

Finally, in 2005, the Supreme Court backpedaled, overruling *Agins* and holding in *Lingle v. Chevron U.S.A. Inc.* that the means-ends test was exclusively a due process test.¹⁹² *Lingle* clarified the focus of the takings and due process tests. The Due Process Clause

¹⁸⁶ The three-part ad hoc balancing test focuses on the diminution in value, the extent of interference with investment-backed expectations, and the character of the regulation. *Id.* at 124.

¹⁸⁷ 447 U.S. 255 (1980), *overruled in part by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

¹⁸⁸ *Id.* at 260 (citation omitted).

¹⁸⁹ See Karkkainen, *supra* note 100, at 883 (arguing that "[c]onflation of substantive due process and Takings Clause doctrine muddled the 'takings' issue in multiple ways" and pointing to *Agins* as point of departure from proper takings jurisprudence); see also David L. Callies & Christopher T. Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard After Lingle v. Chevron*, 40 J. MARSHALL L. REV. 539, 557 (2007) ("[T]he *Agins* test is essentially a substantive due process inquiry . . ."); Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVT. L. REV. 371, 372 (2006) (noting Supreme Court's reliance, in *Agins*, on "seminal due process cases"); Fenster, *supra* note 84, at 735 ("[T]he *Agins* 'substantial advancement' test . . . mistook a substantive due process test for a takings test . . .").

¹⁹⁰ See Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 16 (2008) (suggesting that *Agins* "substantially advances" language "formed the rhetorical basis for the suggestion in *Nollan* that Takings Clause-based review of the impact of regulation on property rights should be undertaken through some form of heightened scrutiny"); Karkkainen, *supra* note 100, at 828 (noting "errant language in *Agins* that imported *Lochner*-style heightened substantive due process review into modern takings law").

¹⁹¹ For a very good history of the relationship between takings law and substantive due process, see Dreher, *supra* note 189, at 373–87.

¹⁹² 544 U.S. 528 (2005). For more in-depth discussion of the line of cases resulting in *Lingle*, see generally Fenster, *supra* note 84. For a discussion of the doctrinal confusion that existed prior to *Lingle*, see generally, for example, Thomas E. Roberts et al., *Land-Use Litigation: Doctrinal Confusion Under the Fifth and Fourteenth Amendments*, 28 URB. LAW. 765 (1996).

prevents government regulations that are arbitrary or irrational, including regulations that have an insufficient means-ends fit.¹⁹³ In contrast, the takings inquiry, according to the Court, is concerned only with the extent of the government's interference with property rights.¹⁹⁴

This history reveals that any doctrinal protection for existing uses is built on shifting constitutional sands. Protection for existing uses that may have been justified originally under substantive due process now sounds more appropriately in the Takings Clause, which, as a whole, entails inquiries that are less deferential to local government. But neither today provides the kind of protection that land use law implicitly assumes. Ultimately, current constitutional doctrine does not compel categorical protection for existing uses.

III

NORMATIVE ACCOUNTS OF EXISTING USE PROTECTION

If the Constitution does not compel protection of existing uses, do (or should) normative considerations justify the protection? Courts—and people more generally—share a strong intuition that existing uses should be protected. In the land use context, where real property and preexisting investments in land are at stake, existing uses seem to demand greater protection. Articulating precisely why, however, is harder than it might seem. In fact, none of the possible justifications for the categorical protection of existing uses withstands serious scrutiny. The bulk of this Part is devoted to identifying, examining, and ultimately rejecting likely normative justifications for existing use protection.

To be clear, many of the possible justifications for existing use protection could apply in specific cases or contexts. The point here is not to suggest that existing uses should never be protected—in fact, they often should. The point, instead, is to demonstrate that they do not deserve the kind of categorical constitutional protection courts currently provide. Once existing uses are dismantled as a specially protected category, it is possible to address with more precision, nuance, and clarity whether a particular existing use should be protected.

¹⁹³ See *Lingle*, 544 U.S. at 542 (“[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.”).

¹⁹⁴ See *id.* at 542 (“In stark contrast to the three regulatory takings tests discussed above, the ‘substantially advances’ inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights.”).

A useful way to begin the discussion is to view the problem of existing uses through the lens of retroactivity where a well-developed body of scholarship has fleshed out closely related issues. The next Section takes on this task. The remainder of this Part then considers and rejects possible justifications—the particular character of the loss, the preservation of the status quo, and the prevention of political process failures—for the protection of existing uses.

A. *Antiretroactivity and Existing Uses*

Many scholars argue that retroactive laws are anathema to liberty and a well-ordered society.¹⁹⁵ On the other hand, even the strongest attacks against retroactive legislation recognize that the government must have some ability to enact laws that affect settled expectations in order to be able to legislate at all.¹⁹⁶ Rules limiting retroactivity are therefore in direct tension with the government's ability to change the law. As Daniel Troy has framed the problem: "To what extent is one willing to sacrifice reliance on existing rules to accommodate the need for change?"¹⁹⁷

Much of the literature on retroactive laws focuses principally on the surprisingly difficult question: What counts as a retroactive law?¹⁹⁸ This definitional problem is easy to identify but very difficult

¹⁹⁵ See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 53 (rev. ed. 1969) ("[A] retroactive law is truly a monstrosity."); DANIEL E. TROY, *RETROACTIVE LEGISLATION* 17–19 (1998) (arguing that retroactive legislation fails to give notice and therefore undermines free will and reliance necessary for social order); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 427 (referring to common assumption that "retroactive exercises of legislative power are incompatible with any fair and just system of government").

¹⁹⁶ See FULLER, *supra* note 195, at 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.").

¹⁹⁷ TROY, *supra* note 195, at 3 (internal quotation marks omitted).

¹⁹⁸ There are a variety of constitutional sources of antiretroactivity rules that apply to private law. The Contracts Clause prevents state government from interfering with existing contract rights (although often anemically). U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."). Substantive due process analysis replaced an early natural rights treatment of retroactive legislation. TROY, *supra* note 195, at 77 (noting that by 1880s, Supreme Court had begun using substantive due process "to implement many of its conceptions of natural justice"). Courts therefore reasoned that retroactive regulations, often described as those affecting vested rights, were unconstitutional under the Due Process Clause. See Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 304 (1925) (summarizing due process cases and citing, inter alia, *Huffman v. Alderson's Adm'r*, 9 W. Va. 616 (1876)). In 1976, however, the Supreme Court refused to strike down an expressly retroactive law on due process grounds. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), cited in TROY, *supra* note 195, at 38, 107 n.84. Nevertheless, substantive due process analysis still appears periodically in retroactivity analysis. For example, in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), a plurality of the Supreme Court struck down a federal statute requiring coal com-

to solve. What counts as a retroactive law, when almost all laws alter the consequences of past conduct?¹⁹⁹ As Professor Jill Fisch has explained, even prospective-only regulations can have a significant retroactive effect.²⁰⁰ While certain laws may be more retroactive than others, almost all affect prior conduct to some degree.²⁰¹

Building on this insight, some scholars distinguish between strongly and weakly retroactive laws.²⁰² The former change a legal

panies to fund retirement benefits for former coal miners. The Court could not agree on the constitutional analysis to apply. Four Justices believed the statute violated the Takings Clause. *Id.* at 522–38 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ.). Justice Thomas suggested it also might violate the Ex Post Facto Clause. *Id.* at 538–39 (Thomas, J., concurring). Justice Kennedy believed the statute was unconstitutional but applied a due process analysis to reach his result. *Id.* at 547–50 (Kennedy, J., concurring in judgment and dissenting in part). The remaining four Justices voted to uphold the statute after applying the Due Process Clause. *Id.* at 556–58, 567–68 (Breyer, J., dissenting). Given the Supreme Court's fractured reasoning regarding retroactivity, it is perhaps not surprising that courts disagree about the source of the constitutional protection for existing uses. For a review of different constitutional prohibitions against retroactivity and their limitations, see Eule, *supra* note 195, at 427–34.

¹⁹⁹ For example, if the government were to remove the home mortgage tax deduction it would have an enormous impact on the value of people's past investment decisions, even if the deduction were only repealed prospectively. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1067 (1997); see also Eule, *supra* note 195, at 435–36 (considering same example). Tax law provides a frequent source of discussion of retroactivity. See generally Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129 (1996) (arguing for transition relief in certain tax situations).

²⁰⁰ Fisch, *supra* note 199, at 1067–69; see SHAVIRO, *supra* note 9, at 26 (identifying retroactive effect of “nominally prospective” changes); TROY, *supra* note 195, at 2 (“[A]lmost all legislation may be characterized as ‘retroactive’ [because] the operation of almost all legislation depends on antecedent facts.”); see also FULLER, *supra* note 195, at 59–61 (discussing “the most difficult problem of all, that of knowing when an enactment should properly be regarded as retrospective”). This identification problem is particularly serious for land use regulations, because the land itself always preexists the regulation. See Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 11–12 (2003) (arguing that “new property rules can never be wholly forward-looking,” because while “they can be applied only to new activities, they can never be applied to new land”).

²⁰¹ See Fisch, *supra* note 199, at 1070 (explaining that describing “retroactivity as a spectrum or range of temporal options rather than as a binary construct provides a better description of the nature and consequences of legal change”); see also Logue, *supra* note 199, at 1133 (“Transition losses can occur whether the new tax law or new interpretation applies *nominally retroactively* or *nominally prospectively*.”).

²⁰² See, e.g., Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 383 (1977) (explaining that retroactivity may be either strong or weak and that “the difference lies in how the impact of a retroactive law on earlier acts in the period prior to its creation is understood”); cf. TROY, *supra* note 195, at 8 (describing Justice Scalia as distinguishing between primary and secondary retroactivity, which “roughly correlate” with strong and weak retroactivity); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 216 (1960) (“[Retroactive] is used both (1) to describe the particular basis of selection for the direct imposition of legal effects and (2) as a description of particular kinds of effects which may occur when a new law is imposed on society.”).

status retroactively. The latter change a legal status prospectively only but alter the consequences of events that predated enactment.²⁰³ For an illustration in the land use context, imagine a new zoning ordinance that eliminates a particular existing use. That zoning ordinance is not strongly retroactive because it only operates prospectively—that is, it requires only that people comply with the new law going forward and does not impose civil or criminal penalties, say, for the existence of the previously conforming use. It has a substantial “weak” retroactive effect, however, insofar as it interferes with the owner’s prior investment in the existing use. But almost all land use regulations are retroactive in this sense. Any land use regulation has the potential to undermine settled expectations around the uses of property.

To be clear, the retroactivity literature on its own does not squarely address the problem of existing uses, let alone solve it. Even a prospective land use regulation—one that does not implicate an existing use—can have a retroactive effect in the sense that it interferes with the owner’s expectations about the use of her property. Antiretroactivity rules, on their own, are therefore either under- or overinclusive when it comes to protecting existing uses. Either they only prohibit regulations that actually change preenactment legal statuses (i.e., that are strongly retroactive), permitting prospective regulations regardless of their impact on existing uses, or they prohibit regulations that significantly interfere with settled expectations, in which case they do not necessarily distinguish between regulations of existing uses and regulations of undeveloped property where the owner reasonably expected to be able to build.

The problem of defining retroactive legislation is difficult. Harder still is the normative problem: deciding whether and to what extent retroactive legislation should be permitted. According to many accounts, some general sense of fairness requires that people be able to order their affairs in reliance on a predictable set of rules.²⁰⁴ Retroactive laws have the effect of changing the rules in the middle of the

²⁰³ Munzer, *supra* note 202, at 383.

²⁰⁴ See Fisch, *supra* note 199, at 1084 (“It is typically thought that prospective laws are more fair and that retroactive laws are more efficient.”); David Frisch, *Rational Retroactivity in a Commercial Context*, 58 ALA. L. REV. 765, 794 (2007) (“Traditional normative criticism of retroactivity has rested on two related assertions: Fairness mandates giving people the opportunity to know in advance what laws will govern their affairs and prohibits changing the rules in midstream, and retroactive laws defeat the legitimate expectations of the persons affected.” (internal footnotes omitted)); see also *Landgraf v. USA Film Prods.*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation . . . embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” (internal footnote omitted)).

game. Antipathy to retroactive laws is also based on the fundamental requirement of notice and fair warning: People should be able to know the legal status of their choices ahead of time.²⁰⁵

On the other hand, to the extent a new rule is an improvement to the legal system, requiring it to apply only prospectively will limit the rule's benefits.²⁰⁶ The possibility of prospective application of an unfavorable legal change may induce people to race to fall within the existing regime.²⁰⁷ In the land use context, as explored in detail in Part IV, this can lead to all kinds of inefficiencies as people engage in strategic behavior to avoid application of a new rule by developing property or engaging in transactions before they otherwise would.²⁰⁸

The question now squarely in focus is whether there is something different about existing uses so that fairness- or efficiency-based arguments can justify their categorical protection. The remainder of this Part examines the most likely justifications: that the extent and nature of the loss associated with the elimination of an existing use is greater and different in kind than the loss that results from the prohibition of a future use; that categorical protection of existing uses is a form of protection for the status quo inherent in the nature of property rights; and that the political economy of existing uses demands their protection. All three justifications turn out to be surprisingly weak.

B. Nature and Extent of the Loss

Why do existing uses seem so different from future uses? Is there any justification for courts treating them differently? There are a number of ways to characterize the different nature of the harm

²⁰⁵ See TROY, *supra* note 195, at 18–19 (arguing that notice is fundamental to fairness, rule of law, and moral choice); see also FISCH, *supra* note 199, at 1085 (“Notice enables people to predict the consequences of their transactions and increases the influence of legal rules upon primary conduct.”).

²⁰⁶ See FISCH, *supra* note 199, at 1088 (“The view that the new rule improves the operative legal principles supports the application of that rule to as broad a class of cases as possible.”).

²⁰⁷ *Id.* at 1089 (“The objectives of a new legal rule may also be undercut if people are able to avoid its application by rushing to complete transactions prior to enactment.”). This is a familiar application of moral hazard and is considered in more detail in Part IV.A, *infra*. See BAKER, *supra* note 40, at 239 (“‘[M]oral hazard’ refers to the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss.”); ALBERT C. LIN, *Size Matters: Regulating Nanotechnology*, 31 HARV. ENVTL. L. REV. 349, 401 (2007) (defining moral hazard as “the temptation to behave differently because of the existence of insurance or other incentives”).

²⁰⁸ See *infra* Part IV.A; see also KAPLOW, *supra* note 9, at 529 (“[T]he encouragement resulting from the assurance that compensation or other protection will be provided in the event of change results in overinvestment.”).

resulting from the elimination of an existing use, but none are particularly satisfying.

1. *Fairness*

There seems to be something particularly unfair about regulating away an existing use. As in the retroactivity literature, the fairness concern is with the government changing regulatory rules on which property owners have reasonably relied.²⁰⁹ Imagine someone who developed a small commercial property only to have a new zoning ordinance downzone the property exclusively for residential use. The new ordinance interferes with the owner's expectations about the use of her property: She designed, built, and budgeted for a project based on existing regulations that, once changed, dramatically reduce the property's economic value. This smacks of unfairness. Indeed, vested rights and, potentially, zoning estoppel might preclude application of the zoning change to the property, presumably to vindicate some combination of reliance interests and fairness.²¹⁰

Notice, however, that this example is not conceptually distinct from the example of an owner of undeveloped land who faces a zoning change *before* having developed her property. In other words, a prospective zoning change can also make a substantial investment in undeveloped property retroactively unappealing and unaffordable. A builder who spends a significant amount of money purchasing undeveloped property in reliance on existing zoning regulations that would permit construction of commercial property presents the same reliance and fairness concerns when a zoning change leaves her with property that can only be developed for less valuable residential use. For the reliance interest to be especially applicable to the protection

²⁰⁹ See Doremus, *supra* note 200, at 14 ("Changing the rules after people have adjusted their conduct on the basis of those rules often seems unfair, because we generally think that people are entitled to, and indeed should, govern their behavior according to the existing rules."); Frisch, *supra* note 204, at 765–66 (describing intuition that "there is something fundamentally unfair about government altering the rules that govern past conduct"); Matthew P. Harrington, *Foreword: The Dual Dichotomy of Retroactive Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 19, 19 (1997) ("On the face of it, there is something unsettling about the possibility that lawmakers might change the rules whilst the game is in progress."). In a leading article, Joseph Singer offered an entire reliance-based theory of property law. See generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). It may be important to ask whether theories of reliance actually have any place in property law, but that question is far beyond the scope of this project.

²¹⁰ See, e.g., Kupchak et al., *supra* note 115, at 24 ("[T]he policy underlying zoning estoppel is two-fold: hold the government to its commitments, and treat property owners who rely fairly."). Zoning estoppel can be applied to prevent the government from changing zoning regulations on which a property owner has reasonably relied, but only if the government has given assurances that the zoning will not change. *Id.*

of existing uses, there must be something unique or at least particularly compelling about reliance that takes the form of an existing use. Merely invoking reliance without providing this additional content does not offer a basis for distinguishing between existing and future uses.

2. *Extent of Loss*

One obvious distinction in the example above is the extent of the property owner's investment in her property and therefore the extent of the loss she suffers when the zoning changes. This, however, is an artifact of the specific example. In fact, viewed through a purely economic lens, the losses associated with regulating existing uses are not necessarily greater than the losses associated with regulating prospective future uses.²¹¹ True, existing uses may increase the extent of loss. All else being equal, eliminating an existing use is likely to impose a more substantial loss than forbidding the same use prospectively. But all else is not equal. Preventing a developer from developing a large residential development (proscribing a future use) may impose much more harm than requiring a property owner to tear down a shack (eliminating an existing use).²¹² More fundamentally, if the extent of economic loss is all that drives the protection of property, then existing uses are irrelevant except as a crude proxy for loss which can presumably be measured much more directly.

Of course, while the losses resulting from the elimination of an existing use are not necessarily greater than the losses resulting from the prohibition of a future use, they do have a different character.²¹³ The former are out-of-pocket costs, the latter are foregone profits, and people may experience these losses differently.²¹⁴ This distinction at least implicates a robust behavioral economics literature on endowment effects, which demonstrates that people generally value property

²¹¹ See Michelman, *supra* note 154, at 1233 (“[A] ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress.”).

²¹² This kind of example is common in the case law. See, e.g., *Savvidis v. City of Norwalk*, No. FSTCV054004143S, 2007 WL 2938522, at *4 (Conn. Super. Ct. Aug. 8, 2007) (granting writ of mandamus on behalf of property owners that spent significant sums on development in reliance on approval of zoning application).

²¹³ Cf. Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1065 (1983) (contrasting consequences of regulation of new products versus regulation of existing products).

²¹⁴ See SHAVIRO, *supra* note 9, at 23 (“People tend to over-weight out-of-pocket costs relative to pure opportunity costs such as foregone gains. . . . Accordingly, out-of-pocket losses and those that result in a perceived transaction loss may tend to be more salient than others . . .”).

they actually possess more than property they do not.²¹⁵ Simply put, the owner of an existing use is likely to value it more than an otherwise identical use that does not yet exist.²¹⁶ Moreover, experimental evidence suggests that inchoate legal entitlements—like the right to possess something in the future—generate weaker endowment effects than the possession of actual, physical objects.²¹⁷ This is consistent with the intuition that actual, existing uses deserve more protection than mere development rights or expectations. Also, endowment effects appear to increase over time, reflecting the sense that the longer a use has existed, the more protection it should receive.²¹⁸

This powerful intuition does not have to be cast in behavioral economics terms. Eliminating an existing use systemically imposes a greater harm than prohibiting a prospective future use because of people's psychological connection with their property. As Justice Holmes famously wrote about adverse possession, "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

²¹⁵ See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003) ("[P]eople tend to value goods more when they own them than when they do not."). See generally SHAVIRO, *supra* note 9, at 23 (discussing endowment effects); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) (demonstrating experimentally that endowment effect persists even in market setting with opportunities to learn).

²¹⁶ See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1479–80 (2008) (discussing endowment effects and noting that "[h]umans have a well-verified psychological inclination to value their current endowments more than identical items that they currently lack but could purchase"); Kahneman et al., *supra* note 215 (making same point).

²¹⁷ See Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541, 1558 (1998) ("[S]ubjects actually have to feel and touch [the object] to make it theirs—the right to [an object is] not endowed."); see also *id.* at 1559 (describing further psychological study); Doremus, *supra* note 200, at 23 ("The [endowment] effect does not seem to attach to expectations. The right to collect a commodity does not give as strong an effect as even brief possession of the commodity itself . . .").

²¹⁸ See Michael A. Strahilevitz & George Lowenstein, *The Effect of Ownership History on the Valuation of Objects*, 25 J. OF CONSUMER RESEARCH 276 (1998) (publishing findings from studies showing endowment effect increasing over time). Responding to this same phenomenon, some have proposed increasing compensation for condemnation the longer property has been owned by the condemnee. See, e.g., MO. ANN. STAT. § 523.039(3) (West, 2009) (offering higher compensation for properties held by same family for fifty or more years), cited in Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1409 n.88; John Fee, *Eminent Domain and the Sanctity of the Home*, 81 NOTRE DAME L. REV. 783, 814–17 (2006) ("For example, eminent domain law might require government to pay homeowners market value plus *X* percent of the home's market value, where *X* depends on how long the owner has lived in the home."). It may, however, be difficult to move from controlled psychological experiments involving tangible and low-value property to real property. See Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1768–71 (1998) ("The classic experiment illustrating the endowment effect involved Cornell coffee mugs.").

without your resenting the act and trying to defend yourself.”²¹⁹ This sentiment is equally applicable to the protection of existing uses. It is hard to deny the entitlement that people feel to continue a use that already exists.²²⁰ As Judge Henry Friendly once wrote, discussing procedural due process, “[W]hatever the mathematics, there is a human difference between losing what one has and not getting what one wants.”²²¹ However framed, people’s connection to their property might justify existing use protection because the character of the relevant harm is different.

While this account may have considerable descriptive force, it is difficult to justify treating these psychological connections differently from property owners’ subjective valuation of their property, whatever the source. It is well-settled doctrine that when the government takes property, owners are entitled to its fair market value and do not receive compensation for subjective value.²²² Courts have reasoned that the difficulty—indeed, the seeming impossibility—of measuring subjective value with any precision militates in favor of ignoring it altogether.²²³ There is really no conceptual difference between the value resulting from the actual possession of property and subjective value resulting from, say, property being in the family for a long time. Both are forms of the subjective value normally excluded from takings protection.

The comparison to the broader category of subjective value reveals yet another problem. The psychological connections between people and their property implicate the extent of harm that results from the elimination of an existing use. Most arguments about including subjective value in takings analysis therefore focus on providing adequate compensation. A variety of academic proposals to

²¹⁹ O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

²²⁰ In support of this intuition, Daniel Troy cites a text on child development that stresses the importance of knowing applicable rules ahead of time. See TROY, *supra* note 195, at 1 (citing H. CLAY TRUMBULL, HINTS ON CHILD TRAINING 216 (1890)).

²²¹ Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1296 (1975), cited in *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 10 (1979). Presaging the economic discussion that follows, Friendly continued, “Revocation of a license is far more serious than denial of an application for one; in the former instance capital has been expended, investor expectations have been aroused, and people have been employed.” *Id.* For further discussion, see Susan H. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 514 (1984).

²²² Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 700–01 (2005).

²²³ See *Id.*, at 701 n.110 (citing cases); see also Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 993–95 (“It is difficult to know how much value someone places on a property, and resort to proxies such as percentage bonuses will generate inaccuracies in both directions.”).

address the problem of subjective value—from a self-valuation model offered by various scholars to awarding percentage bonuses—each increase the amount of compensation the government must pay but do not affect the initial determination of *whether* the government must pay.²²⁴ There is no obvious reason to treat existing uses any differently. If psychological attachment to existing uses implicates the extent of harm but not any qualitative or conceptual differences with prospective uses, then they are better addressed in the compensation inquiry than in the liability determination. But this is not how current land use and property doctrines work.²²⁵

Finally, the fact of an existing use is at best a rough proxy for the kinds of psychological attachments that the law might reasonably seek to protect, administrability concerns notwithstanding. Individuals, and homeowners in particular, may experience endowment effects that change their relationship to existing uses. Applying that intuition to justify protecting commercial property—not to mention more abstract investments in property—is more of a stretch.²²⁶

3. Waste

Perhaps, though, even if the magnitude of the loss cannot justify existing use protection, the character of the loss can. A regulation eliminating an existing use wipes out the money already expended in developing that use. This may seem like a qualitatively different kind of harm because it appears to eliminate a productive and durable asset, thereby imposing some broader cost on society.²²⁷ In fact, however, when it comes to protecting existing uses, this intuition relies on the same unwarranted prioritization of out-of-pocket costs over foregone profits.²²⁸

²²⁴ For a proposal for self-assessment of property values tied to property taxes and sales prices, see Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 300–04 (2001). Richard Epstein has suggested applying some extra percentage increase to compensation at least partly to account for subjective value. Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2114–15 (1997). For a discussion of the possibility of self-assessment in other contexts, see generally Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982).

²²⁵ See *supra* Part I (describing property and land use doctrines protecting existing uses).

²²⁶ See *infra* Part III.B.4 (discussing personhood).

²²⁷ See Dana, *supra* note 40, at 685 (“The costs of undoing an existing development, moreover, are typically much greater than the costs of preventing development.”); cf. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 796 (2005) (“Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner’s ability to destroy her property.”).

²²⁸ See *supra* note 214 (discussing such overweighting). This also resembles at least some characterizations of the sunk cost fallacy in that it unduly privileges money that has

To see why, consider the following stylized hypothetical. Imagine that Los Angeles is interested in zoning some property exclusively for low-income housing and can choose between two lots. The first, in a mixed-income neighborhood, already has a movie theater on it. Zoning that property would render the theater unusable and would further reduce the value of the property for a combined loss of, say, five hundred thousand dollars.²²⁹ The second is an undeveloped lot in the toniest part of Beverly Hills. Zoning it for low-income housing will reduce the value of the property by five million dollars. All else being equal, there is no doubt that the government should choose to zone the movie theater out of existence instead of downzoning the lot in Beverly Hills. The supposed waste resulting from the destruction of the theater is fully captured by the use value of the property. The fact that an existing movie theater is eliminated does not create some additional harm to society above and beyond what is captured by its present market value (subject only to endowment effects and the like).²³⁰ However, eliminating the movie theater is likely to be a taking while downzoning the undeveloped property is not.

Professor Shavell has recently modeled one form of this more general problem, demonstrating that transition costs for modifying durable uses, or otherwise eliminating nonconforming uses, need to be included in the cost-benefit analysis to decide whether to grandfather them.²³¹ His model reveals the potential significance to transition costs of investments in existing uses (what he calls “durable precautions”) but simultaneously recognizes that grandfathering can be

already been spent. See Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided “Reform” of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1534 (2006) (“Cognitive research also finds that individuals are reluctant to walk away from sunk costs, irrationally ignoring the marginal costs and benefits of additional action.”); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 500 (2002) (“When making investment decisions, the old economic adage advises that one should ignore sunk costs, but people intuitively tend to let such costs influence their choices.”).

²²⁹ That loss includes both the costs of tearing down the theater and the lesser value of the property as low-income housing in relation to the higher-valued movie theater.

²³⁰ For a discussion of endowment effects, see *supra* notes 216–18 and accompanying text. This waste analysis will not hold true if eliminating the existing use imposes an intergenerational externality. See Strahilevitz, *supra* note 227, at 793–94 (identifying problem with property destruction as imposing “intergenerational consequences, for better or worse”). By the same token, a regulation can also impose an intergenerational benefit. There is no reason, in the abstract, to suspect that existing uses will be more valuable in the future than the kinds of regulatory benefits the government might seek to obtain by eliminating an existing use. Unless there is some kind of systemic valuation failure for existing uses, the present value of existing uses should capture their value in the future.

²³¹ Shavell, *supra* note 17, at 57–64.

unnecessarily costly.²³² In other words, and consistent with the central claim here, while the fact of some kinds of preexisting uses of property can be relevant to the efficiency of new regulations, it plainly is not dispositive and so does not justify categorical protection.

The picture becomes even more complex if the problem of waste is viewed from a different temporal perspective. Instead of focusing purely on the government's decision whether to regulate after a use is already in place (i.e., after costs have already been sunk), it is more useful to ask what rules should be in place to minimize the opportunity for waste *ex ante*. Of course, both property owners and the government have the chance to prevent waste: the property owner by not building in the first place; the government by not regulating after the use already exists. Under one standard law and economics account, the risk of loss should be placed on the party best situated to avoid it.²³³ In other words, waste will be minimized if the least-cost avoider bears the risk of a use being eliminated.

This approach does not compel categorical protection of existing uses. While the government always has the last chance to avoid the loss—the government is always in a position not to regulate—property owners may frequently be in a better position to minimize costs more cheaply by not building in the first place.²³⁴ There are, in fact, strong reasons to think that compensation may result in overinvestment in property, a point taken up in Part IV.²³⁵ At the very least, the fact-specific and empirical question of who the least-cost avoider is in any particular situation cannot justify protection for existing uses in all or even most cases.²³⁶

²³² See *id.* at 47 (“[A] party ought to continue with its period 1 precaution in period 2 if the cost of the new conventionally optimal precaution for period 2 harm would exceed the marginal reduction in expected harm that would be accomplished by a change to this precaution.”).

²³³ See, e.g., Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1152 (2006) (“[T]he law aims to place liability on the least-cost avoider. The least-cost avoider is frequently the party best able to control a situation.”); Eric Rasmusen, *Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369, 380 (2004) (“The least-cost avoider principle, broadly stated, asks which party has the lower cost of avoiding harm, and assigns liability to that party.”).

²³⁴ This kind of reasoning is reminiscent of the “last clear chance” doctrine in torts, which “allowed plaintiffs to prevail despite their being the cheaper precaution taker against their injury.” Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman’s Rule*, 82 IND. L.J. 745, 771 (2007). This doctrine has been replaced in most jurisdictions by comparative fault regimes. Ehud Guttel, *The Hidden Risk of Opportunistic Precautions*, 93 VA. L. REV. 1389, 1418 n.62 (2007).

²³⁵ See *infra* notes 278–90 and accompanying text (discussing transitions literature).

²³⁶ For examination of the complexities of identifying the least-cost avoider in another context, see Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN.

4. *Personhood*

It may be that these economics-oriented accounts miss some more fundamental aspects of existing uses and the connection that can develop between people and their property. As Professor Radin has observed, some relationships between people and their property implicate the owner's personhood.²³⁷ When this is the case, according to Radin, compensation not only fails to provide sufficient protection but also threatens to work greater injury by commodifying what should be uncommodifiable.²³⁸

Existing uses implicate and simultaneously expand upon this personality theory of property. In Radin's view, property can be constitutive of identity: The relationships between persons and external objects are what create fully developed individuals.²³⁹ These relationships, however, rely on actual objects in the world and not on a mere expectancy or hope for objects in the future.²⁴⁰ They rely, in other words, on existing uses and not merely prospective future ones.

Existing uses are at most a necessary but not sufficient precondition for property to implicate personhood. Radin identifies a continuum from personal to fungible property: The former is constitutive of identity, while the latter is held purely instrumentally.²⁴¹ A prospective future use is, in this sense, always farther to the fungible side of the property spectrum than an existing use. As Radin herself explains, "Object-loss is more important than wealth loss because object-loss is specially related to personhood in a way that wealth-loss is not."²⁴² But it is not the case that all or even most existing uses implicate owners' personhood at all, let alone to an extent that

L. REV. 749, 791 (2008), which discusses the asymmetrical positions of consumers and sophisticated sellers with regard to the ability to avoid mistakes.

²³⁷ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965–66 (1982) (discussing whether people have property interest in their bodies).

²³⁸ See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1907–09 (1984) (describing application of market-inalienability theory to personhood).

²³⁹ Radin, *supra* note 237, at 972–75 (discussing Hegelian theory).

²⁴⁰ As Radin describes it, "Hegel's property theory is an occupancy theory; the owner's will must be present in the object." *Id.* at 973. The primacy of the object's existence, then, is essential to Radin's personhood perspective on property. Extrapolating from the "notion that the will is embodied in things," Radin concludes that "[t]he idea of embodied will . . . reminds us that people and things have ongoing relationships which have their own ebb and flow, and that these relationships can be very close to a person's center and sanity." *Id.* at 977. *But see* Radin, *supra* note 161, at 1692 (suggesting people may have personhood interests in plans to build residence).

²⁴¹ Radin, *supra* note 237, at 959–60 (describing fungible property as opposite of personal property). Radin argues that "[t]he opposite of holding an object that has become a part of oneself is holding an object that is perfectly replaceable with other goods of equal market value. One holds such an object for purely instrumental reasons." *Id.*

²⁴² *Id.* at 1004.

demands protection. The kinds of existing uses frequently at issue in land use disputes are commercial uses, or property owned by corporations. Personhood in such contexts simply is not—or at least not often—at issue.²⁴³

C. *Protecting the Status Quo*

1. *Objective Stability*

Another kind of explanation for the protection of existing uses may come from property law's more general role in promoting stability.²⁴⁴ Indeed, property's long-established concern with perpetuating the status quo has occasionally led to its being cast as an ossifying force and even an enemy of progress.²⁴⁵ For better or worse, property's protection of existing uses may simply be another expression of its general resistance to change. While this characterization of property's stabilizing character has some appeal, it does not withstand serious scrutiny as either a positive or normative account of existing use protection.

First, descriptively, the stability that property promotes may be either stability in the regulatory regime or stability in the actual uses of property. The former does not provide any basis for distinguishing between existing and future uses and is easily set aside. It is simply

²⁴³ Individual owners of small businesses may well have their identities bound up in their commercial property. For a pleasant example, see Donna Paul, *Fashion's Just a Job; Baking's a Destiny*, N.Y. TIMES, Sept. 28, 2007, at F3 (describing young couple buying bakery that appeared far more important to them than their house). Line drawing is nevertheless hard, if not impossible. In an interesting new article, Professor Stephanie Stern questions whether personhood interests are actually at stake in the home or whether "residential protectionism" is simply the result of interest group capture. See Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1096 (2009).

²⁴⁴ See, e.g., Carol M. Rose, *The Shadow of The Cathedral*, 106 YALE L.J. 2175, 2187 (1997) ("The usual roles of property rules—defining rights and identifying rights-holders— . . . encourage individual investment, planning, and effort, because actors have a clearer sense of what they are getting."); see also Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 573 (2005) ("The stability in ownership afforded by the law creates the possibility for developing new kinds of value in, and uses of, property that would otherwise be unavailable."); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 64 (2000) ("A rule that has been around a long time and is relatively unchanging is more likely to be understood because actors . . . are more apt to have encountered the rule in the past and to have made some previous investment in comprehending the rule.").

²⁴⁵ See, e.g., Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 325 (2002) ("[Property] may involve a 'double bind' between reinforcing the status quo by compromising ideals and making very little real progress toward change, and reinforcing the status quo by insisting on utopian ideals and making no progress toward change.").

about minimizing regulatory change and is indifferent to the use of property. The latter is descriptively inadequate as a justification for existing use protection. The now familiar—if not standard—account of property law is organized around creating incentives to put property to more productive use.²⁴⁶ Indeed, the history of property law in this country is the history of promoting increasingly intensive uses of land, of chattles, of ideas. The guiding principle has not been maintaining stability but rather encouraging productivity. Existing use protection is only consistent with this history to the extent that it protects existing uses against *less intensive uses* and not more intensive ones. This distinction simply does not exist in the doctrine.

2. Evidence of Subjective Expectations

Instead of protecting some kind of objective stability, perhaps existing use protection can be explained as protecting property owners' subjective expectations about the use of property. The idea is simply that property owners should be protected from regulatory changes that interfere with real and reasonable expectations. Existing uses may be useful for deciding what count as subjectively real and objectively reasonable expectations because they serve as definitive evidence of some baseline of actual expectations concerning the use of property.²⁴⁷

Whether a use exists or not has little to do with its objective reasonableness; plenty of unreasonable land uses actually exist.²⁴⁸ But existing uses might be useful for converting inscrutable individual plans into protectable property interests. It is one thing to protect a property owner's claim that she hoped, someday, to develop her property. It is, perhaps, something else to protect the property owner who has already actually done so. Viewed this way, existing uses have salience primarily because they are particularly good evidence of a property owner's real expectations about the use of property.

²⁴⁶ See, e.g., Richard A. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 108 (1992) (arguing that distribution of property rights is “functional” and “forward-looking” and suggesting that “the central task is to develop that initial distribution of rights that leads to the shortest path for the productive use of natural resources—that is, to some form of allocative efficiency”).

²⁴⁷ This may also be what Michelman was suggesting in the quotation accompanying note 162, *supra*.

²⁴⁸ The harm-prevention exception for regulatory takings liability clearly demonstrates that property is regularly put to a use that is, or later turns out to be, unreasonable. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992) (articulating nuisance-prevention defense); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding law barring operation of brick mills in residential areas).

Of course, existing uses are only evidence of some floor of expectations, not the ceiling. Property protection does not extend *only* to existing uses. Moreover, existing uses are not the only good evidence of an owner's expectations. Where an owner claims an expectation beyond the existing use of the property, submitted proposals, architect renderings, and even the purchase price of undeveloped property can all demonstrate the sincerity of those plans. This kind of inquiry is entirely consistent with the vested rights doctrine²⁴⁹ as well as with *Penn Central's* focus on investment-backed expectations.²⁵⁰ Still, existing uses seem like the best evidence of actual expectations about the use of property, expectations that the government cannot abrogate without paying compensation.

This account has some descriptive power, but it ultimately does not justify special protection for existing uses. Most profoundly, it does not explain why a property owner's individual plans should be a relevant consideration for property protection in the first place. If the concern is distinguishing pie-in-the-sky development dreams from real, concrete plans, diminution in value already captures this, without focusing at all on actual expenditures or existing uses, or even on subjective expectations. The more speculative and unrealistic an expectation, the less its elimination will impact fair market value.²⁵¹ That is, market value will not reflect unreasonable expectations.

If, instead, the concern is genuinely with protecting subjective expectations—regardless of the impact on the property's fair market value—the result is simply inconsistent with core takings doctrine. When it comes to prospective future uses, the law does not even aspire to protect all genuine and reasonable expectations.²⁵² Developers are routinely required to scale back projects and offer concessions as part of the development process regardless of the sincerity of

²⁴⁹ See *supra* Part I.C (discussing vested rights doctrine).

²⁵⁰ See *supra* notes 132–56 and accompanying text (discussing investment-backed expectations prong of *Penn Central* test).

²⁵¹ See Serkin, *supra* note 222, at 689–92 (discussing highest and best use as component of fair market value).

²⁵² See Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 250–51 (2007) (problematizing what it means for compensation to make property owners whole).

their original expectations.²⁵³ So long as that interference does not go too far, it is not impermissible and does not trigger takings liability.²⁵⁴

Protecting existing uses because they are evidence of some baseline of a property owner's expectations unjustifiably presumes that an existing use also defines the limits of the government's ability to interfere with those expectations. To see the problem, imagine a developer who, in negotiations with a local government, is forced to change her plans for a condo development to build fifty-nine instead of sixty units. It is hard to believe this demand could ever run afoul of the Takings Clause, despite its interference with the owner's sincere expectations.²⁵⁵ But now imagine a local government seeking to force the removal of one condo unit out of sixty that have already been built. These two situations feel different—but not because there is any difference in the extent of the regulations' interference with the property owner's real expectations. Rather, the difference lies in the magnitude of the loss, which the previous section has already rejected as a legitimate basis for existing use protection.

In sum, then, neither a desire for stability (either of regulation or of land use) nor an interest in protecting owner expectations can completely explain or justify a categorical rule protecting existing uses.

D. Political Economy

An entirely different kind of normative justification for existing use protection comes not from the character of the loss, or protection of the status quo, but instead from the potential for systemic political malfunction. According to Professor Fischel, among others, property protection should be at its highest when political protections are at their weakest.²⁵⁶ The question, then, is whether owners of existing

²⁵³ Carol Rose offered the following examples of such tradeoffs and concessions: A community might ask a developer to provide park space as a tradeoff for permission to build a new development, or to preserve a familiar community landmark in exchange for permission to build at a higher density; or the tenants of a low income area, through the local government as mediator, may negotiate with a highrise developer for low-income housing to offset the loss of inexpensive residential hotel space.

Rose, *supra* note 46, at 891 (footnotes omitted).

²⁵⁴ For a discussion of the *Penn Central* factors, see *supra* Part II.B.

²⁵⁵ See *supra* note 158 and accompanying text (discussing diminution in value test for takings liability).

²⁵⁶ WILLIAM A. FISCHEL, REGULATORY TAKINGS 139 (1995) [hereinafter FISCHEL, REGULATORY TAKINGS]. See generally WILLIAM A. FISCHEL, HOMEVOTER HYPOTHESIS (2001) [hereinafter FISCHEL, HOMEVOTER HYPOTHESIS] (arguing that in face of homeowners' political power, developers and owners of undeveloped property need greater protection of property rights). Dean Treanor adopted a similar approach in his leading historical treatment of the Takings Clause, arguing for a political process-based interpretation focused on the political protection of property. Treanor, *supra* note 165, at 708–10; see also

uses are likely to suffer from a predictable political failure. The answer turns out to be somewhat complex.

In his examination of interest group politics, Professor Komesar argues that the principal requirements for generating political pressure are relatively small numbers and high per capita stakes.²⁵⁷ The size of the interest group matters because it affects the ability to identify interested parties as well as the cost of organizing them.²⁵⁸ The per capita stakes matter because they increase the incentives of the interested parties to expend the time and money necessary to overcome the organizational costs.²⁵⁹ These requirements neatly track the characteristics of owners of existing uses, who not only constitute a defined class but also are often easy to identify as the record owners of apparent uses of land. The transaction costs required for their coordination should therefore be relatively low. Moreover, the per capita stakes are predictably high for all the reasons discussed above.²⁶⁰ In the rough-and-tumble of interest group politics, the class of existing use owners should be far less susceptible to the kinds of political failures that public choice theory predicts when costs are imposed on diffuse, disinterested, and unorganized groups.²⁶¹

In contrast, prospective future uses are more susceptible to government interference than existing uses. Many of the beneficiaries of

Doremus, *supra* note 200, at 40 (“More searching review is appropriate where only a minority will bear the regulatory burden . . .”); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991) (“[W]hen . . . the government’s aims could have been achieved in many ways but the means chosen placed losses on an individual or on persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking.”).

²⁵⁷ NEIL K. KOMESAR, *LAW’S LIMITS* 61 (2001) (explaining advantage of “groups with small numbers but high per capita stakes,” whose members “have greater incentive to expend the effort necessary to recognize and understand the issues” over “groups with larger numbers and smaller per capita stakes”).

²⁵⁸ *Id.* (“[F]or larger groups, the cost of participation depends heavily on the cost of organization, which in turn depends on both the size of the group to be organized and the difficulty of identifying and convincing potential allies.”).

²⁵⁹ *Id.*

²⁶⁰ See *supra* Part III.C.2 (discussing subjective value).

²⁶¹ See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37 (1991) (predicting that “small groups with concentrated (high per capita) interests in lawmaking will come closer to their optimal level of petitioning than large groups with diffuse (low per capita) interests”); Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1719 (2007) (“[Public choice theory] points to the disproportionate influence that special interest groups, and chiefly politically powerful real estate entrepreneurs, have over governmental decisions in land policy issues.”). For further discussion of the insights of public choice theory and its implications for property protection, see generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000), and Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1637–43 (2006).

a proposed housing development, for example, are unidentified end-purchasers who are therefore unable to mobilize political opposition to new regulation.²⁶² The developer certainly has an interest—indeed a strong interest—in resisting regulations limiting or eliminating a new development, but even so, that developer is unlikely to internalize all of the costs that the government restriction will impose.²⁶³ For these and similar reasons, Professor Fischel has argued that the Takings Clause should principally be concerned with protecting undeveloped property because of the likely political failures surrounding local governments' land use regulations.²⁶⁴

In fact, however, this political economy account is not so cut-and-dried. Predictable political process failures in some contexts suggest a particular need to protect existing uses from exploitation. Consider Albert Hirschman's concepts of "Exit" and "Voice."²⁶⁵ Owners of existing uses may well have a louder voice in the political process, but it comes with an offsetting loss in the ability to exit. The threat of exit is already low with undeveloped property. As Fischel observes, real property cannot simply be moved.²⁶⁶ If the government passes a new regulation severely limiting the use of property, the owner's only realistic option is to cash out, often at a considerable loss. The costs associated with moving are an opportunity for rent-seeking by the government; so long as the costs of moving are more than the costs imposed by the government, a rational property owner will stay in the

²⁶² See, e.g., Elhauge, *supra* note 261, at 39 (characterizing "[l]arge diffusely interested groups" as underrepresented and as having "a harder time collecting the resources necessary to monitor and evaluate developing issues, make campaign contributions, [and] present information to voters or officials").

²⁶³ For an account of those costs, see Serkin, *supra* note 261, at 1677–79.

²⁶⁴ FISCHEL, REGULATORY TAKINGS, *supra* note 256, at 139, 282; see Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 777 n.119 (1999) (interpreting Fischel as supporting judicial intervention to protect undeveloped land from local governments); Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1126 (1996) (book review) (same); see also William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865, 866 n.7 (1991) ("In many cases, however, zoning imposes burdens on one set of owners (e.g., owners of undeveloped land) to benefit another set of owners (e.g., owners of already-developed homes).").

²⁶⁵ See ALBERT O. HIRSCHMAN, EXIT, VOICE & LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3 (1970). For a thoroughgoing account of the role of exit and voice in local governments, including a description of Hirschman's theory, see Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 476 (1991).

²⁶⁶ See FISCHEL, REGULATORY TAKINGS, *supra* note 256, at 139 ("Owners of property whose services are elastic in supply can protect themselves from myopic local regulation by threatening to leave the jurisdiction. The remaining category, regulation of immobile property by independent local governments and state agencies, requires most of the attention of judges in regulatory takings cases.").

jurisdiction.²⁶⁷ If the costs of exit for owners of undeveloped property are high, they are often even higher for owners of developed property, and when they are, the opportunity for exploitation by the government is higher too.²⁶⁸

Existing uses are also particularly salient, however, because of the opportunity they present for the government to single out specific property owners to bear regulatory burdens.²⁶⁹ There are times—predictable times—when eliminating an existing use is likely to generate, not expend, political capital. Zoning away adult businesses is perhaps the easiest example, in which the costs are imposed on the business owner and the patrons who, because of the nature of the use, are unlikely to mobilize to create coordinated political pressure. But this same political dynamic exists whenever a municipality can single out a politically disfavored use for the benefit of the majority or, simply, the politically powerful.

The opportunity for this kind of singling out is likely to vary depending on the nature and size of the government. It is more present in small, local governments where the stakeholders are clear and the range of interests is relatively narrow. In small municipalities, primarily responsive to homeowner majorities, local politicians maximize their political power by catering to homeowner interests.²⁷⁰ Individual homeowner preferences may vary, but homeowners as a group share a common goal of maximizing property values.²⁷¹ They are also uniquely situated to exert political pressure on local politicians, both because they constitute a majority of voters in most small jurisdictions and because they enjoy informal organizational advantages.²⁷²

Homeowner interests with respect to existing uses are relatively easy to anticipate. In general, homeowners will want their own homes protected from regulatory change.²⁷³ They may feel differently, however, about nonresidential uses, especially those that have (or are perceived to have) an adverse impact on residential property values. If this means shutting down a small truck loading facility or a nearby

²⁶⁷ For a discussion of rent-seeking in land use regulations, see Abraham Bell & Gideon Parchomovsky, *Compensating Against Corruption* 3 (Mar. 3, 2008) (unpublished manuscript, on file with the *New York University Law Review*) (arguing takings compensation is justified because it reduces profitability of rent-seeking behavior).

²⁶⁸ This claim comes with a substantial caveat: Some uses can be moved relatively easily. For example, many businesses do not depend on a specific location.

²⁶⁹ Cf. SHAVIRO, *supra* note 9, at 77 (“[T]here plainly would be a strong argument for allowing *ex post facto* criminal legislation, but for a concern about singling out.”).

²⁷⁰ FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 256, at 87–96 (developing median voter model).

²⁷¹ Serkin, *supra* note 261, at 1648.

²⁷² *Id.*

²⁷³ FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 256, at 9 (discussing NIMBYism).

stable with braying donkeys, so be it. In the absence of a compensation requirement, the government is very likely to regulate regardless of the financial harm it is imposing on the owner of the existing use because the political interests are so neatly aligned to favor homeowners.

The same is simply not true in larger governments. There, interest group politics play out far less predictably. The organizational advantages that owners of existing uses enjoy are not offset by the coordinated political force of local homeowners.²⁷⁴ The political failure to worry about in larger governments is their responsiveness to owners of existing uses, not the opposite. While exceptions are easy to imagine, in general the protection of existing uses therefore appears to be more important for small local governments than for larger or higher levels of government.²⁷⁵ Indeed, existing uses appear to fare well—perhaps too well—at the state and federal level, as various state and federal statutes demonstrate.²⁷⁶

Ultimately, then, it is difficult to generalize about the political power of owners of existing uses. It is likely to depend on the nature of the government and the nature of the use. This variety in the political story cannot justify the blanket protection that existing uses receive. It is simply not the case that existing uses suffer from systemic political failures that justify greater judicial protection across the board.

IV

LIMITING EXISTING USE PROTECTION

Despite its strength, the intuition that existing uses demand categorical protection turns out to be surprisingly difficult to defend. The fundamental problem is that the presence of an existing use does not always correspond to the plausible interests that existing use protection seeks to safeguard. Note that this is not an argument that existing uses are irrelevant, or that they never represent important interests. On the contrary, the presence of an existing use is often a good proxy

²⁷⁴ See Serkin, *supra* note 261, at 1661–64 (arguing that homeowners' political power dissipates at state and federal level).

²⁷⁵ The prescriptions arising from this likely political failure are discussed in more detail in Part IV.C, *infra*. Here, it is enough to repeat Professor Fischel's argument that in the takings context, judicial resources should be focused only on those situations where property owners are unlikely to have a meaningful political remedy. See Fischel, *supra* note 264, at 911–12.

²⁷⁶ Principal among those statutes are the Clean Air Act, the Clean Water Act, the Wilderness Act, the Americans with Disabilities Act, and a number of state statutes, each of which provides special treatment for existing uses. See *supra* notes 12–24 and accompanying text.

for high transition costs or high subjective value, to take just two examples. The conclusion of the previous Part is simply that the categorical protection of existing uses extends more protection than appropriate in at least some cases. The line between existing uses and prospective future uses is not grounded in inherent differences between the two.

It is therefore still worth exploring whether a categorical approach to existing uses makes sense as a kind of prophylactic rule. Instead of delineating some special class of property or entitlements, the category of existing uses may be useful as a proxy for concerns like the extent of loss, transition costs, or high subjective value. In this way, categorical existing use protection can perhaps be defended as an easy-to-administer bright-line rule. Although overbroad, it prevents harms that are often, even if not always, associated with the elimination of an existing use. This protection may be justified after all if it “gets it right” often enough, and at low enough cost, so that it is better than the alternative.

Ultimately, this possible justification implicates an empirical question about the relative costs and benefits of existing use protection. It also implicates an entire academic literature on the benefits of bright-line rules, and the necessary fit between constitutional limits and the interests being protected.²⁷⁷ Indeed, if existing use protection were costless—or even just sufficiently cheap—an admittedly overbroad prophylactic rule might make good sense. It would minimize uncompensated regulatory harms by protecting endowment effects and other psychological connections between people and their property. It would constrain abuse by local governments, and it would be consistent with many people’s deeply held intuitions. But there are strong reasons to be skeptical of this prophylactic justification. Even without a complete empirical cost-benefit accounting—an enterprise far beyond the theoretical focus of this paper—it is clear that the costs are likely to be too great and the benefits too small. This Part discusses these principle costs and benefits and then argues for more limited existing use protection.

²⁷⁷ For a sampling of this literature, see generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 10 (2004), which argues that decision rules are central to judicially-created constitutional doctrine; Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 9 (2001), which argues that where risk of false negatives is high, a prophylactic rule might protect constitutional values; and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207–09 (1988), which defends constitutional rules based on institutional propensities.

A. *The High Costs of Existing Use Protection*

At a sufficient level of generality, the problem of existing uses implicates an unexceptional application of the literature on legal transitions. Protecting owners from legal change—whether in the form of compensation or grandfathering—creates predictable and potentially perverse investment incentives. One of the most obvious is the opportunity for property owners to make investment decisions specifically to take advantage of temporarily favorable regulatory treatment.²⁷⁸ In the face of a future regulatory change, property owners can lock in a use by building or by vesting rights before the regulatory change takes effect.²⁷⁹ This can precipitate a race to develop and can lead to inefficient overinvestment in property.²⁸⁰ For just one example, in *GRA V, LLC v. Srinivasan*,²⁸¹ the New York Supreme Court described the effect of neighborhood opposition to the development of a new apartment building. According to the court, the result was a race in which “the community sought to obtain a rezoning to prohibit [the building], while [the] Owner endeavored to complete as much of the construction as possible before any such rezoning.”²⁸²

There is a complicated but well-developed story to tell about when, and under what conditions, protection from regulatory change is likely to enhance efficiency.²⁸³ As Professor Shaviro has demonstrated, it depends on whether property owners should have an incentive to alter their conduct in anticipation of new rules.²⁸⁴ This, in turn, can depend on whether the underlying rule change is good or not—

²⁷⁸ See Nash & Revesz, *supra* note 10, at 1725 (“[R]elief from a transition in legal regimes is ordinarily inadvisable because it creates an incentive for societal actors not to anticipate changes in the governing law.”); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1070 n.5 (Stevens, J., dissenting) (“In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation.”); Serkin, *supra* note 222, at 677 & n.102 (citing further sources and giving example).

²⁷⁹ Dana, *supra* note 40, at 677–81 (describing “race to develop”); see also Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 325 (2006) (“[P]roperty owners . . . should be forced to internalize [the risk of] . . . foreseeable new regulations designed to protect the public from the harms attendant on the cumulative effects of individual acts of ownership.”).

²⁸⁰ See *supra* Part III.A (discussing inefficiency in terms of antiretroactivity laws).

²⁸¹ 862 N.Y.S.2d 358 (App. Div. 2008).

²⁸² *Id.* at 359–60.

²⁸³ In his careful taxonomy of retroactive effects, Professor Shaviro identifies instances in which retroactive application of rules will not enhance efficiency. SHAVIRO, *supra* note 9, at 47–53 (looking specifically at retroactive application of taxes).

²⁸⁴ *Id.*; see also Logue, *supra* note 40, at 235–45 (identifying situations in which anticipation of legal change is desirable).

that is, whether it represents legal progress, however defined.²⁸⁵ The intuition is that individuals should adjust their behavior to anticipate “good” rules but not “bad” ones.²⁸⁶ It can also depend on whether a failure to anticipate some regulatory change will result in waste.²⁸⁷ There is little doubt, however, that protecting existing uses can induce people to alter at least the timing of their investment decisions, if not their substance, specifically in order to receive favorable regulatory treatment.

Existing use protection can also lead to inefficient investment decisions simply by allowing property owners to ignore the risk of regulatory change. Professor Kaplow examines this problem in his leading article on legal transitions, arguing that compensation or other protection for existing uses is likely to cause property owners to discount the risk of future regulation.²⁸⁸ If property owners know that the government will compensate them for their property’s existing uses, they may fail to account sufficiently for the risk of regulatory change.²⁸⁹ According to Kaplow, this risk should be no different than the risk of fire or flood; it too is a risk that property owners should at least partially internalize in order to induce efficient levels of investment.²⁹⁰

The effect of existing use protection on investment decisions is obviously multifaceted and complex.²⁹¹ At least for owners who are

²⁸⁵ SHAVIRO, *supra* note 9, at 48–51; *see also* Logue, *supra* note 40, at 236–39 (discussing legal “disasters”).

²⁸⁶ *See* Logue, *supra* note 40, at 239–42 (“[I]f the transition is undesirable, the optimal transition policy . . . would be a norm that actually discourages anticipation of the law change and encourages reliance on old law . . .”).

²⁸⁷ *See id.* at 236 (arguing that desirability of legal rule matters less when regulation destroys property values entirely and irreversibly). For discussion of the problem of social waste, *see supra* Part III.B.3.

²⁸⁸ Kaplow, *supra* note 9, at 529.

²⁸⁹ *See id.* at 529–31; *see also* Dana, *supra* note 40, at 679–80 (describing Kaplow’s argument).

²⁹⁰ *See* Kaplow, *supra* note 9, at 528–30; *see also* SHAVIRO, *supra* note 9, at 49 (“Suppose I am considering building a house on a site where the government may at some point exercise its power of eminent domain in order to extend a highway. When and if the highway comes, should I be compensated for the value of my improvements? Here, my incentives will be better if the answer is no.”); Levmore, *supra* note 40, at 1677–79 (“But if the government pays for losses suffered as a result of regulation, then the factory owner has no incentive to anticipate these regulations and to facilitate the move to better and safer methods.”); Logue, *supra* note 40, at 237 (“To ensure that the individual has the ex ante incentives (that is, to force her to internalize the cost of her decision to build on this site), the consequentialist or economic framework would counsel against compensation . . .”).

²⁹¹ It is, in fact, sufficiently complex that it demands considerably more treatment than it can be given here. In particular, different regulatory contexts may afford different opportunities for owners to modify their behavior in anticipation of government action. This is a topic that must be reserved for more comprehensive treatment in future work.

risk averse, some kind of insurance is important for creating efficient investment incentives.²⁹² It may well be that individual homeowners demand more protection against loss and are less susceptible to inefficient overinvestment than, say, owners of commercial or industrial property, or developers, who may have greater ability to take strategic advantage of existing use protection. Nevertheless, the possibility of existing use protection creating perverse ex ante investment incentives in at least some regulatory contexts is of more than theoretical concern. In the face of anticipated regulatory change, property owners sometimes do, in fact, build aggressively to take advantage of more lenient regulations.²⁹³ Even run-of-the-mill land use regulations can stimulate more development, sooner, than would otherwise occur.²⁹⁴

This is all relatively well-trodden ground in the takings and transitions literature: All else being equal, the categorical protection of existing uses threatens to create perverse investment incentives for property owners. But some costs are particularly pointed in the land use context. For example, existing use protection can distort government decisionmaking. If existing uses are compensated, a government sensitive to cost will avoid regulating property with existing uses.²⁹⁵ Knowing this, a property owner can, in effect, manipulate the government's regulatory decisions by developing her property, making it more costly for the government to regulate her property as opposed to her neighbor's undeveloped property.²⁹⁶ The protection of existing uses may also make local governments less willing to experiment with zoning. The less local governments retain the flexibility to get out of unsuccessful zoning decisions, the less they will innovate where the outcome is uncertain.²⁹⁷ This dynamic is also at least partly respon-

²⁹² See, e.g., Doremus, *supra* note 200, at 16 (“Another efficiency concern is the worry that an unstable regulatory climate will inhibit investment, particularly investment that takes a long period of time to mature.”). In the tax context, Logue has argued persuasively that failure to provide transition relief will result in taxpayers demanding a “default premium”—that is, more of a tax benefit in the future to induce such investments to account for the possibility of retroactive change. See Logue, *supra* note 199, at 1139–41.

²⁹³ See, e.g., Dana, *supra* note 40, at 694–95 & n.107 (collecting examples of accelerated development to beat regulatory clock).

²⁹⁴ For this reason, economist Robert Innes has argued that developed and undeveloped property should receive equal treatment for takings purposes. See Robert Innes, *Takings, Compensation, and Equal Treatment for Owners of Developed and Undeveloped Property*, 40 J.L. & ECON. 403, 406–07 (1997).

²⁹⁵ See Serkin, *supra* note 261, at 1666–73 (describing governments' risk aversion).

²⁹⁶ See Innes, *supra* note 294, at 406 (“[T]he least valuable undeveloped land should be taken first, which implies that, if takings are not compensated, landowners have an incentive to develop their land early in order to reduce their risk of government appropriation.”).

²⁹⁷ I credit Professor Fischel with this interesting suggestion.

sible for the recognition that zoning is not so much forward-looking land use planning as it is mere description of existing conditions.²⁹⁸ If planners have to zone around existing uses, then a significant part of any zoning regime will incorporate the existing uses, whether or not they make sense where they are.²⁹⁹ Categorical existing use protection can thereby hobble a local government's zoning power by locking in the status quo and preserving incompatible neighbors.

Finally, the political dynamic around existing uses suggests that courts should be primarily concerned with the actions of small local governments in which owners of existing uses suffer from systemic political failures.³⁰⁰ This focus, however, threatens to exacerbate some of the other costs of existing use protection. Small local governments are likely to be the most sensitive to litigation risks and to takings liability.³⁰¹ In fact, they may be too sensitive and consequently may be overdeterred from enacting what would have been beneficial regulations.³⁰² Also, the relatively low cost to developers and property owners of monitoring local government decisionmaking makes it much easier to foresee adverse regulatory changes.³⁰³ Local government actions such as rezonings are therefore particularly likely to create an inefficient race to invest in order to lock in existing regulations.

At the very least, this catalog of costs calls into question the appropriateness of existing use protection as a prophylactic rule. Legislatures in specific instances are likely to determine that the benefits of protecting existing uses outweigh the costs, but categorically compelling the protection of existing uses eliminates both courts' and legislatures' ability to engage in any more fine-grained analysis of the

²⁹⁸ This concern is often voiced in the zoning and land use literature. See *supra* note 7 (citing sources).

²⁹⁹ Favoring existing uses over potential future uses may also privilege a particular kind of property use. Criticisms of labor theories of property point out the harms of privileging active uses of property over passive ones. See, e.g., Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329, 336 n.36 (2007) (describing Western accounts of property used to "justify colonial expropriations"). The labor theory, in turn, has justified such pernicious acts as the expropriation of land by early European settlers from Native Americans, whose use of land was not perceived as being sufficiently active to warrant legal protection. See *generally id.* It may continue to privilege buildings over open space, farmed land over conserved fields, and the like, although perhaps the definition of "use" can be made sufficiently capacious to encompass non-intensive uses such as conservation.

³⁰⁰ See *supra* Part III.D (discussing political economy of existing uses).

³⁰¹ See Serkin, *supra* note 261, at 1666–67 (explaining why small local governments might be more risk averse than larger governments).

³⁰² See *id.* at 1666–67, 1672–74.

³⁰³ The costs of monitoring local governments are typically much lower than the costs of monitoring larger governments. *Id.*

relative costs and benefits of protecting versus regulating an existing use in a specific context.

B. The Illusory Benefits of Existing Use Protection

Not only does existing use protection impose significant costs, but many of its apparent benefits are largely illusory. Existing uses define less of a bright line than one might generally suppose. There are two principal problems. The first, quite simply, is found in the exceptions to existing use protection. Because courts generally accept as inviolable the implicit protection of existing uses, they are forced to focus on such theoretically unsatisfying questions as whether pouring a footing for a foundation is sufficient to vest development rights³⁰⁴ or whether environmental protection counts as preventing a harm or conferring a benefit.³⁰⁵ If the supposed benefit of categorical existing use protection is the ease with which it can be applied, its myriad and murky exceptions create a doctrine that is actually difficult to apply and theoretically unsatisfying. Focusing, for example, on the development necessary to create a vested right obscures a more straightforward inquiry into the costs and benefits of applying a specific regulation to a particular property, existing use or not.

The second problem with existing uses as a category is deciding what it actually includes. If a local government regulates away an existing adult bookstore but still allows commercial use of the property, has it eliminated a bookstore or has it created some new regulatory restrictions on an existing and ongoing commercial enterprise? How the use is characterized will determine whether or not a regulation even implicates the protection of an existing use. The more narrowly an existing use is defined, the more any regulation will look like it eliminates that use. To take an extreme example, a regulation requiring landlords to install smoke detectors could be construed as eliminating an existing use, if the use is defined as an apartment building without smoke detectors. Similarly, if a local government requires homeowners with wells to hook into the municipal water supply, it could be seen as eliminating the existing well or merely as regulating the continuing use of the house.³⁰⁶ Existing uses may not

³⁰⁴ See *supra* notes 76–82 and accompanying text (discussing *Prince George's County v. Sunrise Development Ltd. Partnership*, 623 A.2d 1296 (Md. 1993)).

³⁰⁵ See *supra* note 92 and accompanying text (noting that distinction between preventing harm and conferring benefit is unsettled).

³⁰⁶ See *City of Gaylord v. Maple Manor Invs.*, No. 266954, 2006 WL 2270494, at *5 (Mich. Ct. App. Aug. 8, 2006) (finding that home rule cities have authority, under police power, to require homeowners to connect to city's sewer system and cease use of wells).

define an easily administrable category for property protection after all.

C. *Designing Appropriate Protection for Existing Uses*

The normative justifications for current existing use protection are surprisingly unconvincing. The costs are substantial. This is not to suggest, however, that existing uses are irrelevant and should simply be ignored. Rather, it is to argue that blanket, categorical rules exempting existing uses from regulatory change protect too much. Courts and government actors should instead apply the same kind of inquiry to both existing and prospective future uses. The same inquiry may well generate a different answer if a use already exists, leading to different results, but not because there is anything sacrosanct about the existing use itself.

This is an important, but still general conclusion. What does it mean on the ground? Perhaps most important is what it does not mean. Following this approach, governments still should not make a common practice of trampling over existing uses. In many—if not most—instances, governments should protect existing uses as part of the usual cost-benefit analysis that they undertake.³⁰⁷ If in a particular situation eliminating existing uses will impose more costs than benefits, then the government should not eliminate them. A typical analysis should take into account the costs of retrofitting existing uses, distributive consequences, and the ultimate effect of existing use protection.³⁰⁸ Ideally, the government will include in its assessment some accounting for property owners' connections to their property. This, however, is not fundamentally different from any government decisionmaking that involves weighing competing costs and benefits from various sources, and it is ultimately an empirical question whether a particular existing use should be protected in a particular case.³⁰⁹ In other contexts involving economic regulations, courts rarely interfere

³⁰⁷ For a thoroughgoing discussion of sophisticated cost-benefit analysis in government decisionmaking, see generally RICHARD L. REVEZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008).

³⁰⁸ For a sophisticated analysis of the systemic effect of grandfathering provisions in environmental regulations, see generally Nash & Revez, *supra* note 10. For a formal model developed by Shavell to evaluate the effect of grandfathering provisions generally, see *Shavell, supra* note 17, at 57–67.

³⁰⁹ See Nash & Revez, *supra* note 10, at 1712 (“In general, the question whether grandfathering combined with more stringent regulation of new sources will lead to more pollution is an empirical one.”). There are, of course, competing and less rational accounts of how governments actually make decisions. See *supra* note 261 and accompanying text (discussing public choice theory).

to second-guess those cost-benefit determinations.³¹⁰ There is little, if anything, conceptually different about existing uses that justifies special judicial protection.

This Article's conclusion also must not be taken to suggest that courts should abdicate any role in reviewing government regulations of existing uses. Indeed, regulations of existing uses should be subject to the same kinds of takings and due process analysis that applies to all government actions. If a regulation goes too far—if it results in too great a diminution in value, or if it is arbitrary or irrational—then courts should strike it down.³¹¹ As discussed above, regulations of existing uses are more likely to trigger takings liability under existing takings doctrine than regulations of prospective future uses because the economic impact is likely to be greater.³¹² But courts should not extend special protection to existing uses, let alone the kind of incredibly strong protection that current land use doctrines provide.

Consider a few examples. Imagine a local government seeking to apply new minimum lot size requirements to an existing house on a one-acre lot. If the new zoning ordinance only permits one house every two acres, rendering the house a prior nonconforming use, the local government should not force the property owner to tear down her house to come into conformity. The costs of doing so would be substantial and would include not only the demolition costs but also the owner's subjective value in her property. If a local government nevertheless tried to impose such a regulation on existing property, a court should invalidate it under the Takings Clause.

Contrast this example with a new ordinance regulating the placement of billboards on roadsides. Its application to existing billboards may well come out quite differently. Of course, if the ordinance was enacted to prevent traffic accidents, it could fall under the harm-prevention exception and be permissible even under current law.³¹³ But if the purpose was instead scenic preservation, or something less clearly implicating health, safety, and welfare, should the government nevertheless be able to act? Here, if the costs of moving the billboards are sufficiently low and the benefits of moving them sufficiently high, it may well be appropriate to apply the ordinance to existing billboards. After all, grandfathering existing billboards runs the risk of creating a race to build billboards in precisely those places

³¹⁰ See *supra* note 181 (citing sources discussing substantive due process).

³¹¹ These are summaries of the leading takings and due process tests, discussed in Part II, *supra*.

³¹² See *supra* note 168 (citing sources discussing economic substantive due process).

³¹³ See *supra* Part I.D (discussing nuisance exception).

where they will become impermissible.³¹⁴ This will undermine the efficacy of the ordinance and will have the perverse effect of conferring extra value on those nonconforming billboards as a direct result of their nonconforming status. It should be much harder for a court reviewing the application of *this* ordinance to existing uses to find a constitutional violation. Especially if the property can still be used for billboards—so long as they are placed in a different location—the effect on the value of the property is likely to be negligible. Similarly, so long as the costs of moving the billboards are sufficiently low, there would not appear to be anything irrational or arbitrary about applying the ordinance to existing billboards. To the contrary, doing so would increase the ordinance's efficacy and thus be perfectly rational.

It is, of course, the cases in the middle that will prove most vexing. Eliminating sheds or out-buildings, forbidding the ongoing use of well-water or septic systems and requiring hook-ups to municipal infrastructure instead, or regulating away a cellular tower all present more complex cost-benefit tradeoffs. But that, ultimately, is the point. Once existing uses are dismantled as a specially protected category, it is possible to address whether a particular existing use should be protected with more precision and sophistication about the costs and benefits actually at stake.

At the end of the day, it is this final point that is probably the most important. With the background rule of existing use protection, the difficult doctrinal work in the area is channeled into the rule's numerous but often peculiar exceptions. This, in turn, puts enormous pressure on such amorphous tests as vested rights, the harm exception for takings liability, and the minimum duration of amortization provisions. These tests do nothing to advance the clarity of land use doctrine and actually obstruct a more direct inquiry into the character and magnitude of a regulation's effects on property rights.

CONCLUSION

By eliminating the special protection of existing uses, legislatures and courts would be able to engage in a more fine-grained and fact-specific analysis when deciding whether the government can eliminate an existing use. Instead of creating a sweeping prohibition, courts would give more latitude to regulatory strategies that interfere with existing uses in particular cases. At the same time, this Article articulates for governments the kinds of costs and concerns that existing uses present. It opens to governments the possibility of regulating existing uses more often than current law allows while highlighting the

³¹⁴ See *supra* Part IV.A (discussing incentives created by grandfathering).

reasons for caution. Ultimately, though, that caution is best exercised by government decisionmakers instead of by courts prohibiting a whole category of regulations based on vague constitutional principles and thin normative justifications.

Many areas of law—from the Takings Clause, to various state and federal statutes, to a variety of land use doctrines—provide special protection for existing uses. The current assumptions that existing uses are entitled to strong if not absolute protection should be eliminated. Existing uses should, instead, be subject to the same constitutional protection as prospective future uses. This will result in greater freedom for government actors to choose for themselves when, whether, and how to treat existing uses when enacting a regulatory change.