Existing Uses and the Limits of Land Use Regulation

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EXISTING USES AND THE LIMITS OF LAND USE REGULATIONS

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This Article identifies the various ways in which property law provides special protection for existing uses, explores the possible justifications for this protection, and argues that none of them 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 non-conforming uses, all 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 of the obvious-seeming justifications dissolve on closer inspection. Concerns about reliance on government regulations, and underlying principles of fairness, are not conceptually different for regulations prohibiting future uses and regulations of existing uses. Nor is the extent of economic loss necessarily greater for one than the other, even though regulations of existing uses involve out-of-pocket costs, whereas regulations of future uses 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 analysis that applies to all regulations and government actions.
# Existing Uses and the Limits of Land Use Regulations

*Christopher Serkin*

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Christopher Serkin

INTRODUCTION

Existing uses occupy a special place in property law. A use, once established, is imbued with an expectation that it can continue to exist, even in the face of regulatory change. A building, for example, once it is built, 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 specific land use doctrines, 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 over-protects existing uses, and that neither constitutional doctrine nor normative considerations can justify the protection courts currently provide.

The legal literature has largely assumed existing uses are entitled to protection, and has almost wholly failed to examine the basis for that

¹ See, e.g. Snake River Brewing Co., Inc. v. Town of Jackson, 39 P.3d 397, 404 (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.”) (internal quotation marks omitted); Rudolf Steiner Fellowship Foundation v. De Luccia, 90 N.Y.2d 453, 463 (N.Y. 1997) (“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.”); Hooper v. City of St. Paul, 353 N.W.2d 138, 141 (Minn. 1984) (referring to the “the constitutional protection afforded existing uses”); Harbison v. City of Buffalo, 4 N.Y.2d 553, 558 (N.Y. 1958) (“When zoning ordinances are initially adopted to limit permissible uses of property, or when property is rezoned so as 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.”).

² For discussion of these specific doctrines, see infra Part I.
At first glance, this is hardly surprising. Most people seem to 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 will almost always grandfather in existing uses. The grocery store in a newly zoned residential area can stay in business. New height, area, or use restrictions are imposed prospectively only, and existing uses are allowed to continue. Try to imagine what it would even mean for a local government to force pre-existing houses to conform to new setback requirements. Non-conforming homes would either have to be picked up and moved back or simply torn down. It is easy to understand the intuition that such a regulation must be somehow unconstitutional.

The calculus is not all so one-sided, however. The costs of protecting existing uses are extremely high. The efficacy of zoning and other comprehensive land use planning can be severely limited if they have to work around existing uses, potentially transforming prospective

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3 Specific doctrines related to existing uses have received serious study, for example, prior non-conforming uses, which are the subject of Part I.C.

4 See, e.g., MASS. GENERAL LAWS c. 40A, §6 (prescribing “minimum of tolerance that must be accorded to nonconforming uses, existing buildings and structures, and the existing use of any building or structure.”); Rourke v. Rothman, 859 N.E.2d 821, 822 n.5 (Mass. 2007); N.J. STAT. ANN. § 40:55D-68 (2007) (“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.”); see also Manhattan, Inc. v. Shelby County, 2008 WL 639791, at *7 (Tenn. Ct. App., March 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.”); Ferraro v. Board of Zoning Adjustment of City of Birmingham, 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.”).

5 See, Ex parte Alabama Alcoholic Beverage Control Bd., 819 So.2d 50 (Ala. 2001) (upholding denial of expansion of nonconforming use but recognizing store as valid nonconforming use allowed to operate). But see, Brewster v. Fayette County Bd. of Country Com’rs, 2005 WL 873224, No. W2003-01842-COA-R3-CV (Tenn. Ct. App., Feb. 15, 2005) (holding previously “grandfathered” grocery store on property could not re-open 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.C (discussing amortization).

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 Assoc., Inc. v. Saverio, 360 So. 2d 470 (Fla. App. 1978), cited in ELLICKSON & BEEN, LAND USE CONTROLS 597 (3rd ed. 2005), (holding invalid attempt to fine condo owner for keeping puppy of dog grandfathered into co-op’s no-pet policy); Young v. Savinon, 492 A.2d 385 (N.J. Super. 1985) (invalidating no-pets provision in lease renewal as applied to existing dogs). For a particularly funny examination of no-pets policies, see The Daily Show With Jon Stewart, Rent Claws, March 29, 2004.
planning into a mere description and codification of existing conditions.\(^7\) The original justification for zoning was to separate incompatible uses of property, and the inapplicability of a new zoning ordinance to prior non-conforming uses can preserve incompatible neighbors.\(^8\) Moreover, an extensive literature on legal transitions has explored the potentially perverse incentives created by protecting people from regulatory change.\(^9\) The question therefore arises whether zoning and other land use controls can apply to existing uses and, if so, when.

The stakes are very high. Existing use protection is intimately bound up with the problem of grandfathering, a central issue in environmental policy, where grandfathering existing uses can dramatically reduce the efficacy of new 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 of 1970,\(^12\) which regulates stationary sources of air pollution, distinguishes explicitly between pre-existing 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

\(^7\) See, 7 Patrick Rohan, Zoning and Land Use Controls, §41.01[2], at 41-6,7 (1978) (“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) [hereinafter, Serkin, Local Property Law] (“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, 2004 WL 1351155 at *15, No. Civ. A.2002-559, Civ. A.2001-380, (R.I. Super., June 9, 2004) (“The restrictive provisions of the [zoning] ordinance properly recognize that “[n]onconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary.”).

\(^8\) In Euclid, the Supreme Court 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.” Village of Euclid, Ohio 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 variances as “especially dangerous because they jeopardize zoning’s primary purpose: separating incompatible land uses.”).

\(^9\) See supra Part III.E (discussing transitions literature).


\(^11\) See id. (discussing Bush grandfathering policies).


\(^13\) Pre-existing uses were subject only to ambient air quality requirements, and not the more strict emissions reduction requirements. See Varadarajan, supra, at 2558.
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 pre-existing use into a prospective, future use. The Clean Water Act, while taking a slightly different approach, also applies differently to existing sources of pollution.

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 pre-date enactment of the statute. The Americans with Disabilities Act ("ADA") applies a less restrictive accessibility standard to existing uses than to new buildings. Similarly, the Wilderness Act grandparents in a substantial number of existing uses, and grazing rights in particular. Florida, in 1995, enacted a new statute in response to a perceived failing by courts to afford sufficient protection to private property under the state or federal Takings Clauses. 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 . . . ."

Other, more specific examples are also easy to find.

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14 42 U.S.C. § 7411(a)(2). This is like the converse of the vested rights doctrine, discussed below. See Part I(B).
16 33 U.S.C. §1316(d); see also Nash & Revesz, supra note 10, at 727-29 (discussing grandfather provisions in Clean Water Act).
18 28 C.F.R. § 36.304 requires existing uses 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, 13 J. LEGAL ASPECTS SPORT 231, 235 (2003) (describing application of ADA to new and existing facilities).
20 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.").
21 See Bert J. Harris, Jr., Private Property Rights Protection Act, FLA. STAT. §70.0001 (1995); see also Nicole S. Sayfie and Ronald L. Weaver, 1999 update on the Bert J. Harris private property rights protection, 73 FLA. B. J. 49 (March 1999) (discussing purpose of statute).
22 FLA. STAT. § 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." FLA. STAT. § 70.001(3)(b).
23 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
As a descriptive matter, much existing use protection can be explained in purely political terms. It was a necessary concession to an entrenched interest group – owners of existing uses – and was required to secure a law’s passage. In fact, however, the politics do not always line up so neatly in favor of protecting existing uses, especially at the local level. 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. This Article therefore uses the specific context of local land use decisions to examine the underlying constitutional and normative justification for the judicial protecting of existing uses.

Current land use law strongly defends existing uses, although that protection sometimes 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. 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. But no amortization rules allow the elimination of an existing use immediately, and indeed the duration of the amortization period is a matter of constitutional concern. Courts engage in often fine-grained

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24 See, Robertson, supra note 17, at 132 (1995) (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 B. Roth, Environmental Considerations in Hydroelectric Licensing: California v. FERC, 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.”).

25 This point is considered in detail in Part III, infra.

26 Those doctrines are the subject of Part I, infra.

27 See, Village of Valatie v. Smith, 83 N.Y.2d 396, 400 (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.”) (internal quotation marks omitted).

28 For a discussion, see text accompanying notes 71-74.

29 E.g., Friends of East Fork v. Clark County, 2006 WL 1745032, No. 33422-4-II at *1, n. 1 (Wash. App. Div. 2, 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.”); Mayor and Council of New Castle v. Rollins Outdoor Advertising, Inc., 475 A.2d. 355, 360 (Del. 1984) (“We are of the opinion that reasonable, required amortization of such nonconforming uses such as sign boards may be accomplished with due process of law, and that such form of regulation does not necessarily constitute a compensable taking.”).
analysis to determine whether an amortization period is sufficient without stepping back to ask the antecedent question why amortization is required at all. The doctrine therefore implicitly assumes that existing uses cannot be eliminated outright, precluding development of a broader constitutional inquiry into the relationship between the government and private property more generally. In other words, focusing only on the constitutionality of the duration of an amortization provision is like quibbling over the bluebooking before editing the text. Other doctrines are similar. 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.

Doctrinally, it may be that property law protects existing uses because the Constitution requires it. This is at least partly true. However, there is hardly consensus about the source of the protection. In reviewing regulations of existing uses, many courts fail to specify the precise constitutional basis for their holdings. Often, courts assume that an existing use simply is protected from some regulation without further explanation.

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. The principal expectation to protect, according to the Supreme Court, is the existing use of the property. In the years since Penn Central, however, courts have not generally used this test to protect existing uses but instead to inquire

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30 These include, notably, the vested rights doctrine and the nuisance exception, both of which are discussed at length in Part I.
31 E.g. Hansen Brothers Enterprises, Inc. v. Board of Supervisors, 907 P.2d 1324 (Cal. 1996); Taylor v. Zoning Bd. of App. Town of Wallingford, 783 A.2d 526 (Conn. App. 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”); 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, 83 Ohio App. 3d 687, 690, (1992) (“The Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution 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, 61 Wash. 2d 425, 428 (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.”)
32 E.g. Terminals Equipment Co. v. San Francisco, 270 Cal. Rptr. 329, 335 (rejecting takings claim because regulation was “only operating to restrict new uses of the subject Property, not to eliminate existing ones.”); City of Annapolis v. Waterman, 357 Md. 484, 514 (“[I]nsofar as the ordinance required the reduction, removal, or destruction of existing property at the owners expense, it was a taking).  
34 Id. at 136.
whether a property owner’s expectations about a future use were reasonable. The other relevant basis for liability under *Penn Central* is the diminution in value test, which limits the amount a regulation can reduce property’s value before requiring compensation. So long as some alternative use of the property remains, however, eliminating an existing use should not necessarily trigger takings liability. More basically, too, *Penn Central* post-dates 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.

Normatively, existing uses might seem to deserve special protection, but it is surprisingly difficult to articulate exactly why. At first blush, obvious choices include some general sense of fairness, or protecting the property owners’ reliance on existing regulations. Looking more carefully, however, neither clearly justifies distinguishing between existing uses and prospective future uses. It can, indeed, seem unfair when a government changes the regulatory rules in the middle of the game, thereby interfering with owners’ reasonable reliance on those pre-existing rules. Nevertheless, these fairness concerns are at issue whenever the government regulates, whether it 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. The protection of existing uses assumes that there is a difference, a real difference, in the unfairness associated with regulating existing uses as opposed to future uses. But merely invoking fairness or reliance does not explain what it is.

Other superficially appealing justifications for existing use protection 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

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35 See, e.g., Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn., 2007) (holding that owner of an option to purchase golf course had no reasonable investment backed expectations to support claim that city’s denial of amendment to the comprehensive plan constituted a 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 [the] reasonable expectations as to the future use of [claimant’s] property.”). The evolution of *Penn Central*’s investment-backed expectations prong is discussed in Daniel R. Mandelkar, *The Notice Rule in Investment-Backed Expectations, in Takings Issues on Takings Issues* 21-29 (Thomas E. Roberts, ed. 2002).

36 *Penn Central*, 438 U.S. at 124 (describing multi-factor test for takings liability).

37 For a discussion of the Due Process Clause, see infra Part II.B.
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 strongly protects. Other possible justifications are similarly unconvincing.\(^{38}\)

There are, moreover, offsetting pressures that militate against protecting existing uses. In addition to relatively general concerns about limiting the government’s ability to regulate, protecting existing uses can lead to inefficient investments in property. Grandfathering and compensation for pre-existing investments can lead property owners to discount the risk of future regulatory action and therefore to inefficiently over-invest in property.\(^{39}\) Protection for existing uses can also induce property owners to invest in their property too early in order to lock-in existing regulations.\(^{40}\) These are among the potentially significant costs of protecting property owners from legal transitions.\(^{41}\)

Courts, therefore, should not protect existing uses any differently than they protect prospective future uses, and should subject both to the same kinds of takings and due process analyses. This is not to deny that legislatures may well have good reason to protect existing uses in a particular situation. In fact, this Article’s analysis highlights the important costs that might result from eliminating a particular use.\(^{42}\) But existing uses should not receive the kind of categorical protection from courts that property and land use law currently offer.

Part I identifies the areas of law that either implicitly or explicitly rely upon strong property protection for existing uses, demonstrating an underlying assumption that existing uses cannot be eliminated without paying just compensation. Part II discusses the possible constitutional bases for the protection of existing uses and finds them lacking. Part III explores normative justifications for protecting existing uses and finds competing considerations. On balance, however, Part III argues that what normative justifications there may be for protecting existing uses do not come close to justifying the robust protection that courts currently

\(^{38}\) The other possible justifications for existing use protection considered in this Article include preventing waste; endowment effects; political economy; identifying owner expectations; protecting stability and the status quo; and existing use protection as prophylaxis. See infra Part III.


\(^{40}\) See, e.g., David Dana, Natural Preservation and the Race to Develop, 143 U. Pa. L. Rev. 655, 678 (1996).

\(^{41}\) The extensive transitions literature is taken up in Part III.E.

\(^{42}\) These include, principally, transition costs, and the extra harm associated with endowed interests. See infra Part III.
afford to them, especially in light of the costs. The Article ultimately concludes that courts should not extend special protection to existing uses.

PART 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 is unclear (and is taken up in the next Part). This Part explores significant land use concepts and doctrines that either protect or implicitly assume the protection of existing uses.  

A. The Vested Rights Doctrine

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. The doctrine is usually implicated when a property owner has begun but not yet completed some project before the government comes along and 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. The doctrinal details determining when a right vests are the subject of frequent commentary. It is the implicit assumption motivating the doctrine that is of particular interest here, however, and not the niceties of the doctrine itself.

43 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 uses that already exist than for those yet to be built. See VICKI BEEN & ROBERT ELLICKSON, LAND USE CONTROLS 293 (3d ed. 2005) (citing Osborne M. Reynolds, Jr., Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame?, 20 URB. L. 1 (1988)).


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).\(^{47}\) Under the vested rights doctrine, then, property rights are subject to a kind of tipping point. Before a right vests, it receives one form of property protection. But once a property owner has done enough to establish a particular use on her property, it is suddenly entitled to much greater protection.

The vested rights doctrine can therefore best be explained as incorporating an assumption that existing uses receive special protection from government regulation. The focus of the vested rights inquiry is on whether the property owner has done enough – has taken sufficient affirmative steps – to be entitled to put her property to an intended use.\(^{48}\) It assumes that once a use has been legally established, it is entitled to protection as an existing use and not merely a potential future use. The line, in other words, between a vested right and a mere expectancy, accords with the line between an existing and a prospective future use.

B. The Standard Zoning Enabling Act

Zoning is perhaps the most ubiquitous context in which the problem of existing uses regularly arises. The treatment of existing uses in zoning law can be traced directly back to the Standard Zoning Enabling Act (“SZEA”).\(^{49}\) 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.\(^{50}\) It was

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\(^{47}\) E.g. Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 152 (Cal. Dist. App. 1948) (“[A valid] permit ripens into a vested property right which may not be taken from him against his will other than by proceedings in eminent domain with the payment of just compensation.”). According even 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.”

\(^{48}\) 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.”).

\(^{49}\) See, Douglas W. Kmiec, Deregulating Land Use: An Alternative Free Enterprise Development System, 130 U. PA. L. REV. 28, 58 (1981) (“[M]ost zoning ordinances contain a provision exempting, either totally or in part, land uses that predate the ordinance. Indeed, 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 farther than that. The famous case, Hadacheck v. Sebastian, involved a municipality eliminating an existing use, and it dates back to 1915. 39 U.S. 394, 414 (1915).

drafted as model legislation, intended to be adopted in its entirety by individual states.\footnote{The SZEA itself provides: \textit{Modify this standard act as little as possible.} – It was prepared with 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 subsequent 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. SZEAA, at 1 ¶ 3.} By the 1930s, a majority of states had adopted some form of the SZEA, and in the subsequent decades almost every state followed suit.\footnote{Carol M. Rose, \textit{Planning and Dealing: Piecemeal Land Use Controls as a Problem of Legitimacy}, 71 CAL. L. REV. 837, 848 n.29 (1983) (citing sources).}

The SZEA recognized and wrestled with the problem of existing uses, and ultimately allowed zoning to apply to them. Paragraph 9 of the SZEA provides:

\begin{quote}
\textit{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 an existing property of its use or maintenance for the purpose to which it is then lawfully devoted.”
\end{quote}

While the utmost 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.\footnote{SZEA at 2, ¶ 9.}

This provision acknowledges that the overwhelming convention, indeed the “utmost universal practice,” is to have zoning apply only prospectively, that is, only to future uses and not to existing ones. The SZEA therefore recognizes there may be something special about existing uses but 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 forbid application of zoning to existing uses.\footnote{See, Comment, \textit{Retroactive Zoning Ordinances}, 39 YALE L. J. 735 (1930) (“Many state enabling acts specifically provide that existing uses shall be exempt from the operation of zoning ordinances, or at least that their elimination shall be effected gradually.”).}

Courts and commentators, however, consistently voiced constitutional concerns about applying zoning to existing uses. In states that followed the SZEA, courts struck down some zoning ordinances that applied to existing uses.\footnote{Jones v. City of Los Angeles, 211 Cal. 304, 310-11 (1930) (citing, \textit{inter alia}, Alfred Bettman, \textit{Constitutionality of Zoning.}, 37 HARV. L. REV. 834, 853 (1924);}
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. The ordinance did not distinguish between existing and future sanitariums. After finding the zoning ordinance constitutional as applied prospectively, the court asked, could the same reasoning “justify the destruction of existing businesses?” It held that “[o]nly a paramount and compelling public necessity could sanction so extraordinary an interference with useful business.” Finding none in that case, the Court struck down the zoning ordinance as applied to existing sanitariums. 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.”

Commentators from the 1920s and 1930s, writing about the SZEA, also doubted the validity of a zoning ordinance that applied to existing uses. 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.” As is typical, the Comment does not explain the reasons for this view.

J.S. Young, City Planning and Restrictions on the Use of Property, 9 MINN. L. REV. 593, 628 (1925); Blumenthal v. Cryer, 71 Cal. App. 668, 670 (1925); Durkin Lumber Co v Fitzsimmons, 147 Atl 555, 558 (N J 1929). Not all states followed suit. The zoning enabling acts of Illinois, Kansas, Massachusetts, New Hampshire, Ohio, and Wisconsin provided that zoning could not apply to existing uses. See Comment, supra note 54 at 735 n.5 (citing statutes).

56 211 Cal. 304, 310-11
57 Id. at 306 (describing zoning ordinance).
58 Id. at 310 (italics in original).
59 Id. at 314.
60 Id. at 314-15.

62 Comment, supra note 54 at 737 (“Hence 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.”); Bettman, supra note 55, at 853 (noting that application of zoning to existing uses would present the same constitutional problem as retroactive laws more generally).

63 Comment, supra note 54 at 737; see also Newman Baker, Zoning Legislation, 11 CORNELL L. Q. 164, 174 (1925-26) (“The Standard Act does not declare that the zoning ordinances shall not be retroactive . . . but 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.”)
nature or source of the constitutional limitation. Other writers at the time suggested similar limits to the zoning power.64

C. Prior Non-Conforming Uses and Amortization

Since the promulgation of the SZEA, rules have developed around the protection of so-called prior non-conforming uses – that is, pre-existing uses that are not in conformity with new land use regulations.65 Initially, the SZEA contemplated that prior non-conforming uses would simply die out over time.66 Their incompatibility with surrounding uses would make them economically unsustainable, or they would be lost to fire or abandonment, or some other event without government interference.67 That assumption has proven false. For some uses, it is their very non-conformity that makes them particularly valuable, in effect assuring their survival.68 In response, local governments have sought proactive ways, short of outright condemnation, to speed the demise of non-conforming uses.69 These efforts have spawned robust and varied rules regarding when a property

64 Young, supra note 55, at 627 (“Retroactive zoning is not to be recommended except in very unusual cases and public protection imperatively demands it.”); Bettman, supra note 55, at 853.

65 See Eric J. Strauss & Mary M. Giese, Elimination of Nonconformities: The Case of Voluntary Discontinuance, 25 Urb. L. 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.”). Courts and particularly commentators distinguish between nonconforming structures and nonconforming uses, although essentially the same reasoning applies to both. See id. at 161.


67 Note, supra note 12, at 2556 (“Zoning regulators believed that these restrictions would cause the gradual disappearance of such nonconforming uses.”); see also Huntington Properties, LLC v. Currituck County, 569 S.E.2d 695, 700 (N.C. 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.”). This view traditionally justifies laws limiting improvements or expansions of non-conforming uses. See, e.g., County Council of Prince George’s County v. E.L., 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.”).

68 Reynolds, supra note 66, at 109; Strauss & Giese, supra note 65, at 163.

69 These include termination of a nonconforming use if the use is abandoned, changed, or destroyed, or precluding any expansion of the use. 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, 39-40 (1989) (summarizing approaches to eliminating existing uses); see also Reynolds, supra, at 101-04 (describing methods of eliminating nonconforming uses); Strauss & Giese, supra note 65, at 163-67 (same).
owner is entitled to expand, adapt, or rebuild such a use. In many states, too, local governments can affirmatively eliminate prior non-conforming uses, without paying compensation, by allowing an affected property owner to continue her use for long enough to amortize her investment. 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 due after the expiration of the period.”

Amortization has been used to eliminate billboards, adult businesses, and sometimes, but more rarely, other kinds of commercial or industrial uses. Even where amortization is expressly available, it is usually limited to uses that involve relatively little investment in actual structures. Amortization rules therefore assume there are limits to a municipality’s ability to eliminate existing uses. Or, to put it differently, amortization has developed as an exception to the protection existing uses otherwise receive.

The use of amortization strikes many people as unfair, and courts disagree about the constitutional basis for amortization and its limits. Some state courts have held that amortization in lieu of compensation is simply unconstitutional. Other courts have held that amortization is a

70 For a summary and analysis of these rules, see 63 A.L.R. 4th 275 (1988).
71 See Peterson & McCarthy, supra note 69, at 37 (“[S]tate courts have generally upheld amortization provisions since the 1950s.”). 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. L. J. & 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.”); Reynolds, supra note 66, 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.”).
74 Collins, supra note 83, at 216; Strauss & Giese, supra note 65, at 164 (“Amortization theory tends to break down in more complex situations involving large structures or multi-faceted uses because of the difficulty of determining and accounting for all of the factors.”).
75 See, e.g., City of Oakbrook Terrace v. Suburban bank and Trust Co., 845 N.E.2d 1000 (Ill. App. 2d, 2006) (holding that municipal ordinance providing amortization period for nonconforming signs violated State Eminent Domain Act,
constitutional means of eliminating prior non-conforming uses, so long as the amortization period is sufficiently long. A lot has been written about the amount of time that governments must give property owners before an existing use can be eliminated, and when amortization statutes can and should be applied. In general, courts weigh the harm to the property owner with the benefit to the public of eliminating the prior nonconforming use. The test sounds primarily in due process. These

which required just compensation); PA Northwestern Distributors, Inc. v. Zoning Hearing Bd. of Tp. of Moon, 584 A.2d 1372 (Pa. 1990) (holding that amortization provisions are unconstitutional because they take property without 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.”).

See, e.g., Trip Associates, Inc. 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 (“The weight of authority supports the conclusion that a reasonable amortization provision would not be unconstitutional.”); Board of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026 (Ind. 1998) (holding that amortization provisions that require an owner to discontinue a nonconforming use after a certain period of time are not per se unconstitutional). The inquiry into the 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. 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.”).

See generally Collins, supra note 83; Cf. Reynolds, supra note 66, at 108 (describing constitutional concern about duration of amortization period).

See, Modjeska Sign Studios, 373 N.Y. 2d at 480 (“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 83, 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 69, at 72-79 (applying Penn Central test to as applied challenge to amortization provisions).

Lingle v. Chevron, 544 U.S. 528 (2005). In fact, however, the test for amortization of prior existing uses may actually be more protective than substantive due process. In a dissenting opinion, a judge in the Washington Court of Appeals argued that prior existing uses are entitled to greater protection than the Due Process Clause provides:

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
doctrinal complexities can be elided, however, to focus instead on the underlying assumptions about existing uses.

The background rule, even in most jurisdictions that allow amortization, is that governments cannot eliminate existing uses immediately.\(^{80}\) 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 is left unstated.

D. The Nuisance Exception

A broad but problematic exception to the protection of existing uses is the so-called “nuisance exception” in the Takings Clause.\(^{81}\) Applying the nuisance exception, the government can regulate away a hazardous or injurious activity without paying compensation. Most famously, in Hadacheck v. Sebastian, the Supreme Court upheld a statute that eliminated an existing brickyard from a residential neighborhood.\(^{82}\) Likewise, two early-Twentieth-Century cases from Louisiana upheld a zoning ordinance that required existing businesses to

\[^{80}\] Craig Peterson & McCarthy, supra note 69, at 39 (“[P]re-existing uses and aspects of development are always to some extent ‘grandfathered’); Reynolds, supra note 66, 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.”)(internal quotation marks omitted); Cunningham & Kremer, supra note 44, at 660-61 (“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.”).

\[^{81}\] See, 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.”); 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.”).

\[^{82}\] Hadacheck v. Sebastian, 39 U.S. 394, 414 (1915). Mugler v. Kansas, 123 U.S. 623, 673 (1887), is similar, rejecting on a harm-prevention rationale a constitutional challenge by distillery owners to prohibition in Kansas. More perniciously, the California Supreme Court upheld legislation eliminating 110 Chinese laundries on finding that they caused a harm. See Ex Parte Quong Wo, 161 Cal. 220 (1911), discussed in Young, supra note 55, at 627.
liquidate or move out of residential neighborhoods within one year on grounds of harm prevention. 83 Colorfully, in 1919 the California Supreme Court upheld an ordinance excluding mules for hire in residential neighborhoods. 84 Finding the ordinance reasonable, that court wrote, “We 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 twixt it and silence.’” 85 Similar if less colorful cases are now legion. 86

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. 87 In other words, harm-prevention is an exception to an unstated background rule that the government cannot simply eliminate an existing use (subject, of course, to the other exceptions already discussed). Where a regulation eliminating an existing use is not preventing a harm, courts have held the regulation invalid in the absence of compensation. 88 Of course, as many people have observed, it is hard to find a limiting principle that distinguishes between a regulation preventing a harm and a regulation conferring a benefit, but that such a line even needs to be drawn demonstrates that existing uses are normally protected. 89

83 Comment, supra note 54 at 786-87 (citing State v. MacDonald, 121 So. 613 (La. 1929); State v. Jacoby, 123 So. 314 (La. 1929)).
84 Boyd v. City of Sierra Madre, 41 Cal. App. 520 (1919), cited in Young, supra note 55, at 616.
85 Id.
86 E.g. Goldblatt v. Hempstead, 369 U.S. 590 (1962) (upholding regulating banning excavations below water table, despite effect of eliminating gravel mining operation in existence for 30 years); 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”); Department of Agriculture and Consumer Services v. Polk, 568 So.2d 35, 43 (Fla. 1990) (holding that destruction of trees exhibiting bacterial disease did not constitute taking).
87 Comment, supra note 54 at 737; Young, supra note 55, at 627 (“Some cities have made their ordinances retroactive for industries more or less offensive.”).
88 See, e.g., Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 15 (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. South Carolina 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 prescriptive of a use under established property and nuisance principles); Robinson v. City of Seattle, 119 Wash. 2d 34, 50 (1992) (“If 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.”).
89 E.g. Glynn S. Lunney, Responsibility, Causation, and the Harm-Benefit Line in takings Jurisprudence, 6 FORDHAM J. ENVTL. L.J. 433 (1995); see also Lucas, 505 U.S. at 1024 (reasoning that the difference between preventing a harm and conferring a benefit is “often in the eye of the beholder”).
PART II. CONSTITUTIONAL PROTECTION FOR EXISTING USES

As Part I demonstrated, there is a strong current running through land use law that existing uses cannot be regulated away without compensation. This protection is usually based upon perceived constitutional requirements, although their nature and content are only vaguely defined. *Hansen Brothers Enterprises, Inc. v. Board of Supervisors,*\(^{90}\) 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.”\(^{91}\)

In its general discussion of zoning’s application to existing property rights, the *Hansen Brothers* court cited *Penn Central,\(^{92}\)* the foundational modern Takings Clause case, as well as *Euclid v. Ambler Realty Co.,\(^{93}\)* the case upholding zoning against a facial Due Process Clause challenge.\(^{94}\) The Court went no further 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.\(^{95}\)

It is therefore no simple task even to identify the supposed constitutional underpinnings for the land use doctrines discussed in Part I. That is, however, the necessary first step, undertaken in the first section below, before examining more fully in the sections that follow 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 *Penn Coal v. Mahon,* but pre-date any conception of the Takings Clause as providing robust property protection

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\(^{90}\) 907 P.2d 1324 (Cal. 1996).

\(^{91}\) Id. at 1335 (quoting Edmonds v. County of Los Angeles 40 Cal.2d 642, 651 (1953)).

\(^{92}\) 438 U.S. 104, 125 (1978).

\(^{93}\) 272 U.S. 365 (1926).

\(^{94}\) *Hansen Brothers*, 907 P.2d at 1335.

\(^{95}\) *E.g.* Calvert v. County of Yuba, 145 Cal. App. 4th 613, 623 (Cal. App. 3d, 2006) (“In light of 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.”). For other examples, see *supra* notes 1, 31 & 32.
from land use regulations. 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. Courts seemed to demand some kind of important or compelling government reason for zoning existing uses, and stood ready to invalidate zoning ordinances that did not have one. As zoning authorities have grown more sophisticated, however, they have come to employ more targeted techniques to eliminate existing uses, like amortization of prior non-conforming uses. These implicate a more specific but still unsettled constitutional inquiry.

Courts’ treatment of amortization statutes highlights the doctrinal confusion surrounding existing uses generally, and prior non-conforming uses in particular. A number of courts have held that an amortization period is nothing but a deferred taking of property. They reason that eliminating an existing use immediately would be an unconstitutional taking of property, and putting off eliminating the use until tomorrow (or for a fixed amortization period) is no more constitutional. Allowing a business or use to remain in existence for a while – even for a few years – is no substitute for the compensation the Takings Clause requires.

Other courts have struck down amortization provisions after applying a substantive due process analysis. These courts reason that land use regulations eliminating existing uses are generally arbitrary or

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


98 See supra note 55 (citing cases).

99 E.g. Hoffmann v. Kinealy, 389 S.W.2d 745, 754-55 (Mo. 1965) (“[T]ermination of realtors’ pre-existing lawful nonconforming use of their lots for the open storage of lumber, building materials and construction equipment would constitute the taking of private property for public use without just compensation in violation of Missouri Constitution’s Takings Clause] – 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 Northwestern Dist., Inc. v. Zoning Hearing Bd. of Adjustment, 584 A.2d 1372, 1376 (Pa. 1990); cf. also Collins, supra note 71, 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 66, at 105 & n.24.

100 E.g. Hoffmann v. Kinealy, 389 S.W.2d 745, 753 (Mo. 1965) (“[N]o one has, as yet, been so brash as to contend that . . . a pre-existing lawful nonconforming use might be terminated immediately. In fact, the contrary is implicit in the amortization technique itself which would validate a taking presently unconstitutional by the simple expedient of postponing such a taking for a ‘reasonable’ time.”).

101 See PA Northwestern Distributors, 584 A.2d at 1376; see also 83 Am. Jur. 2d Zoning and Planning § 622, n.5 (2007) (collecting cases invalidating amortization rules under Takings Clauses); Reynolds, supra note 66, at 105-06 (citing cases striking down amortization on Takings Clause grounds).

unreasonable. As with all police powers, the zoning power is limited by the Due Process Clause, and this requires an inquiry into the public benefit and private harms of a zoning ordinance. Since, according to these courts, the private harm of eliminating an existing use is very high, they are generally unwilling to allow amortization unless there is an even more compelling public purpose.

The majority of courts, however, have upheld amortization statutes, but only after applying a takings analysis. They have sometimes reasoned that the amortization period itself serves as a kind of implicit compensation sufficient to satisfy the Takings Clause’s requirement of just compensation. 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 the regulation has “gone too far.” Still other courts have held that amortization is actually an alternative to just compensation that nevertheless satisfies the Takings Clause. 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 still more complexity to the vested rights doctrine. Many courts locate the protection of vested rights in the Takings Clause. Confoundingly, the
phrase, “vested rights” is used in at least two distinct ways.\textsuperscript{110} Some cases define vested rights as protected property interests and distinguish them from mere expectations that do not even implicate the Takings Clause.\textsuperscript{111} Used this way, vested rights have a limiting character; courts will not even apply takings analysis to rights that are not vested.\textsuperscript{112} The term is, in essence, synonymous with a property right, making the word “vested” superfluous.\textsuperscript{113} Other cases, 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).\textsuperscript{114} Here, the phrase “vested right” is a legal conclusion that the property right at issue is protected from regulation, absent compensation. In other words, finding a “vested right” is sometimes used to begin the takings inquiry, and other times to end it.\textsuperscript{115}

\textsuperscript{110} Others have noted the use of the phrase “vested rights” as a substitute for real analysis. See Cunningham & Kremer, supra note 44, 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.”).

\textsuperscript{111} \textit{E.g.} Shrader v. U.S., 38 Fed.Cl. 788, 796-97 (1997) (“regarding 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.’”); Tracy v. City of Deshler, 568 N.W.2d 903, 907 (Neb. 1997) (contrasting “vested right” with a “mere privilege”); Attorney General v. Michigan Public Service Com’n, 642 N.W.2d 691, 699 (Mich. App., 2002) (“One who asserts an uncompensated taking claim must first establish that a vested property right is affected.”); See Cunningham & Kremer, supra note 44, at 648.

\textsuperscript{112} In this sense, the term “vested right” is synonymous with the term “protected property interest” and, as such, is entirely circular. See Cunningham & Kremer, supra note 44, at 640.

\textsuperscript{113} Any property right is potentially protected by the Takings Clause, not just vested property rights. Gregory Overstreet & Diana Kirchheim, \textit{The Quest for the Best Test to Vest}: \textit{Washington’s Vested Rights Doctrine Beats the Rest}, 23 Sea. U. L. Rev. 1043, 1071 (2000) (“In fact, many state courts use the words “vested right” and "property right" interchangeably.”); \textit{cf.} 26 AM. JUR. 2D EMINENT DOMAIN § 150 (“For purposes of just compensation in an eminent-domain proceeding, ‘property’ includes every sort of interest the citizen may possess.”).


\textsuperscript{115} According to Cunningham & Kremer, “The term should be recognized as the end product of a process that weighs and analyses a private interest to determine whether it is of sufficient status to receive legal protection.” Cunningham & Kremer, supra note 44, at 641; \textit{see also} James L. Kainen, \textit{The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights}, 79 Cornell L. Rev. 87, 104-06; 112-14 (1993) (suggesting historical explanation for confusion about vested rights).
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 only applies 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.\textsuperscript{116} On the other hand, finding that a vested right is protected property under the Fifth Amendment would not seem to end the inquiry whether a particular government action is an unconstitutional taking. Yet courts consistently reason as though a vested right simply cannot be regulated away.\textsuperscript{117}

Other courts and commentators have located the protection for vested rights in the Due Process Clause, invoking concerns of fundamental fairness.\textsuperscript{118} Or, courts identify the vested rights doctrine as balancing the power of government to control land use with the rights of property owners to due process of law.\textsuperscript{119} This hodgepodge of justifications all support the underlying rule that once a right has vested, it is generally immune from government interference without


\textsuperscript{117}E.g. First of America 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.); Colorado Ground Water Com’n v. North Kiowa-Bijou Groundwater Management Dist., 77 P.3d 62, 81 (Colo. 2003) (“[The Plaintiff’s groundwater right] must . . . be treated as a vested right. As such it cannot be taken away by subsequent legislative action . . . .”).

\textsuperscript{118}Mandelkar, supra note 35, at n.71 (citing sources); see also Hayes v. Howell, 308 S.E.2d 170 (Ga. 1983) (“It has also been said that ‘the term “vested rights,” which cannot be interfered with by retrospective laws, means interests which it is proper for [the] state to recognize and protect and of which [the] individual cannot be deprived arbitrarily without injustice.’”) (quoting American States Water Service Co. of California v. Johnson, 31 Cal. App. 2d 606 (1939)); Goldrush II v. City of Marietta, 267 Ga. 683, 694 (1997) (“A property interest protected by the due process clauses of the federal and state constitutions meets our definition of ‘vested rights.’”); Gregory Overstreet & Diana Kirchheim, The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest, 23 Sea. U. Lr. 1043, 1071 (2000) (“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.”)

\textsuperscript{119}E.g. Michael Weimann Assoc. Gen. Partnership v. Huntersville, 147 N.C. App. 231, 234 (2001); 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.”); Waikiki Marketplace Inv. Co. v. Honolulu, 949 P.2d 183, 193 (Ha. Ct. App. 1997) (“Therefore, due 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.”).
compensation, but the confusion about the source of the rule makes the precise content of the protection difficult to discern.\(^{120}\)

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.\(^{121}\) 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.\(^{122}\) Fundamentally, the inquiry in these latter opinions is whether the regulation is an invalid exercise of the police power, that is to say, 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, remain 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.

B. The Takings Clause

There are two principal bases for takings liability relevant to existing uses.\(^{123}\) The first is the *per se* rule from *Lucas*.\(^{124}\) The second,

\(^{120}\) Kainen, *supra* note 115, 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 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.”


\(^{122}\) E.g. *City of Minot v. Freelander*, 426 N.W.2d 556 (N.D. 1988) (demolition of house to stop nuisance does not violate Takings Clause); *Just v. Marinette County*, 56 Wis. 2d 7 (1972) (upholding wetlands regulation as preventing harm). *But see* Dep’t of Agriculture and Consumer Services 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.”) (internal citations omitted). The relationship between the Police Power and the Takings Clause is enormously contested. *See* Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986); James E. Krier, & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 862 (2004) (discussing Merrill).

\(^{123}\) This assumes that existing uses are not eliminated through permanent physical occupations, proscribed in *Loretto v. Teleprompter Manhattan CATV*
and the more important, is the *ad hoc* balancing test from *Penn Central*. Both implicate the protection of existing uses, but are ultimately unpersuasive bases for broad brush existing use protection.

The *Lucas* rule is narrow in scope and easy to state. According to the Supreme Court, “[w]here 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.” Provocatively, the test does focus on *use* instead of on market value, implicating the protection of existing uses. Of course, the *Lucas* test does not create *per se* takings liability when 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 the following factors for evaluating whether a regulation amounts to a taking: (1) the extent of the diminution of property value it caused; (2) its interference with reasonable investment-backed expectations; and, (3) its character. Both the first and second factors are at least potentially relevant to the protection of existing uses, and are usefully considered in reverse order.

The diminution of 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

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*Corporation*, 458 U.S. 419 (1982). Nor are they eliminated through government exactions, the permissible limits of which are defined in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), and *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987).


126 *Lucas*, 438 U.S. at 1027.

127 See STEVEN EAGLE, REGULATORY TAKINGS, 7-3.

128 *Penn Central*, 438 U.S. at 124.

129 The third factor might also be relevant to this analysis, at least as interpreted by Professor Eagle. Steven J. Eagle, “Character” as “Worthiness”: A New Meaning for *Penn Central’s Third Test*, 27 ZONING & PLANNING L. REP. 1, 2-3 (2004). Traditionally, the character of the regulation implicated only a distinction between a physical invasion and regulation merely affecting economic interests. *Id.* More 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.* This reading of the third *Penn Central* factor is very interesting but, at the least, does not represent a consensus view of the content of the test.
significant protection for existing uses. The facts of the *Penn Central* case are by now so familiar that they hardly bear repeating. 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. This designation prevented Penn Central, the owner of Grand Central, from developing an office tower on top of the terminal. 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.

In fact, the Supreme Court expressly distinguished other cases on grounds that they involved an interference with the present existing use of property. According to the Supreme Court, then, the existing use of property constitutes an owner’s “primary expectations” about the use of that property.

The application of this second factor has proven conceptually and practically difficult. Some commentators have suggested that it is not particularly different from diminution in value — *Penn Central*’s first...
There can be no doubt, however, that the inquiry into investment-backed expectations has changed over time and has lost its focus on the existing use of the property. In *Kaiser Aetna v. United States*, the Supreme Court subtly but profoundly changed the *Penn Central* language from “distinct investment-backed expectation” to “reasonable investment-backed expectations.” Partly as a result, this factor is now principally used to distinguish between protecting a property owner’s reasonable expectations from pie-in-the-sky development dreams. 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. The Takings Clause will not protect unreasonable expectations about the use of property, even if prohibiting that use results in a significant diminution of value. In other words, the test today

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139 See Mandelkar, *supra* note 35, at 21 (“[T]he investment-backed expectations fact has become . . . a shield for government that protects land use regulations from the Takings Clause.”); J. David Breemer, *Playing the Expectations Game*, 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”). 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.” Oswald, *supra* note 136, at 108.

140 Oswald, *supra*, at 111 (discussing property owner’s expectations as bound up with ability to anticipate future government actions). Frank Michelman originally articulated this problem, distinguishing the “speculator” in land from a landowner with genuine expectations about the use of property, based principally on the amount paid for the property in the first place. Michelman, *supra* note 136, at 1234.

141 People’s Super Liquor Stores, Inc. v. Jenkins, 432 F. Supp. 2d 200 (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); National Viatical, Inc. v. Oxendine, No. 1:05-CV-3059-TWT, 2006 WL 1071839 (N.D. Ga., April 20, 2006) (dismissing complaints based on allegations that statute lowered prices of life insurance policies on the secondary market, because plaintiff failed “to demonstrate how this regulation interferes with their reasonable investment-backed expectations.”); Board of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026, 1030 (Ind. 1998) (noting that “the Supreme Court has ‘uniformly rejected the proposition that diminution in property value, standing alone, can establish a taking’”)
focuses more on the reasonableness of a property owner’s expectations, not on her investments, and therefore focuses on future uses and not existing ones.\textsuperscript{142}

Nowhere is the confusion about the meaning of investment-based expectations more immediately apparent than in the Supreme Court’s decision in \textit{Palazzolo v. Rhode Island}.\textsuperscript{143} 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.\textsuperscript{144} The majority held that takings claims survive transfer of the property.\textsuperscript{145} In concurrence, Justice O’Connor argued that the inquiry into investment-backed expectations is \textit{ad hoc} and multi-factored, and that pre-existing regulations are one factor among many for courts to consider.\textsuperscript{146} In contrast, Justice Scalia concurred separately to write that pre-existing regulations should have no impact on a property owner’s investment-backed expectations.\textsuperscript{147} Justice Stevens, dissenting, argued exactly the opposite: that pre-existing regulations were dispositive as to the takings claim.\textsuperscript{148} The content, and the 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. Instead of a test designed to protect existing uses of property, some have suggested that it should be used to limit protection for property acquired by gift or inheritance.\textsuperscript{149} Professor Mandelkar has argued that it might refer to unforeseeable

\begin{itemize}
\item \textit{E.g.,} Laura Dietz, \textit{et al.,} 26 A.M.
\textit{JUR. 2D EMINENT DOMAIN} § 14 \textit{Noncategorical Regulatory Taking Analysis – Specific Factors Employed (“[I]nvestment-backed expectation must be reasonable”).}
\item \textit{533 U.S. 606} (2001).
\item \textit{Id.} at 626 (summarizing state’s 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. After all, they purchased or took title with notice of the limitation.”).
\item \textit{Id.} at 629-630.
\item \textit{Id.} at 634-35 (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.’”).
\item \textit{Id.} at 637 (Scalia, J., concurring).
\item \textit{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.”).
\end{itemize}
Professor Epstein has argued that “investment backed expectations” is an unfortunate turn-of-phrase, actually synonymous with “reasonable expectations” or even with “private property.” Courts have fared no better at providing coherent content to this test. All this is to say that Penn Central’s focus on investment-backed expectations may, at least under some interpretations, provide protection for existing uses. However, because the content and application of this factor is, at best, *ad hoc* and, at worst, hopelessly confused, its actual application to existing uses is less than conclusive.

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. Applying this factor, a regulation is a compensable taking if it reduces the value of the property by too much, an inquiry that is not irrelevant to the protection of existing uses. Indeed, 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 identical parcels of land, the first has a building on it and 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.

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152 Breemer, *supra* note 139, 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.”); 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.”).
153 See Oswald, *supra* note 136, at 107 (“[T]he meaning of the phrase remains uncertain, rendering its effectiveness as a legal doctrine questionable at best.”); Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993); see also Breemer, supra, at 82 & n.6 (citing sources and describing investment-backed expectations as “certainly the least understood” of the *Penn Central* factors).
154 See Oswald, *supra* note 136, 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 138, 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.”).
155 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 130, 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.”).
on the second. The owner of the first parcel has suffered a more significant economic impact – the value of his land has been reduced by more than the value of his neighbor’s land.\footnote{Before the regulation, the first lot might have been worth $1,000,000, and the second lot worth $250,000 (to reflect 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.}

Diminution of 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 \textit{Penn Central} test is applied in reference to the value of the property as a whole, it serves only to prevent the government from eliminating valuable existing uses on parcels of land that have little other value.\footnote{\textit{Penn Central}, 438 U.S. at 130-131.} Where the existing use either does not add very much to the 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 of value test provides very little protection.

Of course, eliminating an existing use would always trigger liability under the diminution of 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.\footnote{For a discussion of conceptual severance, see, Margaret Jane Radin, \textit{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 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, \textit{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).} Professor Michelman, whose incomparably influential article on the Takings Clause provided a blueprint for the \textit{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 perceived, sharply crystallized, investment-backed expectation.\footnote{Michelman, supra note 136, 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 Radin, supra, at 1684 (describing Penn Central test as “created under the salutary influence Frank Michelman’s famous article.”); Oswald, supra note 136, at 104 (“Michelman’s analysis clearly influenced Justice Brennan as he wrote the majority opinion in Penn Central.”); Gregory M. Stein, The Effect of Palazzolo v. Rhode Island on the Role of Reasonable Investment-Backed Expectations, in TAKING SIDES ON TAKINGS ISSUES 42 (Thomas E. Roberts, ed. 2002).

\footnote{See, e.g., Giovanella v. Conservation Com’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.”); City of Coeur D’Alene v. Simpson, 136 P.3d 310, 319 (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, 1221 n.12 (N.Y. 2004) (evaluating “effect of the government action on the value of the property as a whole, rather than to its effect on discrete segments of the property.”); Machipongo Land and Coal Co., Inc. v. Com., 799 A.2d 751, 768 (2002) (recalling Penn Central’s mandate that “in regulatory takings cases we must focus on the ‘parcel as a whole.’”).


\footnote{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 Congress who drafted the so-called}}
animates both land use doctrine and the Takings Clause, but 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 far from clear. After the fallout from *Lochner v. New York*, courts have had little appetite for striking down economic regulations on substantive due process grounds. In fact, substantive due process protection for most economic rights all but
ended after *Lochner*. Curiously, land use has remained one area where courts have consistently been willing to invalidate regulations under substantive due process.

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. This, in turn, requires courts to judge the government’s action against its goals. Due Process analysis will therefore prohibit the government from imposing harms that are disproportionately high compared to the benefits created. This kind of balancing no longer has any place in takings analysis. Still, considerable confusion remains. Due Process review is highly deferential, and land use controls enacted pursuant to the government’s police power are entitled to a presumption of

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166 *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”) (internal quotation marks and citations omitted).


170 See *id*. For a compelling account of the complicated relationship between the Takings and Due Process Clauses, see generally Karkkainen, supra note 97.

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

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 retroactively. The goal of separating uses is decidedly rational, and imposing that separation on existing uses will be even more effective at achieving this goal.

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. 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. In this view, property is owned subject to the state’s police power, which includes the power to redefine the content of property rights. The principal constitutional inquiry is therefore focused on the validity of the state’s exercise of its police powers, and not on the impact of a regulation on

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173 See Eger v. Levine, 153 A.D.2d 998 (1989). For an example of a court rejecting a due process challenge to a regulation eliminating an existing use, see e.g., Hartland Sportsman's Club, Inc. v. Town of Delafield, 35 F.3d 1198 (7th Cir. 1994).

174 See text accompanying *supra* note 8

175 E.g. Lincoln Trust Co. v. Williams Bldg. Corporation, 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 judgment of the municipal authorities.”); see also Merrill, *supra*; cf. Bettman, *supra* note 55, 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.”).

176 Karkkainen, *supra* note 97, at 841 (“Thus a legitimate exercise of the police power could never give rise to a compensable taking”).
property. In other words, courts evaluating the constitutionality of state land use laws or regulations had only to decide whether the government acted within the scope of its permissible police powers, and if it had, there could be 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. Courts would invalidate regulations that they found were arbitrary or irrational. Often, this involved a court’s judgment about whether or not the regulation was somehow unfair. Fundamentally, however, this inquiry was rooted in the Due Process Clause, and not the Takings Clause.

Despite some foreshadowing in 1922, the Takings Clause did not come into its own until 1978 in *Penn Central Transportation Co. v. City of New York*. The *Penn Central* test, as described above, focuses

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177 For a fascinating and thoroughgoing analysis of this history, see *id.* at 838-51.

178 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”).

179 See, e.g., Geisenfeld v. Village 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 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)); 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”); City of Tuscon v. Arizona 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.”); Appeal of Kerr, 144 A. 81, 83 (Pa. 1928) (“[T]he mere fact that the effect of the general scheme of a zoning statute or ordinance may be to depreciate property values, is not a sufficient consideration to make it invalid as a whole, and that a particular provision under attack must in itself be clearly arbitrary and unreasonable and without substantial relation to public health, safety, morals or general welfare before it can be declared unconstitutional.”) (quoting Ward’s Appeal, 137 A. 630, 631 (Pa. 1927)); Longley v. Rumsey, 224 N.Y.S. 165, 166 (N.Y. Sup. 1927) (holding a zoning ordinance invalid because of its failure to act in accordance with a comprehensive plan and “because of the arbitrary method by which the character of the so-called districts is determined.”).

180 Bettman, *supra* note 55, 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.”).

181 Karkkainen, *supra* note 97, at 841-42 (defining content of due process review).

entirely on the impact of the regulation on property rights.\textsuperscript{183} Two years later, however, in 1980, the Due Process and Takings tests came together in the Supreme Court’s decision in \textit{Agins v. City of Tiburon}.\textsuperscript{184} In Agins, the Supreme 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.”\textsuperscript{185} As many commentators noted, this language appeared to incorporate a substantive due process means-ends test into the Takings Clause.\textsuperscript{186} Courts could therefore be excused for invoking both the Takings Clause and substantive due process in the same breath.\textsuperscript{187} For 25 years, they wrestled with the relationship between substantive due process and the Takings Clause, often applying a more searching inquiry under the latter than traditional Due Process analysis would have required.\textsuperscript{188}

Finally, in 2005, the Supreme Court backpedaled, overruling Agins, and holding in \textit{Lingle v. Chevron} that the means-ends test was exclusively a Due Process test.\textsuperscript{189} \textit{Lingle} clarified the focus of the

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\textsuperscript{183} The three-part \textit{ad hoc} balancing test focuses on the diminution of value, the character of the regulation, and the extent of interference with investment-backed expectations. \textit{Id.}

\textsuperscript{184} 447 U.S. 255 (1980).

\textsuperscript{185} 447 U.S. 255, 260 (1980).


\textsuperscript{188} See, Nestor M. Davidson, \textit{The Problem of Equality in Takings}, 102 NW. UNIV. L. REV. 1, 16 (2008) (suggesting that Agins “substantially advances” test “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, \textit{supra} note 97, at 828 (noting “errant language in Agins that imported \textit{Lochner}-style heightened substantive due process review into modern takings law.”).

\textsuperscript{189} For more in-depth discussion of the line of cases resulting in \textit{Lingle v. Chevron}, 544 U.S. 528 (2005), see Fenster, \textit{supra} note 186. For a discussion of the doctrinal confusion that existed prior to Lingle, see generally, e.g., Roberts, et al., \textit{Land-Use Litigation: Doctrinal Confusion Under Fifth and Fourteenth Amendments}, 28 URB. L. AW. 765 (1996).
\end{footnotesize}
Takings and Due Process tests. The Due Process Clause prevents government regulations that are arbitrary or irrational, including regulations that have an insufficient means-ends fit. 190 In contrast, the takings inquiry, according to the Court, is concerned only with the extent of the government’s interference with property rights. 191 

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, 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.

PART III. NORMATIVE JUSTIFICATIONS FOR PROTECTING EXISTING USES

If the Constitution does not compel protection of existing uses, does (or should) the protection come instead from more general normative considerations? People will undoubtedly have a strong intuition that existing uses should be protected, but articulating why is harder than it might seem. This Part undertakes that task, by examining what, exactly, is and is not different about existing uses, and when those differences should and should not matter for their legal protection.

A. Anti-Retroactivity and Existing Uses

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. Many scholars argue that retroactive laws are anathema to liberty and a well-ordered society. 192 On the other hand, even the strongest attacks against retroactive legislation recognize that government must have some ability to enact laws that affect settled expectations or else government will not be able to legislate at all. 193 Rules limiting retroactivity are therefore in direct tension with the government’s ability to change the law. As

190 *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.”).
191 See *Lingle*, 544 U.S. 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.”) (italics in original).
193 Fuller, supra, 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.”).
Daniel Troy has framed the problem, “to what extent is one willing to sacrifice reliance on existing rules to accommodate the need for change?”

Much of the literature on retroactive laws focuses principally on the surprisingly difficult question: what counts as a retroactive law? This definitional problem is easy to identify but very difficult to solve. What counts as a retroactive law, when almost all laws serve to alter the consequences of past conduct? As Professor Jill Fisch has explained, even prospective-only regulations can have a significant retroactive

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194 TROY, supra note 39, at 3 (internal quotation marks omitted).
195 There are a variety of constitutional sources of anti-retroactivity rules that apply to private law. The Contracts Clause prevents state government from interfering with existing contract rights. 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 39, at 77 (“By the late 1880s, the Supreme Court began using the substantive component of due process clause 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, 34 YALE L.J. 303, 304 (1925) (summarizing Due Process cases and citing, inter alia, Huffman v. Anderson’s Admr., 9 W. VA. 6167 (1876)). By 1976, the Supreme Court refused to strike down an expressly retroactive law on Due Process grounds. See Usery v. Turner Elkhorn Mining, 428 U.S. 1 (1976), cited in TROY, supra note 39, at 39. Nevertheless, substantive due process analysis still appears periodically in retroactivity analysis. See Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), discussed infra note 201. For a review of different constitutional prohibitions against retroactivity, and their limitations, see Eule, supra note 192, at 427-34.
196 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. This excellent example was examined by Professor Jill Fisch who writes: “[E]limination of the tax deduction for interest on home mortgages, even if implemented in future taxable years, would have a substantial impact on existing homeowners.” Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 HARV. L. REV. 1055, 1067 (1997); see also Eule, supra note 192, at 435-36 (considering same example). Tax law provides a frequent source of discussion of retroactivity. See generally Kyle 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).
effect. Laws are therefore either more or less retroactive, but almost all laws affect prior conduct to some degree.

Building on this insight, some people distinguish between strongly and weakly retroactive laws. The former change a legal status retroactively, the latter change a legal status only prospectively but rely on events that predate enactment of the law. 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 does not impose civil or criminal penalties, say, for the existence of the use in the past. It has a severe “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 threatens to undermine settled expectations around the uses of property. If someone pays a substantial premium for undeveloped property zoned commercial, and then the local government downzones the property, the government’s downzoning is similarly retroactive, even though it does not interfere with an existing use.

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. Anti-retroactivity rules, on their own, are therefore either under or over-inclusive when it comes to protecting existing uses. Either they only prohibit regulations

197 See Fisch, supra, at 1067-73; see also DANIEL SHAVIRO, WHEN RULES CHANGE 26 (2000) (identifying retroactive effect of “nominally prospective” changes); TROY, supra note 39, at 2 (“[A]lmost all legislation may be characterized as ‘retroactive’ [because] the operation of almost all legislation depends on antecedent facts.”); FULLER, supra note 192, at 59-60 (discussing definition problem). This is particularly true of land use regulations, because the land itself always pre-exists the regulation. See Holly Doremus, Takings and Transitions, 19 J. LAND USE & ENV’T L. 1, 11-12 (2003) (“[N]ew property rules can never be wholly forward-looking. Although they can be applied only to new activities, they can never be applied to new land.”).

198 Fisch argues that retroactivity is not an all-or-nothing characterization of a law, but that it exists on a spectrum. Fisch, supra, at 1070 (“Understanding the concept of 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 196, at 1133 (“Transition losses can occur whether the new tax law or new interpretation applies nominally retroactively or nominally prospectively.”).

199 Stephen Munzer, Retroactive Law, 6 J. LEGAL STUD. 373, 383 (1977); Cf. also TROY, supra note 39, at 8 (describing Justice Scalia as distinguishing between primary and secondary retroactivity which tracks a similar distinction); 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.”).

200 Munzer, supra, at 383.
that actually change pre-enactment 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.\textsuperscript{201} The normative problem is even harder, deciding whether and to what extent retroactive legislation should be permitted. Theorists generally identify competing pressures of fairness and efficiency. Fairness, according to these accounts, requires that people be able to order their affairs in reliance on a predictable set of rules.\textsuperscript{202} Retroactive laws have the effect of changing the rules in the middle of the game. Antipathy to retroactive laws is also based on fundamental requirements of notice and fair warning, that people should be able to know the legal status of their choices ahead of time.\textsuperscript{203}

Efficiency concerns, on the other hand, often demonstrate the desirability of at least some retroactive laws.\textsuperscript{204} To the extent a new rule is an improvement in the legal system, requiring it to apply only

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\textsuperscript{201} So, too, it must be noted, is identifying the source of the constitutional prohibition against retroactive regulation. In \textit{Eastern Enterprises v. Apfel}, 524 U.S. 498 (1998), a plurality of Supreme Court struck down a federal statute requiring coal companies to fund retirement benefits for former coal miners. The Supreme Court could not even agree, however, on the constitutional analysis to apply. Four justices believed the statute violated the Takings Clause. \textit{Id.} at 522-538 (Justices O’Connoer, Rhenquist, Scalia and Thomas). Justice Thomas believed it violated the \textit{Ex Post Facto} Clause. \textit{Id.} at 538-39. Justice Kennedy also believed the statute was unconstitutional, but applying a Due Process analysis to reach his result. The remaining four Justices voted to uphold the statute after applying the Due Process Clause. 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.

\textsuperscript{202} Fisch, supra note 196, at 1085 (“Notice enables people to predict the consequences of their transactions and increases the influence of legal rules upon primary conduct.”).

\textsuperscript{203} TROY, supra note 39, at 18-19; see also David Frisch, \textit{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.”); Fisch, supra, at 1084 (“It is typically thought that prospective laws are more fair and that retroactive laws are more efficient.”); see also Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) “[T]he presumption against retroactive legislation is deeply rooted in [American] jurisprudence, and 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.”).

\textsuperscript{204} See Fisch, supra, at 1088 (noting that “although fairness arguments are typically used to support prospective lawmakers, efficiency is generally viewed as favoring retroactivity.”).
prospectively will limit the rule’s benefits.\textsuperscript{205} Moreover, limiting a rule to prospective application can create an inefficient rush to develop in the face of anticipated regulatory change.\textsuperscript{206} The possibility of an unfavorable legal change may induce people to race to fall within the existing regime.\textsuperscript{207} This can lead to all kinds of inefficiencies as people engage in strategic behavior to avoid application of a new rule thereby perhaps developing property, or engaging in transactions, before they otherwise would.\textsuperscript{208}

When it comes to existing uses, the question now sharply in focus is whether the competing fairness and efficiency concerns are particularly acute or otherwise apply differently to existing uses. It turns out, there is no single answer, and the justifications for the special treatment of existing uses are therefore less than completely compelling. The following sections consider likely seeming justifications that do not actually support the intuition for protecting existing uses, namely: extent and nature of the loss, protecting the status quo, and the political economy of existing uses. All 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 describe the different nature of the harm resulting from the elimination of an existing use, but none are particularly satisfying.

1. Fairness. Most straightforwardly, 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 a property owner has reasonably

\footnotesize\textsuperscript{205} Fisch, supra, 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.”).

\footnotesize\textsuperscript{206} This is a familiar application of moral hazard. See Albert C. Lin, Size Matters: Regulating Nanotechnology, 31 HARV. ENVTL. L. REV. 349, 401 (2007) (describing moral hazards as any “temptation to behave differently because of the existence of insurance or other incentives.”); Tom Baker, On The Genealogy of Moral Hazard, 75 TEX. L. REV. 237, 238-239 (1996) (“In the economics literature and in the law and policy debate that draws upon this literature, ‘moral hazard’ refers to the tendency for insurance against loss to reduce incentives to prevent or minimize the cost of loss.”).

\footnotesize\textsuperscript{207} Fisch, supra note 196, 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.”).

\footnotesize\textsuperscript{208} See supra Part III.E; see also Louis Kaplow, An Economic Analysis of Legal Transactions, 99 HARV. L. REV. 509, 529 (1986) (“The encouragement resulting from the assurance that compensation or other protection will be provided in the event of change results in overinvestment.”).
relied. Imagine someone who developed a small commercial property only to have a new zoning ordinance downzone the property for residential use only. 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 its economic value. This at least 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 a sense of fairness.

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 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 independent content, does not serve as a basis for distinguishing between existing and future uses.

2. Extent of Loss. One obvious distinction in this example 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. 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). More fundamentally, too, 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 extent of the loss from eliminating an existing use is not necessarily greater than the loss from prohibiting a future use, it has a different character. The former are out-of-pocket costs, the latter, foregone profits, and people may experience these losses differently. This distinction at least implicates a robust behavioral economics literature on endowment effects, which demonstrates that people generally value property they actually possess more than property they do not. Simply put, the owner of an existing use is likely to value it more than an otherwise identical use that does not yet exist. 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

211 This kind of example is common in the case law. E.g. Savvidis v. City of Norwalk, No. FSTCV054004143S, 2007 WL 2938522 (Sup. Ct. Connecticut, Aug. 8, 2007) (finding “amount of money spent in the renovations indicated a substantial detriment” when certificate of occupancy was refused and issuing writ of mandamus ordering the defendant to issue a certificate of occupancy).


213 SHAVIRO, supra note 197, at 23 (“People tend to over-weight out-of-pocket costs relative to pure opportunity costs such as forgone gains . . . . Accordingly, out-of-pocket losses and those that result in a perceived transaction loss may tend to be more salient than others”).

214 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”); Daniel Kahneman, et al., Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. Pol. Econ. 1325 (1990) (reporting “several experiments that demonstrate that [the] ‘endowment effect’ persists even in market setting with opportunities to learn.”); SHAVIRO, supra note 197, at 23 (discussing endowment effects).

215 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, supra note 214.
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.

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. Writing about adverse possession, Justice Holmes famously wrote, “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 taken away without your resenting the act and trying to defend yourself . . . .” 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. 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.”

However framed, people’s connection to their property might

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216 Rachlinski & Juergen, supra, at 1558 (suggesting that “subjects actually have to feel and touch [the object] to make it theirs – the right to [an object] was not endowed.”); see also id. at 1559 (describing further psychological study); Doremus, supra note 197, 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”).

217 See Michael A. Strahilevitz & George Lowenstein, The Effect of Ownership History on the Valuation of Objects, 25 J. OF CONSUMER RESEARCH 276 (1998) (publishing studies showing endowment effect increasing over time). Responding to this same phenomenon, some people have proposed increasing compensation for condemnation the longer property has been owned by the condemnee. E.g. John Fee, Eminent Domain and the Sanctity of the Home, 81 NOTRE DAME L. REV. 783, 814-17 (2006); MO. ANN. STAT. § 523,039(3), cited in Dephna Lewinsohn-Zamir, Identifying Intense Preferences, (draft on file with author). It may, however, be difficult to move from controlled psychological experiments involving tangible and low-value property, like coffee cups, to real property. See Jennifer Arlen, Comment, The Future of Behavioral Economic Analysis of Law, 51 VAND. L. REV. 1765, 1771 (1998). (“The classic experiment illustrating the endowment effect involved Cornell coffee mugs.”)

218 Oliver W. Holmes, The Path of the Law, 10 HARV. L. REV. 457, 477 (1897).

219 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 39, at 1 (citing H. CLAY TRUMBULL, HINTS ON CHILD TRAINING (1890)).

220 Henry J. Friendly, Some Kind of Hearing, 123 U.PA. L. REV. 1267, 1296 (1972), quoted in Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 10 (1973). 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 a 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).
justify existing use protection because the extent of harm is that much
greater.

While this account has considerable descriptive force, it is very
difficult to justify treating these psychological connections, however
manifested, differently from individual owners’ subjective value in 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.\footnote{See
Christopher Serkin, \textit{The Meaning of Value: Assessing Just
Compensation For Regulatory Takings}, 99 NW. U. L. REV. 677, 700-01
(2005) [hereinafter, Serkin, \textit{The Meaning of Value}]}

Courts have reasoned that the difficulty – indeed, the seeming impossibility – of
measuring subjective value with any precision militates in favor of
ignoring it altogether.\footnote{See Serkin, \textit{Local Property Law}, at 943; see also Lee Anne Fennell,
\textit{Taking Eminent Domain Apart}, 2004 MICH. ST. L. REV. 957, 992–1002 (discussing
“uncompensated increment”).}

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.

The comparison to subjective value reveals another problem, too.
The psychological connections between people and their property
implicate the extent of harm resulting from the elimination of an existing
use. Most arguments about including subjective value in takings
analysis focus on the extent of compensation. A variety of academic
proposals to address the problem of subjective value, from a self-
valuation model offered by various scholars, to percentage bonuses, all
increase the amount of compensation the government must pay, but not
the initial determination whether the government must pay.\footnote{For
proposal for self-assessment of property values tied to property taxes
and sales prices, see, Bell & Parchomovsky, \textit{Takings Reassessed}, 87 VA. L. REV. 277
300-04 (2001); see also generally See Saul Levmore, \textit{Self-Assessed Valuation Systems
for Tort and Other Law}, 68 VA. L. REV. 771 (1982). Richard Epstein has proposed
applying some extra percentage increase to compensation at least partly to account for
subjective value. Richard A. Epstein, \textit{A Clear View of The Cathedral: The Dominance

There is no reason why existing uses should be treated any differently. If existing
uses implicate the extent of harm instead of any qualitative or conceptual
differences with prospective future uses then they are better included in
the compensation inquiry than in the liability determination. This is not
how current land use and property doctrines work, however.\footnote{See supra Part I (describing
property and land use doctrines protecting existing uses).}

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 would appear to eliminate a productive
and durable asset, thereby imposing some broader cost on society.\textsuperscript{225} In fact, however, this intuition relies on the same unwarranted prioritization of out-of-pocket costs over foregone profits.\textsuperscript{226}

To see why this is true, consider the following stylized hypothetical. Imagine that Los Angeles is interested in zoning some property 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.\textsuperscript{227} 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).\textsuperscript{228} 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 non-conforming uses, need to be

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\item \textsuperscript{225} Cf. Lior Jacob Strahilevitz, \textit{The Right to Destroy}, 114 \textit{YALE L. J.} 781, 796 (2006) ("Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner’s ability to destroy her property.").
\item \textsuperscript{226} See supra note 213. This also resembles at least some characterizations of the sunk cost fallacy in that it unduly privileges money that has already been spent. See Susan Block-Lieb & Ted Janger, \textit{The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided “Reform” of Bankruptcy Law}, 84 \textit{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, \textit{Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking}, 87 \textit{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.").
\item \textsuperscript{227} That loss include both the costs of tearing down the theater, and the lesser value of the property as low-income housing than as the higher-valued movie theater.
\item \textsuperscript{228} For a discussion of endowment effects, see infra text accompanying notes 215-217. This waste analysis will not hold true if eliminating the existing use imposes an intergenerational externality. Strahilevits, \textit{supra} note 225, at 793-94 (identifying problem with property destruction as imposing “intergenerational consequences, for better or worse."). The problem with this analysis is that 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.
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included in the cost benefit analysis to decide whether to grandfather. 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 unnecessarily costly. In other words, and consistent with the central claim here, the fact of some kinds of preexisting uses of property can be relevant to the efficiency of new regulations, but is plainly not dispositive and so does not justify categorical protection.

The picture is more complex, too, 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 instead 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, and 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. 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 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. There are, in fact, strong reasons to think that compensation may result in over-investment in property, a point taken up in Part III. At the very least, the fact-specific and empirical question

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229 See Shavell, supra note 17, at 57-64.
230 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.”).
231 See, Scott Hershovitz, Two Models of Tort (And Takings), 92 VA. L. REV. 1147, 1152 (2006) (“The thesis is that the 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.”).
232 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, 82 IND. L. J. 745, 771 (2007). Tellingly, the doctrine has been replaced in most jurisdictions by comparative fault regimes. See Ehud Guttel, 93 VA. L. REV. 1389, 1418 n.62 (2007).
233 See infra text accompanying notes 278-288 (discussing transitions literature).
who the least-cost avoider is in any particular situation cannot justify protection for existing uses in all or even most cases.\(^{234}\)

4. **Personhood.** If may be that these economic-focused accounts miss some more fundamental aspect 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.\(^{235}\) When this is true, according to Radin, compensation not only fails to provide sufficient protection but actually threatens to work greater injury by commodifying what should be uncommodifiable.\(^{236}\)

Existing uses implicate and, simultaneously, expand upon this personality theory of property. In Radin’s view, property can be constitutive of identity; it is the relationship between a person and an external object that creates fully developed individuals.\(^{237}\) This relationship, however, relies upon an actual object in the world and not a mere expectancy or hope for an object in the future.\(^{238}\) It relies, in other words, on an existing use and not merely a prospective future use.

However, existing uses are 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, the latter is held purely instrumentally.\(^{239}\) A prospective future use is, in this sense, always farther on the fungible side of the spectrum of property than an existing use. As Radin herself explains, “Object-loss is more important than wealth loss because object-loss is


\(^{235}\) See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982). A Kantian account might also generate a similar insight. Kant’s theory of property begins with the physical connection between people and things, a connection that requires a very literal ability to grasp an object in the real world.

\(^{236}\) See Margaret Jane Radin, *Marktet-Inalienability*, 100 HARV. L. REV. 1849, 1907-09 (describing application of market-inalienability theory to personhood).

\(^{237}\) *Id.* at 972-75 (discussing Hegelian theory).

\(^{238}\) 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 the 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 158, at 1692 (suggesting people may have personhood interests in plans to build a residence).

\(^{239}\) Radin, *supra* note 236. at 959-60 (describing fungible property as opposite of personal property and arguing that “[t]he opposite of holding an object that has become 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.”).
specially related to personhood in a way that wealth-loss is not." But it is not that case that all or even most existing uses implicate owners’ personhood at all, let alone to an extent that 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 is simply not – or at least not often – at issue.

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. Indeed, property’s long-established concern with perpetuating the status quo has occasionally cast it as an ossifying force and even an enemy of progress. 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 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 rejected. It is simply 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

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240 Radin, supra note 235, at 1004.
241 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, September 28 2007, at C1 (describing young couple buying bakery that appeared far more important than their house). Line drawing is nevertheless hard, if not impossible.
242 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, 574 (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.”).
243 E.g. Craig Anthony 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.”).
is organized around creating incentives to put property to more productive use.\textsuperscript{244} Indeed, the history of property law in this country is the history of promoting increasingly intensive uses.\textsuperscript{245} It is not about stability but encouraging productivity. Existing use protection is only consistent with this history to the extent it protects existing uses from less intensive uses, not more intensive ones – a distinction that simply does not exist in the doctrine.

Even assuming for the moment that stability is a desirable goal for a property regime, existing use protection represents a peculiarly unsatisfying means of achieving that goal. Until a use exists, governments can regulate up to the deferential and relatively hands-off limits imposed by the Takings and Due Process Clauses. To the extent this promotes stability in actual uses of land, it is the result of deference to government regulations restricting changes in the intensity of land uses. Stability, in other words, comes from judicial deference to restrictive government regulations. Suddenly, once a use exists, the tables turn and stability results from protecting that use against regulatory change. More than stability, this is a kind of one-way ratchet of property protection. Its effect on stability of land uses is therefore contingent on the nature of the government regulation. In fact, however, pro development land use initiatives receive the same deference as restrictive regulations. Preservationist regulations can be struck down under doctrines like vested rights that protect existing uses.\textsuperscript{246} Stability in the actual uses of land is at best a secondary effect of some existing use protection, if it is related at all.

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

\textsuperscript{244} See Richard A. Epstein, \textit{International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News}, 78 VA. L. REV. 85, 108 (1992) (“[T]he distribution of property rights . . . is a functional question, forward-looking in orientation, in which 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.”).

\textsuperscript{245} See Richard A. Posner, \textit{Savigny, Holmes, and the Law and Economics of Possession}, 86 VA. L. REV. 535, 559 (2000) (“It is undesirable in general that property should remain in the common pool . . . [T]he owner who does not react to the adverse possession of his property for years is indicating that he does not value the property significantly, which is the practical economic meaning of abandonment.”); \textit{cf. also}\ Carol M. Rose, \textit{Possession as the Origin of Property}, 52 U. CHI. L. REV. 73, 82 (“[I]t turns out that the common law of first possession, in rewarding the one who communicates a claim, \textit{does} reward useful labor; the useful labor is the very act of speaking clearly and distinctly about one's claims to property.”).

\textsuperscript{246} \textit{E.g.} Valley View Industrial Park v. City of Redmond, 733 P.2d 182 (Wash. 1987) (en banc).
subjectively real and objectively reasonable expectations because they are definitive evidence of some baseline of actual expectations concerning the use of property.

Whether a use exists or not has little to do with its objective reasonableness; plenty of unreasonable land uses actually exist. 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.

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, 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 doctrine, as well as with *Penn Central’s* focus on investment-backed expectations. 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 on actual expenditures or existing uses, or even on subjective expectations at all. The more speculative and unrealistic an expectation, the less its elimination will impact fair market value.

That is, market value will not reflect unreasonable expectations. If, instead, the concern is genuinely with protecting subjective expectations – regardless of the impact on 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

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247 The “harm-prevention” exception for regulatory takings liability clearly demonstrates that property is regularly put to a use that is then, or later turns out to be, unreasonable. *See, e.g.*, *Hadacheck v. Sebastian*, 29 U.S. 394 (1915) (upholding law barring operation of brick mills in residential areas); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) (articulating nuisance-prevention defense).

248 *See supra* Part I.A (discussing vested rights doctrine).

249 *See Serkin, The Meaning of Value*, at 689-92 (discussing highest and best use as component of fair market value).
all genuine and reasonable expectations. Developers are routinely required to scale back projects and offer concessions as part of the development process, regardless of the sincerity of their original expectations. So long as that interference does not go too far, it is not impermissible.

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 59 instead of 60 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. But now imagine a local government seeking to force the removal of one condo unit out of 60 that have already been built. These two situations certainly feel different, but not because there is any difference in the extent of the regulations’ interference with the property’s owner’s real expectations, but instead because of the magnitude of the loss, rejected in the previous section as a basis for existing use protection.

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, for example, property protection should be at its highest when political protections are at their weakest. The question, then, is whether owners of existing uses are likely to suffer from a predictable political failure. The answer turns out to be somewhat complex.


251 See Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy, 71 CAL. L. REV. 837, 891 (“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.”).

252 For a discussion of the Penn Central factors, see supra text accompanying notes 128-156.

253 See supra text accompanying note 155 (discussing diminution in value test for takings liability).

254 WILLIAM A. FISCHEL, REGULATORY TAKINGS 139 (1995); see also generally WILLIAM A. FISCHEL, HOMEOWNER HYPOTHESIS. 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 162, at 782.
In his examination of interest group politics, Professor Komesar has argued that the principal requirements for generating political pressure are relatively small numbers and high per capita stakes.\textsuperscript{255} The size of the interest group matters because it affects the ability to identify interested parties, and then the cost of organizing them.\textsuperscript{256} 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.\textsuperscript{257} This appears to track neatly on to the owners of existing uses who not only constitute a defined class but are also easy to identify. They are, after all, the current owners of the existing uses. Transaction costs involved in coordinating owners of existing uses are therefore relatively low. Moreover, the per capita stakes are also predictably high, for all the reasons discussed in the previous section. In the rough-and-tumble of interest group politics, the class of existing owners appears far less susceptible to the kinds of political failures that public choice theory predicts, where costs are imposed on a diffuse, disinterested, and unorganized group.\textsuperscript{258}

In contrast, prospective future uses are, arguably, more susceptible to government interference than existing uses. Many of the beneficiaries of a proposed housing development, for example, are unidentified end-purchasers who are therefore unable to mobilize political opposition to the regulation.\textsuperscript{259} The developer certainly has an

\textsuperscript{255} Neil K. Komesar, Law’s Limits 61 (2001) (“Interest groups with small numbers but high per capita stakes have sizeable advantages in political action over interest groups with larger numbers and smaller per capita stakes, because higher per capita stakes mean that the members of the interest group will have greater incentive to expend the effort necessary to recognize and understand the issues.”).

\textsuperscript{256} 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.”).

\textsuperscript{257} Id. (“[H]igher per capita stakes mean that the members of the interest group will have greater incentive to expend the effort necessary to recognize and understand the issues.”).

\textsuperscript{258} For a discussion of the insights of public choice theory and its implications for property protection, see Daryl Levinson, Making Government Pay Markets, Politics, and the Allocation of Constitutional Costs, 67 U. Chi. L. Rev. 345 (2000); Christopher Serkin, Big Differences for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. Rev. 1624, 1637-43 (2006); see also Amnon Lehavi & Amir N. Licht, Eminent Domain, Inc., 107 Colum. L. Rev. 1794, 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.”); Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 38 (1991) (noting that “collective action problems mean that every group is likely to invest less in petitioning efforts than would be necessary to maximize the group’s net gains from petitioning” and 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.”).

\textsuperscript{259} See e.g. Elhauge, supra, at 39 (characterizing “large diffusely interested groups” as underrepresented and having “a harder time collecting the resources
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.\textsuperscript{260}

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.\textsuperscript{261}

In fact, however, the political economy of existing uses is less settled. There are predictable political process failures that may suggest a particular need to protect existing uses from exploitation. The first comes from Albert Hirschman’s concepts of “Exit” and “Voice.”\textsuperscript{262} 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.\textsuperscript{263} 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 less than the costs imposed by the government, a rational property owner will stay in the jurisdiction.\textsuperscript{264} 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.\textsuperscript{265}

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.\textsuperscript{266} There are times –

\begin{itemize}
\item \textsuperscript{260} For an account of those costs, see Serkin, \textit{supra} note 258, at 1677-80.
\item \textsuperscript{261} \textit{Fischel, Takings}, at 251-52; \textit{see also} William A. Fischel, \textit{Exploring the Kozinski Paradox: Why is More Efficient Regulation A Taking Of Property}, 67 Chi.-Kent L.Rev. 865, 912 FN 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).”).
\item \textsuperscript{262} \textit{See} ALBERT O. HIRSCHMAN, \textit{Exit, Voice \\& Loyalty}. For a thoroughgoing account of the role of exit and voice in local governments, see \textit{See Vicki Been, \textit{“Exit” As A Constraint On Land Use Exactions: Rethinking The Unconstitutional Conditions Doctrine} 91 COLUM. L. REV. 473, 476 (1991) (describing Hirschman’s theory).
\item \textsuperscript{263} \textit{See Fischel, Regulatory Takings}, at 252.
\item \textsuperscript{264} For a discussion of rent-seeking in land use regulations, see Abraham Bell \\& Gideon Parchomovsky [draft on file with author].
\item \textsuperscript{265} This claim comes with a substantial caveat. Some uses can be moved relatively easily, like many businesses that do not depend on a specific location. The distinction between an existing \textit{physical} use and an existing \textit{activity} is considered in Part III.
\item \textsuperscript{266} This concern plainly justifies the prohibition against \textit{ex post facto} criminal liability. \textit{See Shaviro, supra} note 197, at 77 (“[T]here plainly would be a
predictable times – when eliminating an existing use is likely to generate, not expend, political capital. Zoning away adult businesses is perhaps the easiest example, where 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.\textsuperscript{267}

The opportunity for this kind of singling out is likely to vary depending in 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.\textsuperscript{268} Individual homeowner preferences may vary, but homeowners as a group share a common goal of maximizing property values.\textsuperscript{269} 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.\textsuperscript{270}

Homeowner interests around existing uses are relatively easy to anticipate. In general, they want their own homes protected from regulatory change.\textsuperscript{271} They may feel differently, however, about non-residential 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 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

\textsuperscript{267} Many people have argued that the Takings Clause should be particularly sensitive to regulation of individuals or groups with inadequate political remedies. \textit{See}, \textit{e.g.}, Doremus, supra note 197, at 40 (“More searching review is appropriate where only a minority will bear the regulatory bargain”); Saul Levmore, \textit{Takings, Torts and Special Interests}, 77 VA. L. REV. 1333, 1344-45 (1991) (“[W]hen the government . . . [placed losses on an individual or persons who are not part of an existing or easily organized political coalition, then we can expect to find a compensable taking.”).

\textsuperscript{268} \textsc{Fischel, Homevoter Hypothesis}, at 87-96 (developing median voter model).

\textsuperscript{269} \textit{See} Serkin, supra note 258, at 1648.

\textsuperscript{270} \textit{See} id.

\textsuperscript{271} \textsc{Fischel, Homevoter Hypothesis} at 9.
coordinated political force of local homeowners. 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. Indeed, existing uses appear to fare well – perhaps too well – in the rough and tumble of interest group politics at the state and federal level, as various state and federal statutes demonstrate.

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 demand greater judicial protection across the board.

E. Prophylaxis and the Costs of Existing Use Protection

Given the complex political story surrounding regulation of existing uses, and at least the possibility of greater harm arising from the regulation of many existing uses, it is possible to conceive of existing use protection as a kind of prophylactic rule. The rule appears easy to administer and prevents harms that are often, even if not always, associated with the elimination of an existing use. In other words, perhaps the normative justification for existing use protection is that the rule gets it right often enough, and at sufficiently low cost, so that it is better than the alternative.

Of course, a more narrowly tailored existing use test would minimize the costs of over-protection. A test focused on the nature of the investment in property, and also the duration of ownership, could identify the existing uses that are most likely to come with significant

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272 See Serkin, supra note 258, at 1661-64 (arguing that homeowners’ political power dissipates at the state and federal level).

273 The prescriptions arising from this likely political failure is discussed in more detail, infra Part III(D). Here, it is enough to repeat Professor Fischel’s argument that judicial resources are best spent in the takings context focusing only on those situations where property owners are unlikely to have a meaningful political remedy. See William A. Fischel, Exploring the Kozinski Paradox, 67 CHI.-KENT L. REV. 865, 911 (1991).

274 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 statute statutes, all of which provide special treatment of existing uses. They are described supra text accompanying notes 18-20.

275 There is an extensive literature on constitutional prophylactic rules, the most notable of which is the Miranda rule. See David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. CHI. L. REV. 190, 207-09 (1988); Evan H. Caminker, Miranda and Some Puzzles of “Prophylactic” Rules, 70 U. CIN. L. REV. 1, 9 (2001); Mitchell N. Berman, Constitutional Decision Rules, 90 VA. L. REV. 1 (2004).
A test more sensitively attuned to the political dynamics in a jurisdiction would single out for protection those uses that are most susceptible to political malfunctions. Such inquiries come with their own administrative costs, however, and the possibility of under-protection. Ultimately, then, the question is whether the harms of under-protecting existing uses outweigh the harms of over-protecting them.

If existing use protection were costless, or just sufficiently cheap, a prophylactic rule might make good sense. It helps to minimize uncompensated regulatory harms by protecting endowment effects and other psychological connections between people and their property. It constrains abuses by local governments, and is consistent with many people’s deeply held intuitions. There are, however, strong countervailing reasons not to afford special protection to existing uses. A catalog of the costs of existing use protection tips the scale in the other direction, and is the final task taken up before arguing that current law over-protects existing uses.

One of the most obvious costs of existing use protection is the opportunity it creates for property owners to make strategic and inefficient investment decisions. In the face of a future regulatory change, property owners might inefficiently race to lock in a use as soon as possible in order to take advantage of existing regulations. This predictably leads to a race to develop and to the inefficient over-investment in property.

As Professor Shaviro has demonstrated, there is a complicated story to tell about when, and under what conditions, protection from regulatory change is likely to be efficiency enhancing. At the most general level, it depends on whether property owners should alter their

\[\text{Attachments.}^{276}\] A test more sensitively attuned to the political dynamics in a jurisdiction would single out for protection those uses that are most susceptible to political malfunctions.\(^{277}\) Such inquiries come with their own administrative costs, however, and the possibility of under-protection. Ultimately, then, the question is whether the harms of under-protecting existing uses outweigh the harms of over-protecting them.

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\(^{276}\) For a discussion of these factors, see supra [].

\(^{277}\) See supra Part [].

\(^{278}\) See 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, The Meaning of Value, at 699 (citing sources).

\(^{279}\) Dana, supra note 40, at 677-81; see also Joseph William Singer, The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations, 30 HARV. ENVTL. L. REV. 309, 326 (2006) (“[Property Owners] should be forced to internalize . . . foreseeable new regulations designed to protect the public from the harms attendant on the cumulative effects of individual acts of ownership.”). The question when, and under what conditions, this kind of race to develop will actually exist probably deserves more consideration that it has received. It goes beyond the scope of this paper, however.

\(^{280}\) In his careful taxonomy of retroactive effects, Professor Shaviro identifies instances in which retroactive application of rules will not be efficiency enhancing. See SHAVIRO, supra note 197, at 48-53.
conduct in anticipation of new rules.\textsuperscript{281} This, in turn, can depend on whether the underlying rule change is good or not – that is, whether it represents legal progress, however defined.\textsuperscript{282} The intuition is that individuals should adjust their behavior to anticipate “good” rules, but not “bad” ones.\textsuperscript{283} It can also depend on whether a failure to anticipate some regulatory change will result in waste.\textsuperscript{284} If regulations of existing uses are compensated, then property owners might ignore the risk of regulatory change and thereby create additional costs for government compensation.\textsuperscript{285}

Professor Kaplow examined this concern 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.\textsuperscript{286} If property owners know that the government will compensate them for any subsequent regulation of their existing uses, they may fail to account sufficiently for the risk of regulatory change.\textsuperscript{287} According to Kaplow, this risk should be no different than the risk of fire or flood; it is a risk that property owners should at least partially internalize in order to induce efficient investment incentives.\textsuperscript{288}

Compensation for existing uses can distort government decision-making too. If existing uses are compensated, a government sensitive to cost will avoid regulating property with existing uses.\textsuperscript{289} 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.\textsuperscript{290} This may inefficiently distort government

\textsuperscript{281}S\textsc{haviro}, supra note 197; Logue, supra note 39, 235-245 (identifying situations in which anticipation of legal change is desirable).

\textsuperscript{282}S\textsc{haviro}, supra, at 48-51; Logue, supra note 39, at 236-39.

\textsuperscript{283}Logue, supra, at 239-42.

\textsuperscript{284}See id. at 236 (arguing that desirability of legal rule matters less when regulation destroys property values entirely in a way that cannot be reversed).

\textsuperscript{285}The problem of social waste is discussed supra text accompanying notes 224-234.

\textsuperscript{286}Kaplow, supra note 39.

\textsuperscript{287}See Kaplow, supra; Dana, supra note 40, at 679-80 (describing Kaplow’s argument).

\textsuperscript{288}See Kaplow, supra; Levmore, supra note 39; see also S\textsc{haviro}, supra note 197, at 49 (“Suppose that 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.”); Logue, supra note 39, at 237 (describing similar example),

\textsuperscript{289}See Serkin, supra note 258, at 1666-73 (describing governments’ risk aversion).

\textsuperscript{290}See Robert Innes, T\textsc{akings}, C\textsc{ompensation}, and E\textsc{qual T\textsc{reatment for Owners of Developed and Undeveloped Property}, 40 J. L. & E\textsc{con} 403, 406 (1997) (“[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.”).
decision-making, and also lead to inefficient over-investment by property owners.

On the other hand, failure to protect existing uses may instead result in inefficient under-investment.291 Few, or at least fewer, people would take the risk of developing property, at considerable expense, if a regulatory change-of-heart could wipe out the development, without providing any compensation.292 In fact, insurance against the risk of legal change is particularly important for assets that cannot be easily diversified, like an individual’s home, and this “insurance” can take the form of government liability.293

The effect of existing use protection on investment decisions is obviously multi-faceted and complex.294 It may well be that individual homeowners demand more protection against loss, and are less susceptible to inefficient over-investment 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, tend to build aggressively to take advantage of more lenient regulations.295 Even run-of-the-mill land use regulations can stimulate more development sooner than would otherwise occur.296

Protecting existing uses raises additional concerns, too. As with anti-retroactivity principles, the protection of existing uses can limit the government’s ability to enact regulations that would genuinely benefit the public. As discussed in Part II, there is a well-developed literature around the problem of prior non-conforming uses in zoning law.297 The protection of existing uses can threaten the efficacy of an entire zoning

291 E.g. Doremus, supra note 197, at 16 (“Another efficiency concern is the worry that an unstable regulatory climate will inhibit investment, particular 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. Logue, supra note 196, at 1141.

292 See Logue, supra.

293 SHAVIRO, supra note 197, at 41.

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

295 E.g. Dana, supra note 40, at 694-95 & n.107 (collecting examples of accelerated development to beat the regulatory clock).

296 For this reasons, economist Robert Innes has argued that developed and undeveloped property should receive equal treatment for takings purposes. See Innes, supra note 290, at 406-07.

297 See supra Part I(C).
regime. It is also at least partly responsible for the recognition that zoning is less forward-looking land use planning than mere description of existing conditions.\footnote{298} If planners have to zone around existing uses, then a significant part of any zoning project will involve incorporating the existing uses, whether or not they make sense where they are.\footnote{299}

There is another serious problem with protecting existing uses. Put simply: what even counts as an existing use? 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 the most 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.\footnote{300} Existing uses may not define an easily administrable category for property protection after all.

Finally, the political dynamic around existing uses suggests that courts should be primarily concerned with actions by small, local governments where owners of existing uses may suffer from systemic political failures.\footnote{301} 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.\footnote{302} In fact, they may be too sensitive and be over-deterred from enacting what would actually have been beneficial regulations.\footnote{303} Also, the relatively low cost to developers and property owners of monitoring local government decision-making makes it much easier to foresee

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

\footnote{299} Favoring existing uses over potential future uses may also be privileging a particular kind of use of property. Criticisms of labor theories of property point out that the harms of privileging active uses of property over passive ones. E.g. Jedediah Purdy, Property and Empire: The Law of Empirialism in Johnson v. M’Intosh, 75 GEO. WASH. L. REV. 329, 336 n. 36 (2007). This, 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 also 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, like conservation.

\footnote{300} Gaylord v. Maple Manor Investments, 2006 WL 2270494 (Mich. App.).

\footnote{301} See supra Part III(D).

\footnote{302} See Serkin, supra note 258, at 1666-67 (discussing local governments’ risk aversion).

\footnote{303} See id.
adverse regulatory changes. Local government actions such as rezonings are therefore particularly likely to create an inefficient race to invest in order to lock in the 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 courts should not categorically compel this protection. It is overbroad, and the costs are too high.

IV. PRESCRIPTIONS FOR EXISTING USES AND CONCLUSION

The normative justifications for special protection for existing uses are surprisingly unconvincing. Existing use protection also creates substantial costs. The ineluctable conclusion is that existing uses should not be entitled to special judicial protection, and should instead be subjected to the same constitutional inquiry that applies to all regulations and government actions. It is, however, important to articulate as clearly as possible the breadth and the limits of this prescription.

Perhaps the most important point to emphasize is that this Article’s conclusion is not intended to encourage governments to make a common practice of regulating existing uses out of existence. In many if not most instances, governments should protect existing uses as part of the usual cost-benefit analysis that they undertake. 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 include the costs of retrofitting existing uses, distributive consequences, and the ultimate impact of existing use protection.

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 decision-making 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. In other contexts involving economic regulations, courts rarely interfere to second-guess

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304 Information costs, and the costs of monitoring local governments, are typically much lower than for larger governments. Id. at 1667.

305 For a thoroughgoing discussion of sophisticated cost-benefit analysis in government decision-making, see RICHARD REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008).

306 For a sophisticated analysis of the systemic effect of grandfathering provisions in environmental regulations, see Revesz & Nash, supra note 10.

307 See Revesz & Nash, supra, 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 text accompanying note 258 (discussing public choice theory).
those cost-benefit determinations. 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 subjected to the same kinds of takings and due process analysis that applies to all government actions. If the 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. As discussed above, regulations of existing uses are more likely to trigger takings liability under existing takings doctrine than regulations of prospective future uses, just because the economic impact is likely to be greater. But courts should not extend special protection to existing uses, let alone the kind of incredibly strong protection that current land use doctrines provide.

These clarifications do not diminish the practical significance of removing the essentialism of existing uses. By eliminating the special protection of existing uses, courts will 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 will 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 both opens to governments the possibility of regulating existing uses more often than current law allows while highlighting the reasons for caution. Ultimately, though, that is caution best exercised by government decision-makers instead of by courts prohibiting a whole category of regulations based on vague constitutional principles and thin normative justifications.

Many areas of law provide special protection for existing uses, from the Takings Clause, to various state and federal statutes, to a variety of land use doctrines. 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.

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308 See supra note (citing sources discussing substantive due process).
309 These are summaries of the leading Takings and Due Process tests, discussed supra text accompanying Part III.
310 See supra note 165 (citing sources discussing economic substantive due process).