

VESTED RIGHTS AND THE PRESUMPTION OF LAWFUL USE

*Adam J. MacLeod**

ABSTRACT

Presumptions matter in cases and controversies about private rights. A party who bears the burden of proof or persuasion and who cannot meet that burden will lose. But private law presumptions are not as well understood as the presumption of innocence in criminal prosecutions. This article explains a number of presumptions governing property, especially land use, by reference to the concept of vested private rights. A person may enjoy the presumption that his use of property is lawful when he has a right to make the use prior to a legal challenge or change in the law, and his right is vested in the sense that it cannot be terminated until someone proves that the use is unlawful. The right may be defeasible, but someone other than the right holder bears the burden of proving that it should be defeated. A survey of land use decisions from federal and state courts over the last century demonstrates that the existence or non-existence of a vested land use explains legal and factual presumptions better than more formal explanations, such as courts' use of so-called "rational basis" review. This suggests the existence of a general, standing presumption that existing land use rights are vested as long as they are not contrary to fundamental law.

TABLE OF CONTENTS

1. INTRODUCTION	3
2. VESTED PRIVATE RIGHTS	7
2.1. What Vested Rights Are	7

* Professor of Law, St. Mary's University. For helpful comments I am grateful to Jessica Asbridge, Johnny Buckles, Eric Claeys, Courtney Cox, Bryan Cwik, Richard Epstein, Brian Angelo Lee, Adam Mossoff, Lateef Mtima, and Christopher Newman. For research assistance I am grateful to John Locke Adair, Soren Geiger, Leslie Godinez Parra, Patrick Featherston, and Jazmyn Rivera.

2.2. Authority for Vested Rights	13
2.3. Some Examples	15
2.3.1. Constitutional Bans on Retrospective Abrogation.....	15
2.3.2. Public Servitudes and Trusts	17
2.3.3. Private Rights that Remain Vested Across State Lines	18
2.3.4. Vested Liberty Estoppel.....	19
2.3.5. Vested Water Rights.....	21
2.3.6. Vested Nonconforming Uses.....	21
3. EXPLAINING PRESUMPTIONS WITH VESTED RIGHTS	24
3.1. Presumptions Require Explanation.....	24
3.2. Vested Rights Supply a Descriptive Explanation	25
3.3. Vested Rights Supply a Normative Explanation	32
4. VESTED RIGHTS IN CASES OF ALLEGED PRIVATE PROPERTY WRONGS	35
5. VESTED RIGHTS IN DUE PROCESS AND RATIONALITY CHALLENGES	38
5.1. Presumptions and Established Uses Matter.....	38
5.2. Many States Protect Vested Rights with a Presumption of Lawfulness	42
6. VESTED RIGHTS IN TAKINGS CASES.....	52
6.1. Different Showings in Different Cases	52
6.2. States that Have Weakened Vested Rights for Takings Claims.....	54
6.3. States that Presume Vested Uses are Compensable Property	55
7. USES THAT ARE NOT VESTED	58
7.1. No Vested Use, Burden on Land User	58
7.2. No Existing Use and No Reliance.....	60
7.3. Use Contrary to Law.....	61
7.4. Privilege, Not a Right	62
7.5. Not a Property Right at Common Law	64
8. CONCLUSION.....	64

1. INTRODUCTION

*Possession is nine-tenths of the law.*¹ *One who comes to an alleged nuisance has a heavy burden to prove liability.*² *The grant of a patent is prima facie evidence of a patentee's right.*³ Though no competent lawyer would confuse these pithy maxims (and others like them) for hard-and-fast rules of decision, they express something true about how legal and judicial reasoning operate. The truth is that in legal disputes, one person usually begins with an advantage over the other. This is because, when reasoning about legal disputes, lawyers and judges begin with presumptions. At the outset, one party is presumed to be right, innocent, at liberty, or immune from liability; the other party bears the burden of proving wrongdoing, guilt, a breach of duty, or entitlement to a remedy.

The advantage of enjoying a presumption matters. A party who bears the burden of proof or persuasion and who cannot meet that burden will lose. So, presumptions are important. But not all presumptions are well understood as legal doctrines. Some, such as the presumption of innocence in criminal proceedings, get a lot of attention.⁴ They are understood to be connected to fundamental due process guarantees and other basic principles of justice.⁵ Others, such as the presumption that a person in possession of a chattel is lawfully in possession, are less often studied, and their connection to fundamental legal doctrines is not as well understood.

¹ Day v. Case Credit Corp., No. 01CV00304-WRW, 2007 WL 604636, at *4 (E.D. Ark. Feb. 22, 2007); Somo v. Superior Ct., 27 P.2d 790, 790 (Cal. Dist. Ct. App. 1933); cf. EMER DE VATEL, THE LAW OF NATIONS 457 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) (“The possessor may . . . remain in possession till proof be adduced to convince him that his possession is unjust.”).

² Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass’n, 337 N.W.2d 427, 432 (N.D. 1983).

³ Cantrell v. Wallick, 117 U.S. 689, 695 (1886).

⁴ The scholarly literature on this topic is vast. Some of the more important or enlightening works include Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 12 (1964); GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 42 (2d ed. 1983); Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 106 (2003).

⁵ See Packer, *supra* note 4, at 12–14, 17; Pennington, *supra* note 4, at 115; David S. Sytsma, *Matthew Hale as Theologian and Natural Law Theorist*, in GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY 163, 178 (Mark Hill QC & R. H. Helmholz eds., 2017).

This article explains a number of presumptions governing property, especially land use, by reference to the concept of vested private rights. The term “vested right” is familiar to land use lawyers and to constitutional scholars, for whom it refers to particular doctrines with clearly defined elements and implications.⁶ But vested permits to develop land and the vesting of constitutional offices are just two examples of a broader jurisprudential phenomenon. In a variety of contexts, and under many different constitutional, legal, and equitable doctrines, rights can become vested in the broad sense that they are immunized to some degree against subsequent legal change or abrogation.

The concept of vested rights has played a formative role in American jurisprudence from the beginning.⁷ It is alive and well in American law, contrary to reports that the legal doctrines employing vested rights were “brutally murdered” by an earlier generation of legal scholars.⁸ But much of its work is subtle and easy to miss. Scholars now are paying renewed attention to the role that vested rights play in constitutional law and the law of public

⁶ See J. Spencer Hall, *State Vested Rights Statutes: Developing Certainty and Equity and Protecting the Public Interest*, 40 URB. LAW. 451, 452–53, 455 (2008) (discussing vested rights in the land use context); Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1045–46 (2000) (same); E.A. Prichard & Gregory A. Riegler, *Searching for Certainty: Virginia’s Evolutionary Approach to Vested Rights*, 7 GEO. MASON L. REV. 983, 998–1000 (1999) (same); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1481–83 (2022) (discussing vesting of executive power in the constitutional context).

⁷ See THE FEDERALIST NO. 44, at 304–05 (James Madison) (Jacob E. Cooke ed., 1961); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (2d ed. 1832); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 272–74 (Melville M. Bigelow ed., Little, Brown & Co. 5th ed. 1891) (1833); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357–413 (1868); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255 (1914).

⁸ Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1087–88 (1956). The scholars who were reputed to have discredited the doctrine were Legal Realists. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935); Robert L. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523, 527, 529 (1927); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 233 (1927); Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 306 (1925); see also Lawrence K. Griffith, *Conflict of Laws—The Supreme Court Deals Death Blow to “Vested Rights” Doctrine*, 57 TUL. L. REV. 178, 180 n.14 (1982).

rights.⁹ The role that vested rights play in structuring private law and adjudication of private rights is at least equally as significant but has not received as much scholarly attention.¹⁰

The prevalence of vested private rights across wide swathes of the law supplies an explanation for what Judge Wilkinson has called the “presumption of civil innocence.”¹¹ Analogous to the presumption of innocence in criminal cases, the presumption in civil cases places the burdens of proof and persuasion on a person who alleges unlawful conduct, for example, that a property use is contrary to law. A person may enjoy the presumption that his use of property is lawful when he has a right to make the use prior to a legal challenge or change in the law, and his right is vested in the sense that it cannot be terminated until someone proves that the use is unlawful. The vested right enables the right holder to continue the authorized conduct, and thus functions as a liberty. By giving rise to a presumption of civil innocence,

⁹ Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. PA. L. REV. 617, 701–03 (2023); Shugerman, *supra* note 6, at 1534; Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 317–26 (2022); Joseph Landau, *Rescinding Rights*, 106 MINN. L. REV. 1681, 1696–97 (2022); Dan Friedman, *Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly from Enacting Retroactive Civil Laws?*, 82 MD. L. REV. 55, 95–96 (2022); Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1433–34 (2021); Note, *Beyond “No Law to Apply”:* *Uniting the Current Court in the Context of APA Reviewability*, 134 HARV. L. REV. 1206, 1220–21 (2021); Adam J. MacLeod, *Public Rights After Oil States Energy*, 95 NOTRE DAME L. REV. 1281, 1308–09, 1326–36 (2020); Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2597–98, 2607–08 (2019); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1699–1703 (2012); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1023–29 (2006); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1442 (1999); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907, 907–08 (1993).

¹⁰ See Karen Halverson Cross, *Faculty Handbook as Contract*, 45 CARDOZO L. REV. 789, 839–41 (2024); Adam J. MacLeod, *Vested Patents and Equal Justice*, 72 CATH. U. L. REV. 359, 396 (2023); Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891, 946–47 (2022); Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL’Y 253, 290 (2017) [hereinafter MacLeod, *Brutal Murder*]; Christopher M. Newman, *Vested Use-Privileges in Property and Copyright*, 30 HARV. J.L. & TECH. 75, 81, 87 (2017).

¹¹ J. Harvie Wilkinson III, *The Presumption of Civil Innocence*, 104 VA. L. REV. 589, 590 (2018).

it also functions as an immunity. The right is immunized against abrogation or against the imposition of a remedy for its exercise. The immunity may be defeasible, but someone other than the right holder bears the burden of proving that it should be defeated.

When applied in property law, the presumption means that an established property use that has never been judged wrongful is presumed lawful and cannot be taken away, either without good reason or until proven unlawful. We can call this the presumption of lawful use. The vestedness of the right, and the corresponding presumption in the right-holder's favor, may be strong, even conclusive, as where a vested nonconforming use is entirely immune from subsequent changes in zoning ordinances. Or it may be weak, as where it can be overcome by evidence of a landowner's unlawful conduct or a rational basis for a change in the zoning classification.

Vested rights shape adjudication in private law and at the intersection of public law and private law. Vested uses often determine the initial presumption where courts are called upon to review conflicts between land users and those challenging a land use as unlawful. This presumption often pertains both in private actions, such as nuisance, and in actions involving constitutional challenges to generally applicable statutes and ordinances, such as due process validity challenges and inverse condemnation actions seeking just compensation for property takings. In such cases, the doctrine of vested rights often determines who enjoys the initial presumption in a case and who bears the burden of proving that the other party's action is contrary to law.

This is subtle work. Vested rights play a more dramatic role in rulings that certain rights are vested in the strong constitutional sense, and cannot be taken away, such as those discussed in Sections 2.1 and 2.3.1 below. The role of vested rights in establishing presumptions is less easily noticed. But that role is arguably more important because it is more commonplace. The strongest vested rights, which are fully immunized against any abrogation or alteration, are few. Vested rights play a much more expansive role in adjudication by placing upon one party the burdens of proof and persuasion. In property, as in other areas of the law, uses that establish presumptions do not attract as much attention as rights that are vested in the strong, constitutional sense of being entirely immunized against retrospective

abrogation.¹² But they are quite common and more important for the routine practice of law.

After this introductory Part 1, Part 2 explains what a vested right is and how some rights are more strongly vested than others. Part 3 employs the concept of vested rights to explain presumptions in property disputes generally. Those presumptions require both a descriptive explanation—what is actually going on when a court places the burden on one party rather than the other—and a normative explanation—why courts are justified in assigning burdens of proof and persuasion as they do. The doctrine of vested rights supplies both explanations. Part 4 examines how vested use rights establish presumptions in private-party disputes such as trespass and nuisance cases. Part 5 does the same for rationality and due process challenges to enactments and official acts that affect land use, and Part 6 does the same for takings claims. The role of vested private rights in determining presumptions in these cases is apparent when one examines what courts *do* in their reasoning more closely than the formal recitations that they often include in their opinions, such as the phrase “rational basis,” to express a deferential posture toward local and state legislatures. A corollary of the vested rights doctrine is that a property owner or lawful user has been deprived of no property if its asserted use is not a vested right. As Part 7 explains, the landowner bears the burden in such cases. Part 8 briefly concludes.

2. VESTED PRIVATE RIGHTS

2.1. What Vested Rights Are

A vested right is a right that cannot be taken away. In its strongest form, a vested right cannot be divested at all. It is fully vested. In weaker forms, vested rights cannot be taken away until some obstacle is overcome by the person who would divest them. The obstacle might be the payment of just compensation for expropriation by eminent domain, an offer of proof

¹² This article follows the convention in American jurisprudence of referring to a law as “retrospective” if it abrogates a preexisting private right and as “retroactive” if it authorizes the imposition of some criminal punishment on a person after the person has already committed the sanctioned act. See Corwin, *supra* note 7, at 249; 2 STORY, *supra* note 7, at 272–73.

that a right holder's conduct is unlawful, or a showing that the right has been abandoned.

Put more precisely in analytical terms, a vested right is any right that is coupled with an immunity against abrogation, alteration, and expropriation. The immunity corresponds with someone's lack of legal power to abrogate or take the right. If Person A has an immunized right, then all persons who are not Person A (i.e., Person B, Person C, etc.) have legal disabilities to divest Person A of the right. No one has the legal ability to deprive A of his right.

Strong vested rights—central instances of vested rights—are immunized against everyone, so that no one, not even a sovereign legislature, has the legal competence to divest the right holder of the right.¹³ And they are immunized completely, so that not even the payment of just compensation nor a change in the law can justify their extinguishment. Such rights are vested in the sense that they cannot be abrogated retrospectively, even by subsequent changes in the law. Once the rights vest, they stick around. Such rights are few, though they are famous for the dramatic role they play in certain constitutional cases, especially in American constitutional law.

Rights can also be vested in a weaker, but important and more ubiquitous, sense. They can establish defeasible presumptions of lawfulness. This kind of weak vested right is far more pervasive, though less well noticed, in legal reasoning. In a variety of contexts, and under many different constitutional, legal, and equitable doctrines, private rights can become vested in the sense that they impose some burden on, or obstacle to, those who would have them abolished or altered.

The term “vested right” is at work in several legal, equitable, and statutory doctrines that are familiar to land use scholars and lawyers. But the general concept of a vested private right and the principle that ties all the various doctrines together are much less familiar. This is partly because of the neglect that legal scholars have shown to vested private rights over the last century. And it is partly because most vested rights hide in plain sight.

¹³ See, e.g., *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913) (holding that the City lacked authority to abrogate statutory right of recovery for injuries it caused to landowners by amending the statute retrospectively after the landowners' cause of action accrued as “[t]his was to deprive the plaintiffs in error of a right which had vested before the repealing act”).

The strongest vested rights—those so strong that they cannot be destroyed or appropriated, even by legislation—can be seen in venerable, long-established constitutional doctrines. They include many fundamental rights that are said to be “natural” or secured by the law of “nature and reason.”¹⁴ Chief among these is the freedom that a former slave obtains after escaping to free soil.¹⁵ Before the abolition of slavery by the Thirteenth Amendment, a slave who escaped to a free nation or state, such as England or Ohio, could not thereafter be restored to slavery under the doctrine of the common law.¹⁶ This was the doctrine that Justice McLean invoked in his dissent in *Dred Scott v. Sandford*,¹⁷ which was ultimately vindicated by ratification of the Thirteenth Amendment.¹⁸

In an influential case decided while he was riding circuit, *Society for the Propagation of the Gospel v. Wheeler*, Justice Joseph Story showed how strong vested private rights can work in more commonplace legal practice. The New Hampshire Constitution forbids any legislature to abrogate a vested private right retrospectively or to convey it from one party to another.¹⁹ In obedience to that provision, Story struck down a New Hampshire statute as applied to landowners whose property the statute would have appropriated.²⁰ The demandants, agents of a British corporation, were the original owners of land in New Hampshire who were dispossessed during the Revolutionary War.²¹ After the war, they demanded seisin of the land from New Hampshire citizens then occupying it.²² A jury found that they were entitled to seisin of the land.²³ But the occupants argued that they were entitled to the value of improvements they had placed on the land during their

¹⁴ Corwin, *supra* note 7, at 248; 1 WILLIAM BLACKSTONE, COMMENTARIES *123.

¹⁵ See 1 BLACKSTONE, *supra* note 14, at *123–27; JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION 37–73 (2012) (tracing the natural-law foundations of claims to freedom based on residence in free jurisdictions).

¹⁶ *Somerset v. Stewart* (1772) 98 Eng. Rep. 499, 504; Lofft 1, 8–9 (KB); *Forbes v. Cochrane* (1824) 107 Eng. Rep. 450, 454; 2 B. & C. 448, 456–57 (KB).

¹⁷ 60 U.S. (19 How.) 393, 534–35 (1857) (enslaved party) (McLean, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

¹⁸ U.S. CONST. amend. XIII, § 1.

¹⁹ N.H. CONST. pt. 1, art. 23.

²⁰ *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 769 (C.C.D.N.H. 1814) (No. 13,156).

²¹ *Id.* at 763.

²² *Id.* at 757.

²³ *Id.*

occupancy, citing a statute enacted in 1805 that would require the true owners to pay to the defendants the increase in the land's value resulting from the improvements.²⁴

Story concluded that the statute was unconstitutional.²⁵ The improvements that the defendants made during their occupancy had become fixtures to the land and thus belonged to the demandants.²⁶ The statute would be constitutional if given “a prospective operation, so as to apply to improvements made after the statute.”²⁷ But it would divest the true owners of their vested rights in fixtures annexed before the statute's enactment, and this retrospective application of the statute was unconstitutional.²⁸

Story interpreted New Hampshire's constitutional prohibition against retrospective laws more broadly than prohibitions against *ex post facto* laws and impairments of contracts. He understood it to prohibit “all statutes, which, though operating only from their passage, affect vested rights and past transactions.”²⁹ This includes “every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.”³⁰ Though he was reticent to question the constitutionality of a duly-enacted statute, he was compelled to hold that the statute would extinguish the vested rights in the improvements because it “confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land.”³¹

Vested rights do not always favor private landowners and land users. Public rights can vest in the public, just as private rights can vest in persons. No private person can have a vested private right in something in which the public holds a right in common.³² Some vested rights authorize governments

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 769.

²⁷ *Id.*

²⁸ *See id.*

²⁹ *Id.* at 767.

³⁰ *Id.*

³¹ *Id.* at 768 (cleaned up).

³² *Kennestone Hosp., Inc. v. Emory Univ.*, 897 S.E.2d 772, 779 (Ga. 2024); *see also, e.g., State v. N. Star Concrete Co.*, 122 N.W.2d 118, 122 (Minn. 1963) (holding that the

to act or refrain from acting in a way that causes injury to a particular property estate. And the public right may not be abrogated retrospectively. So in an Illinois case, a landowner filed a takings claim against a township after the township's stormwater system overflowed in heavy rains, causing a flood on the claimant's land.³³ Under long-settled, fundamental law, a local government has no duty to provide any particular public services to any particular resident, and on that ground the trial court granted motions to dismiss in favor of the defendant government agencies.³⁴ Before final judgment was entered, the Illinois Supreme Court abolished the so-called public duty rule and held in a separate case that public officials may be held liable for willful failure to serve the public.³⁵ But in the takings case, the same court refused to apply the "unexpected abolishment of the long-standing public duty rule" retrospectively to impose on the public officials who created the stormwater system a public duty that they did not have at the time they acted—that is, to deprive them of their common-law liberty.³⁶

The idea that vested rights cannot be taken away by anyone, not even by a sovereign legislature, is deeply rooted in the constitutional doctrines that dominated American jurisprudence for the first century and a half.³⁷ Such strongly vested rights are few. But they are conceptually important because it is by reference to strongly vested rights, such as those which Story vindicated in *Wheeler*, that we can recognize weaker vested rights as partly vested.³⁸ So, for example, a constitutional requirement that dormant mineral right holders be given notice before their rights are deemed abandoned by operation of law,³⁹ a requirement that a government must pay compensation

state acquired vested right in bed of artificially relocated river, in trust for the people of the state, as the river was subject to navigable servitude).

³³ *Tzakis v. Maine Twp.*, 181 N.E.3d 812, 814, 816 (Ill. 2020).

³⁴ *Id.* at 816.

³⁵ *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 755 (Ill. 2016).

³⁶ *Tzakis*, 181 N.E.3d at 819–20.

³⁷ THE FEDERALIST NO. 44, *supra* note 7, at 301 (James Madison); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798) (explaining why legislatures, though sovereign, are not competent to “violate the right of an antecedent lawful private contract; or the right of private property”); *Corwin*, *supra* note 7, at 255.

³⁸ *MacLeod*, *Brutal Murder*, *supra* note 10, at 295–307.

³⁹ *Wilson v. Bishop*, 412 N.E.2d 522, 524–26 (Ill. 1980); *Wheelock v. Heath*, 272 N.W.2d 768, 773–74 (Neb. 1978).

for property that it takes by eminent domain,⁴⁰ and a constitutional guarantee that common-law rights must be adjudicated by a jury,⁴¹ all secure vested private rights to some extent. Those legal and constitutional doctrines do not entirely prohibit the destruction or abrogation of private rights, but they interpose some obstacle that must be cleared—impose some duty that must be satisfied—before the holder of the right can be deprived of it. This makes property rights of the same character as the fully vested rights that the New Hampshire constitution secures, but in a lesser degree.

All vested rights are important and interesting. Even weakly vested rights, which are not fully vested in that strong sense of being fully immunized against retrospective abrogation, protect the liberty and presumed innocence of persons. One way that weak vested rights perform this work is by determining presumptions. This work is less dramatic than full immunization of a person's liberty but is no less important and is much more common. Indeed, vested rights determine presumptions throughout the law and in a variety of contexts.

Presumptive rights to use property are important, as will be shown below, though they are weaker than fully immunized rights. A presumption may be relatively strong, irrebuttable even, or relatively weak, according to the strength of the right it secures. Like other presumptions, a presumption in favor of a vested use may determine the outcome of a case or at least create a fact question for a jury.⁴² Or it may simply preserve the status quo until some judgment enters against the first user. In all cases, they perform some work by placing upon the party challenging the right's lawful status some burden to make the case. A presumptive right may be defeasible, but until defeased it controls judgment.

⁴⁰ See, e.g., *Sinnickson v. Johnson*, 17 N.J.L. 129, 143–45 (1839); *People v. Platt*, 17 Johns. 195, 215 (N.Y. Sup. Ct. 1819); *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816).

⁴¹ See, e.g., *Ex parte Moore*, 880 So. 2d 1131, 1134–35 (Ala. 2003); *People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 843 (Cal. 1951); *Wisden v. Superior Court*, 21 Cal. Rptr. 3d 523, 526–27 (Ct. App. 2004).

⁴² *Golenternek v. Kurth*, 212 S.W.2d 14, 17 (Ark. 1948).

2.2. Authority for Vested Rights

In the hierarchy of legal authority, the authority of a vested right transcends the authority of the court and of the public officials who would abrogate it. Thus, the authority for a vested right precedes a judicial decision declaring the right to be vested. Vested rights determine adjudication; they are not products of adjudication. Joseph Story expressed the gist of the idea when he influentially insisted that “no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property.”⁴³ The authority for the vesting may be a state constitution.⁴⁴ Or it may be some unwritten source of law, such as the common law or natural law, which precedes the state’s existence.⁴⁵ What matters is that the authority is superior or prior to the power of the person who would terminate or abrogate the right, or who seeks a remedy or sanction for its exercise, or is beyond the legal competence of that person to abrogate or alter.

It follows that adjudication of a vested use right does not cause the right to become vested. Rather, a court declares that the right has vested by some prior act or authorization. So, for example, the Colorado Supreme Court has held “that water rights vest upon appropriation, not upon adjudication.”⁴⁶ Thus, “the right, which has already vested due to appropriation, becomes legally enforceable upon the filing of an application for adjudication.”⁴⁷ Employing classic natural rights logic,⁴⁸ the court explained that the right to use water vests as a property right “by virtue of acts in putting the water to a beneficial use . . . combined with an intent to appropriate.”⁴⁹ Adjudication does nothing to cause or alter the vesting of the right “but rather establishes a priority date that can be enforced against other users.”⁵⁰

⁴³ 2 STORY, *supra* note 7, at 273.

⁴⁴ See *infra* Section 2.3.1.

⁴⁵ See *Bell v. Town of Wells*, 557 A.2d 168, 171–73 (Me. 1989) (vested littoral rights of oceanfront lot owners); *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 458–59 (Mich. 2020) (vested right of landowner to collect surplus proceeds from tax foreclosure sale).

⁴⁶ *Shirola v. Turkey Cañon Ranch, L.L.C.* (*In re* Application for Water Rts. of Turkey Cañon Ranch L.L.C.), 937 P.2d 739, 744 (Colo. 1997).

⁴⁷ *Id.*

⁴⁸ See ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS 3 (2025).

⁴⁹ *Turkey Cañon Ranch*, 937 P.2d at 748 (citations omitted).

⁵⁰ *Id.* at 744.

Most commonly, rights are vested because they are secured by a higher source of *legal* power against changes by lower legal powers. Because constitutions create the powers of legislators, judges, and executive officials, they are superior to the powers of those officials to take or alter legal rights. Constitutional rights are immunized against destruction, abrogation, and expropriation because constitutions are sources of political power to change the law, and constitutions define the limits on that power. Where vested rights are constitutional rights, as in states whose constitutions prohibit retrospective abrogation of vested private rights, they enjoy this transcendent constitutional status.⁵¹

The chronological precedence of a vested right and its constitutional status often reinforce each other. That a right is declared in a constitution shows that it preexists the constitution, and the priority of the doctrine securing a right is viewed as evidence of its constitutional status. For example, Michigan's high court reasoned that a common-law right that "originated as far back as Magna Carta" is "'vested' such that the right is to remain free from unlawful governmental interference," and the takings clause in Michigan's constitution declares the same doctrine as that declared in the Magna Carta.⁵²

By the same logic, state statutes may prohibit local governments from taking some vested rights because a state's sovereignty is superior to that of a local government. Local governments derive their power to enact and change the law from states. They are thus bound by whatever limits states place upon their power. For example, many statutes codify protections for vested land uses and immunize them against abrogation as so-called "non-conforming uses."⁵³ The "rule concerning the continuance of a nonconforming use protects the 'right' of a user to continue the same use of the property as it existed before the date of the adoption [or challenged amendment] of the zoning regulations."⁵⁴

⁵¹ See *infra* Section 2.3.1.

⁵² See *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 459 (Mich. 2020) (cleaned up).

⁵³ See, e.g., CONN. GEN. STAT. § 8-2(d)(4) (2023); KY. REV. STAT. ANN. § 100.253 (West 2015); MINN. STAT. § 462.357(1e) (2025).

⁵⁴ *Helbig v. Zoning Comm'n*, 440 A.2d 940, 946 (Conn. 1981) (citing *Beckhish v. Planning & Zoning Comm'n*, 291 A.2d 208 (Conn. 1971); *Abbadessa v. Board of Zoning Appeals*, 54 A.2d 675 (Conn. 1947)).

2.3. Some Examples

2.3.1. Constitutional Bans on Retrospective Abrogation

A strong, central case of a vested right is a preexisting private right in a state whose constitution prohibits retrospective laws.⁵⁵ Courts in such states go to some lengths to avoid retrospective applications of laws that would affect vested private rights, interpreting new regulations to be prospective only in all cases where the statute or ordinance admits such an interpretation.⁵⁶ By insisting that new laws can only be applied prospectively, courts avoid conflicts between duly enacted laws and vested rights that were established before a change in the law.⁵⁷ Courts find the same protection for vested use rights at work in the interpretive maxim that laws should not be read to produce unreasonable or unjust results,⁵⁸ and in the canon that positive laws which derogate common-law rights are construed strictly.⁵⁹ And some states have gone so far as to declare retrospective abrogation of vested property rights per se unreasonable and unconstitutional.⁶⁰

Georgia's constitution prohibits "retroactive" laws and "laws impairing the obligation of contract[s]." ⁶¹ Georgia's high court interprets this provision to forbid "passage of retroactive laws which injuriously affect the vested rights of citizens."⁶² This imposes an interpretive duty on Georgia courts to avoid retrospective application of any law. Where a statute would divest a private right holder as applied, the state constitution "requires that that amendment be applied prospectively rather than retroactively."⁶³

⁵⁵ See, e.g., MO. CONST. art I, §13; TENN. CONST. art. I, § 20.

⁵⁶ See, e.g., *Bd. of Trs. of the Internal Improvement Tr. Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973).

⁵⁷ See *Muskin v. State Dep't. of Assessments & Tax'n*, 30 A.3d 962, 970 (Md. App. Ct. 2011).

⁵⁸ *Snake River Brewing Co. v. Town of Jackson*, 39 P.3d 397, 408 (Wyo. 2002).

⁵⁹ *Id.* at 404.

⁶⁰ *Ailes v. Decatur Cnty. Area Plan. Comm'n*, 448 N.E.2d 1057, 1060 (Ind. 1983), *overruled by* *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1032 (Ind. 1998).

⁶¹ GA. CONST. art. I, § 1, para. X.

⁶² *Recycle & Recover, Inc. v. Ga. Bd. of Nat. Res.*, 466 S.E.2d 197, 199 (Ga. 1996) (citing *Fortson v. Weeks*, 208 S.E.2d 68 (Ga. 1974); *Bullard v. Holman*, 193 S.E. 586 (1937)).

⁶³ *Id.*

Florida courts have ruled that statutes which place a limitations period on the defeasibility of defeasible fees or on easements may be applied prospectively to property rights created after the date of enactment, but not retrospectively to those created before enactment.⁶⁴ Interpreting the constitutional term “contracts” broadly to encompass vested property rights created by deeds as well as contract rights, the Florida courts reason that to divest a preexisting possibility of reverter or right of entry would violate Florida’s constitutional prohibition against impairing the obligation of contracts.⁶⁵ As applied to vested future interest holders, the statute “is unconstitutional and void.”⁶⁶ But the statute operates on its terms to limit the defeasibility of fees created after the statute’s date of enactment.⁶⁷

Colorado’s constitution also prohibits retrospective laws, in addition to ex post facto laws and impairments of contracts.⁶⁸ Every law is retrospective within the meaning of that prohibition “which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.”⁶⁹ The Colorado legislature has given specific form to the constitutional guarantee by, among other things, declaring that “a local government shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.”⁷⁰ The legislature enacted this statute “to protect inalienable property rights recognized by the Colorado Constitution,” including the anti-retrospectivity clause.⁷¹

⁶⁴ *Biltmore Vill., Inc. v. Royal*, 71 So. 2d 727, 729 (Fla. 1954); *Trs. of Tufts Coll. v. Triple R. Ranch, Inc.*, 275 So. 2d 521, 528 (Fla. 1973); *J. C. Vereen & Sons, Inc. v. City of Miami*, 397 So. 2d 979, 983 (Fla. Dist. Ct. App. 1981).

⁶⁵ *Royal*, 71 So. 2d at 728.

⁶⁶ *Id.* at 729.

⁶⁷ *Vereen & Sons*, 397 So. 2d at 983–84.

⁶⁸ COLO. CONST. art. II, § 11.

⁶⁹ *Denv., S. Park & Pac. Ry. Co. v. Woodward*, 4 Colo. 162, 167 (1878) (citing *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. Sup. Ct. 1811); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

⁷⁰ COLO. REV. STAT. § 38-1-101(3)(a) (2024).

⁷¹ *JAM Rest., Inc. v. City of Longmont*, 140 P.3d 192, 196 (Colo. App. 2006).

2.3.2. Public Servitudes and Trusts

Another classic example of a vested right is the public's right in land held as a public servitude or in public trust.⁷² The vesting of public rights in navigable waterways has been the fundamental doctrine of American law from the beginning, famously expressed in the Northwest Ordinance the same year that the framers drafted the U.S. Constitution.⁷³ Nor was the doctrine original to the Confederation Congress. The idea that navigable waters are inherently commons resources is centuries old in Western law.⁷⁴ Even rights in resources that are not inherently public, or public as a matter of natural right or immemorial custom, can become vested in the public. When the government holds proprietary rights on behalf of the people in trust or confers rights of common use on the people by statute, it creates for itself obligations to honor its promises.⁷⁵

As the U.S. Supreme Court held in *Illinois Central Railroad Co. v. Illinois*, even a sovereign state legislature is incompetent to deprive the public of its ownership rights in navigable water by conveying public property into private hands.⁷⁶ The people's title precedes the authority of the state legislature. It is rooted in the general common-law doctrines of navigable servitudes and public trust;⁷⁷ or in immemorial usage of the state or locality;⁷⁸ or in actual usage of the body of water itself.⁷⁹ The constitutional power of the legislature is limited by those sources of authority for the public right, which the legislature's power presupposes. This entails that, where a state owns a resource in public trust, and the public's ownership is vested, the state has

⁷² See, e.g., *State by Lord v. N. Star Concrete Co.*, 122 N.W.2d 118, 122 (Minn. 1963).

⁷³ An Ordinance for the Government of the Territory of the United States North-West of the River Ohio art. 4 (July 13, 1787).

⁷⁴ See 1 THE DIGEST OF JUSTINIAN 39–40 (Charles Henry Monro trans., Cambridge Univ. Press 1909) (533); MATTHEW HALE, A TREATISE RELATIVE TO THE MARITIME LAW OF ENGLAND 8 (1787); Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 4 (2018).

⁷⁵ *Kennestone Hosp., Inc. v. Emory Univ.*, 897 S.E.2d 772, 780 (Ga. 2024).

⁷⁶ 146 U.S. 387, 452 (1892).

⁷⁷ *Id.* at 436–37, 458; *Morgan v. King*, 35 N.Y. 454, 457–58 (1866).

⁷⁸ *Ryals v. Pigott*, 580 So. 2d 1140, 1145–52 (Miss. 1990).

⁷⁹ *State v. Twiford*, 48 S.E. 586, 588 (N.C. 1904); *Smart v. Aroostook Lumber Co.*, 68 A. 527, 531–32 (Me. 1907).

no competence to create or convey away vested private property rights in the resource.⁸⁰ Conversely, if a waterway is not navigable and is privately owned, the private owner's rights are vested and the state may not divest them without exercising the eminent domain power and paying compensation.⁸¹

2.3.3. Private Rights that Remain Vested Across State Lines

The example best known to lawyers in private interstate and international law practice is the private right that continues to be governed by the law of the state where it vested even after its holder travels to another state.⁸² This is the general doctrine of the First Restatement of Conflict of Laws, which provides, among other things, "The nature and characteristics of an interest created by a conveyance of an interest in a chattel is determined by the law of the place where the chattel is at the time of the conveyance."⁸³ Though largely abandoned in private international law governing torts,⁸⁴ the doctrine of vested private rights remains the law in several states for questions concerning property. So it is settled law in some states "that title to a chattel passes according to the law of the place where the chattel was located at the time of the transaction by which it is claimed the title was passed."⁸⁵ Similarly, a married couple who hold property in a community-property state continue to hold community property rights after moving to a common-law state, and vice versa.⁸⁶

⁸⁰ *In re Surface Water Use Permit Applications*, 550 P.3d 1167, 1216 n.60 (Haw. 2024); *Ryals*, 580 So. 2d at 1149.

⁸¹ *Morgan*, 35 N.Y. at 457; *Ryals*, 580 So. 2d at 1149.

⁸² *See Youssouppoff v. Widener*, 158 N.E. 64, 69 (N.Y. 1927).

⁸³ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 258 (A.L.I. 1934).

⁸⁴ R. D. Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT'L & COMPAR. L.Q. 268, 268 (1959).

⁸⁵ *Ravn v. McCalley*, 228 S.W.2d 61, 63 (Ark. 1950); *accord* *Universal C.I.T. Credit Corp. v. Hulett*, 151 So. 2d 705, 709 (La. Ct. App. 1963); *Budget Plan, Inc. v. Savoy*, 145 N.E.2d 710, 712 (Mass. 1957). *But see* *Luce v. Fleck*, 75 N.Y.S.3d 822, 828 (N.Y. Sup. Ct. 2018) (abandoning vested rights in favor of "most significant relationship test").

⁸⁶ *People ex rel. Dunbar v. Bejarano*, 358 P.2d 866, 868–69 (Colo. 1961); *Schneider v. Toledo Tr. Co. (In re Estate of Kessler)*, 203 N.E.2d 221, 222–23 (Ohio 1964). *But see* *In re Marriage of Whelchel*, 476 N.W.2d 104, 109 (Iowa Ct. App. 1991) (abandoning the vested rights doctrine and adopting the Second Restatement's "most significant relationship" balancing test).

2.3.4. Vested Liberty Estoppel

The example that may be most familiar to land use lawyers is the development right vested in a landowner or developer to vindicate some detrimental reliance.⁸⁷ In many cases, it is called a “vested rights” doctrine, though it is really a type of equitable estoppel.⁸⁸ Under this doctrine, property rights are not vested in the true sense of being immune from retrospective abrogation; they are vested because equity requires that they vest.⁸⁹ In cases where the doctrine applies, a vesting of a proposed land use is not the reason for ruling in the property owner’s favor; it is the result of the ruling. Put more precisely, it is not the right itself that does the work of protecting a land user’s expectations.⁹⁰ Rather, it is the land user’s own conduct and the inequity of changing the rules after the land user has begun to act in reliance upon them.⁹¹

The term “vested right” is often used when a local government issues a permit for a land use, or makes some other affirmative act favoring a proposed or existing use, and the landowner or developer acts in detrimental reliance upon the permit or other official action.⁹² Then the permit is said to be vested and thereafter cannot be abrogated without some “good cause” or “public necessity.”⁹³ The permit is not vested in the fullest, strongest sense

⁸⁷ *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 572–73 (Fla. Dist. Ct. App. 1975); *Dingeman Advert., Inc. v. Algoma Twp.*, 223 N.W.2d 689, 691–92 (Mich. 1974); *El Dorado at Santa Fe, Inc. v. Bd. of Cnty. Comm’rs*, 551 P.2d 1360, 1366 (N.M. 1976); *Town of Midland v. Wayne*, 773 S.E.2d 301, 307–08 (N.C. 2015); *City Ice Delivery Co. v. Zoning Bd. of Adjustment*, 203 S.E.2d 381, 382 (S.C. 1974); *H.R.D.E., Inc. v. Zoning Officer of Romney*, 430 S.E.2d 341, 345 (W. Va. 1993).

⁸⁸ David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 63–66 (1971); Hall, *supra* note 6, at 453–55; *Snake River Brewing Co., Inc. v. Town of Jackson*, 39 P.3d 397, 407–08 (Wyo. 2002).

⁸⁹ *Vanvoorhis v. Shrewsbury Twp.*, 176 A.3d 429, 436–37 (Pa. Cmmw. Ct. 2017).

⁹⁰ *See Monroe Cnty. v. Ambrose*, 866 So. 2d 707, 710 (Fla. Dist. Ct. App. 2003) (holding that despite “plain language” immunizing a recorded plat plan after it is recorded from subsequent legal changes, “[r]ecordation alone is not sufficient to establish vested rights”; some detrimental reliance on the preexisting law is required).

⁹¹ Heeter, *supra* note 88, at 88.

⁹² *Boise City v. Blaser*, 572 P.2d 892, 893–94 (Idaho 1977); *Vanvoorhis*, 176 A.3d at 436–37; *Pure Oil Div. v. City of Columbia*, 173 S.E.2d 140, 143 (S.C. 1970).

⁹³ *Town of Paradise Valley v. Gulf Leisure Corp.*, 557 P.2d 532, 540 (Ariz. Ct. App. 1976); *Pure Oil Div.*, 173 S.E.2d at 143.

of a lawful, existing property use under the New Hampshire Constitution or a public servitude in American constitutional doctrine. But the government that issued the permit is estopped from divesting the permit to some degree; it may divest the permit only for one of a limited number of compelling reasons.

The inquiry is limited to whether the landowner, user, or developer acted in good faith reliance upon existing laws before the laws changed.⁹⁴ Because it is some inequity, rather than a legal right, which performs the normative work, the issuance of a development, use, or building permit is not by itself sufficient to vest the intended use,⁹⁵ nor is it even always required.⁹⁶ The most important equitable consideration is that “the land owner has demonstrated reliance on the requirements currently in effect and has pursued compliance in good faith.”⁹⁷ The issuance of a permit is evidence to be considered,⁹⁸ but is “not dispositive of the question of vested rights.”⁹⁹

One practical implication of the equitable nature of estoppel is that a right that is “vested” in this sense is not alienable to subsequent owners of the same parcel.¹⁰⁰ It is instead personal to the owner who acted in detrimental reliance upon the law prior to the rezoning.¹⁰¹ Unlike a vested property right, it cannot be conveyed with the parcel to a new owner after a change in the zoning laws. By contrast, in New Hampshire, whose constitution expressly prohibits retrospective abrogation of vested private rights, a

⁹⁴ Hall, *supra* note 6, at 457–59; *Dingeman Advert., Inc. v. Algoma Twp.*, 223 N.W.2d 689, 691 (Mich. 1974).

⁹⁵ Heeter, *supra* note 88, at 67; *see, e.g., Shellburne, Inc. v. Roberts*, 224 A.2d 250, 254 (Del. 1966); *Dingeman Advert.*, 223 N.W.2d at 691.

⁹⁶ *Town of Largo v. Imperial Homes Corp.*, 309 So. 2d 571, 573 (Fla. Dist. Ct. App. 1975); *Pure Oil Div.*, 173 S.E.2d at 143; *Vill. L.L.C. v. Del. Agric. Lands Found. (In re 244.5 Acres of Land)*, 808 A.2d 753, 757 (Del. 2002); *Swan Beach Corolla, L.L.C. v. Cnty. of Currituck*, 760 S.E.2d 302, 309 (N.C. Ct. App. 2014); *Clackamas Cnty. v. Holmes*, 508 P.2d 190, 193–94 (Or. 1973).

⁹⁷ *In re 244.5 Acres of Land*, 808 A.2d at 757.

⁹⁸ *Id.* at 758.

⁹⁹ *Id.* at 757.

¹⁰⁰ *BBC Land & Dev., Inc. v. Butts Cnty.*, 640 S.E.2d 33, 35 (Ga. 2007); *Friends of Yamhill Cnty. v. Bd. of Cnty. Comm’rs*, 446 P.3d 548, 558–59 (Or. Ct. App. 2019).

¹⁰¹ *BBC Land & Dev.*, 640 S.E.2d at 35; *Friends of Yamhill Cnty.*, 446 P.3d at 558–59.

vested right to continue real estate development is a property right protected by law and is alienable to successors in interest.¹⁰²

2.3.5. Vested Water Rights

In states that adhere to riparian doctrine, riparian owners have use rights but not vested property in the water. But water rights can become vested property rights in states that adhere to the first appropriation doctrine.¹⁰³ A state may alter statutory privileges to use water. But “prestatutory ‘vested’ rights that existed under common law . . . may not be impaired by statutory law.”¹⁰⁴ Once the vestedness of a water right has been adjudicated, it takes priority over subsequent appropriations.¹⁰⁵ Lower-priority right holders are thereafter forbidden to divest higher-priority users of their water usage.

2.3.6. Vested Nonconforming Uses

An immunized nonconforming use is another, relatively strong vested right.¹⁰⁶ “Generally, a ‘nonconforming use’ may not be terminated by a new zoning enactment.”¹⁰⁷ The vested, nonconforming use is a “use of property that lawfully existed prior to the enactment of a zoning ordinance that continues after the ordinance’s effective date.”¹⁰⁸ State courts consider this a

¹⁰² Henry & Murphy, Inc. v. Town of Allenstown, 424 A.2d 1132, 1134 (N.H. 1980); Morgenstern v. Town of Rye, 794 A.2d 782, 787–88 (N.H. 2002).

¹⁰³ Shirola v. Turkey Cañon Ranch, L.L.C. (*In re* Application for Water Rts. of Turkey Cañon Ranch L.L.C.), 937 P.2d 739, 749 (Colo. 1997); Sullivan v. Lincoln Cnty. Water Dist., 542 P.3d 411, 419 (Nev. 2024).

¹⁰⁴ Sullivan, 542 P.3d at 419 (citing Andersen Fam. Assocs. v. Hugh Ricci, 179 P.3d 1201, 1204–05 (Nev. 2008)).

¹⁰⁵ Turkey Cañon Ranch, 937 P.2d at 749.

¹⁰⁶ See White v. City of Elk River, 840 N.W.2d 43, 49–50 (Minn. 2013) (“[A]lthough a ‘zoning ordinance “may constitutionally prohibit the creation of uses which are nonconforming,” existing nonconforming uses must be permitted to remain.” (quoting Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 726 (Minn. 2010))); Thompson v. Union Cnty., 874 S.E.2d 623, 633 (N.C. Ct. App. 2022); Rutherford v. Murray, No. E2003-01333-COA-R3-CV, 2004 WL 1870066, at *14–16 (Tenn. Ct. App. 2004).

¹⁰⁷ City of New Haven v. Flying J., Inc., 912 N.E.2d 420, 424 (Ind. Ct. App. 2009) (citing Metro. Dev. Comm’n v. Pinnacle Media, LLC, 836 N.E.2d 422, 425 (Ind. 2006)).

¹⁰⁸ *Id.* (quoting Metro. Dev. Comm’n, 836 N.E.2d at 425).

constitutional requirement.¹⁰⁹ And they generally consider statutory protections for nonconforming uses to be specifications of the general constitutional guarantees that no state will take property without due process and just compensation.¹¹⁰

Unlike uses that vest as a result of equitable estoppel, a vested nonconforming use is an alienable property right. Once vested, an immunized nonconforming use runs with the land to subsequent purchasers.¹¹¹ The right is, in this sense, *in rem* rather than personal.¹¹² It follows “that this right may not be terminated or destroyed by change of ownership of property alone.”¹¹³ This is one meaning of the right being vested. It cannot be divested by an act of conveyance.

The right is also vested against retrospective abrogation by changes in the law. For example, Colorado courts immunize vested, nonconforming uses against later regulatory changes in obedience to Colorado’s positive law and to satisfy the Colorado constitution’s express guarantee that vested private rights must not be abrogated retrospectively.¹¹⁴ This is true despite the strong, standing presumption that legislative enactments are valid and effective to alter legal rights. In Colorado, a zoning reclassification is generally entitled to “a presumption of validity and one assailing it, bears the burden of overcoming that presumption, and courts indulge every intendment in favor of its validity.”¹¹⁵ And to tip the scales in the local government’s favor and to preserve “[t]he entire purpose of zoning,” the challenging landowner must “establish such invalidity beyond a reasonable doubt.”¹¹⁶ Significantly, the Colorado Supreme Court announced that standard in a case in which the city had not challenged or threatened the continued validity of the

¹⁰⁹ *City of Waconia v. Dock*, 961 N.W.2d 220, 236 (Minn. 2021); *Barrett v. Hinds Cnty.*, 545 So. 2d 734, 738 (Miss. 1989); *Snake River Brewing Co., Inc. v. Town of Jackson*, 39 P.3d 397, 403 (Wyo. 2002).

¹¹⁰ *Flying J.*, 912 N.E.2d at 424; *Petruzzi v. Zoning Bd. of Appeals*, 408 A.2d 243, 246 (Conn. 1979); *Silver v. Zoning Bd. of Adjustment*, 255 A.2d 506, 507 (Pa. 1969); *Snake River Brewing Co.*, 39 P.3d at 403 n.2, 407.

¹¹¹ *In re Indianhead, Inc.*, 198 A.2d 522, 525 (Pa. 1964).

¹¹² *Heroman v. McDonald*, 885 So. 2d 67, 70–71 (Miss. 2004).

¹¹³ *Id.* at 71.

¹¹⁴ *See supra* Section 2.3.1.

¹¹⁵ *Bird v. City of Colorado Springs*, 489 P.2d 324, 325 (Colo. 1971).

¹¹⁶ *Id.* at 326 (citing *Baum v. City of Denv.*, 363 P.2d 688 (Colo. 1961)).

landowner's vested, nonconforming use.¹¹⁷ Indeed, in another case, the court distinguished between lawful uses that were vested at the time of a zoning classification and those that had not then vested.¹¹⁸ The court affirmed an injunction requiring the removal of house trailers that were placed on a lot after a new prohibitory zoning classification, while allowing maintenance of those trailers that had been placed before the new zoning classification.¹¹⁹ Concerning the unvested trailers, the county did not bear the "burden to show that the trailers constitute a public nuisance or a hazard to public health and safety."¹²⁰ Rather, the landowner bore the burden "to show [the] unconstitutionality" of the new zoning classification, and the "validity of the regulations must be upheld in the absence of evidence demonstrating that they do not foster legitimate governmental purposes."¹²¹ But the "three original trailers which were present when the zoning laws were changed to exclude trailers are valid non-conforming uses" and could remain on the premises.¹²²

Sometimes a vested right holder bears the initial burden of proving that his right vested.¹²³ This is apparent where landowners shelter under nonconforming use statutes.¹²⁴ A landowner who claims protected status for a vested nonconforming use must bear the initial burden of proving that the use preexisted the adverse official action.¹²⁵ For example, the Colorado Supreme Court has ruled that a city is not required to prove that a landowner intended to abandon a vested, nonconforming use before ruling that the use has been discontinued.¹²⁶ This may be due to another presumption, that a lawfully-constituted legislature has acted rationally and lawfully, consistent with its constitutional and legal obligations.

If a land user proves that a use is vested, then the vesting of the use will shift the presumption and burden of proof from the right holder to the party who wants the use found unlawful, such as a neighbor or local

¹¹⁷ *Id.* at 325.

¹¹⁸ *Bd. of Cnty. Comm'rs v. Mountain Air Ranch*, 563 P.2d 341, 343, 345 (Colo. 1977).

¹¹⁹ *Id.* at 343.

¹²⁰ *Id.* at 344.

¹²¹ *Id.*

¹²² *Id.* at 345.

¹²³ *Ready Mix, USA, LLC v. Jefferson Cnty.*, 380 S.W.3d 52, 67 (Tenn. 2012).

¹²⁴ *Id.*

¹²⁵ *City of New Orleans v. Hamilton*, 602 So. 2d 112, 115 (La. Ct. App. 1992).

¹²⁶ *Hartley v. City of Colorado Springs*, 764 P.2d 1216, 1225 (Colo. 1988).

government.¹²⁷ The party challenging the use must prove that the nonconforming use was not vested, for example, because the owner stopped making it or abandoned it.¹²⁸ Or he must prove that the land user has made some change to the use that removes it from the statutory protection.¹²⁹

3. EXPLAINING PRESUMPTIONS WITH VESTED RIGHTS

3.1. Presumptions Require Explanation

A presumption preserves one party in the status quo—for example, a person’s liberty, possession, use, or public right—until the other party meets some burden of proof, persuasion, or both. Presumptions are, in this sense, unequal. One party must make a prima facie showing; the other need not do anything (unless the presumption later shifts). If the law is ambiguous or the evidence inconclusive, the party who enjoys the presumption wins by default; the party who bears the burden loses. The same is true when evidence is unavailable.

Because they perform such important work in legal reasoning, and because of their apparent inequality, presumptions require an explanation. Or rather, they require two kinds of explanation. Presumptions structure legal reasoning at the outset of deliberation. So we need to know how presumptions work and how they relate to each other before deliberation gets going. We need an account of what legal or factual circumstance (or both) correlates with the existence of a presumption. Call this a descriptive explanation.

Presumptions also require justification, which is a different kind of explanation. We need to understand not only how presumptions arise and how they work in practice but also why presumptions are acceptable, at least most of the time. Why is it okay that one party enjoys a presumption and the other does not? To answer that question we need to understand the reasons to have presumptions of civil innocence. Call this a normative explanation.

¹²⁷ *Mayer-Wittmann v. Zoning Bd. of Appeals*, 218 A.3d 37, 49 (Conn. 2019); *Grannis v. Schroder*, 978 S.W.2d 328, 332 (Ky. 1997) (placing burden on neighbor who challenged landowner’s nonconforming use to prove that proposed repairs did not come within the statutory protection).

¹²⁸ *Hamilton*, 602 So. 2d at 115.

¹²⁹ *Grannis*, 978 S.W.2d at 332.

3.2. Vested Rights Supply a Descriptive Explanation

Vested rights provide both kinds of explanation. Descriptively, vested rights explain why some right claimants are entitled to a presumption while others bear burdens of proof and persuasion. Often, the person who enjoys the presumption is the one who has already been making use of a tangible or intangible resource and whose use has never been adjudicated to be unlawful.¹³⁰ Especially where the conduct by the first person to make a use was lawful under immemorial common-law doctrines or longstanding positive rules, the use may be presumed lawful as compared with competing, subsequent proposals for use. The practical implication is that one who would alter the existing use rights of interested parties may succeed but must first provide a reasoned justification.

Consider how the doctrine of vested rights explains an apparent inconsistency that has characterized judicial review of zoning laws from the beginning. In early constitutional challenges to land use ordinances, the U.S. Supreme Court consistently said that it was reviewing the ordinances for a rational basis.¹³¹ But the way in which the Court employed rational basis review differed from case to case. In one landmark case, the Court placed the burden on the landowner to negate any rational bases.¹³² In the next, the Court placed the burden on the municipal government to prove a rational basis.¹³³ And the burden of proof was dispositive in both cases.¹³⁴

In *Village of Euclid v. Ambler Realty*, the Court denied a landowner an injunction to prohibit the enforcement of new zoning regulations.¹³⁵ The Court placed upon the landowner who challenged the zoning regulations the burden to negate all possible rational bases for them.¹³⁶ In his opinion for the Court, Justice Sutherland explained why the Court would defer to prospective zoning ordinances, which were then a recent innovation.¹³⁷ Even

¹³⁰ See, e.g., Alan L. Durham, *The Trouble with Tacking: A Reconsideration of Trademark Priority*, 54 HOU. L. REV. 1027, 1028 (2017).

¹³¹ See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391–92 (1926).

¹³² See *id.* at 395–96.

¹³³ See *Nectow v. City of Cambridge*, 277 U.S. 183, 188–89 (1928).

¹³⁴ *Euclid*, 272 U.S. at 395–96; *Nectow*, 277 U.S. at 188–89.

¹³⁵ *Euclid*, 272 U.S. at 396–97.

¹³⁶ *Id.* at 395–96.

¹³⁷ *Id.* at 392.

though the ordinances “must find their justification in some aspect of the police power,” the line between justified and unjustified regulations “is not capable of precise delimitation.”¹³⁸ Sutherland did not perceive in common-law maxims and doctrines any workable standards for determining the legality of prospective land use regulations, though the common law of nuisance does provide useful “analogies.”¹³⁹ Sutherland did not disclose his jurisprudential assumptions underlying this view. Perhaps he had in mind the common-law doctrine of legislative supremacy, that a Parliament (and, after American independence, a state legislature) is competent to change the law prospectively as long as it does not traduce natural rights or attempt to do anything “naturally impossible.”¹⁴⁰

In that particular case, Ambler Realty failed to show that village’s ordinance was unjustified.¹⁴¹ Significantly, however, Sutherland emphasized that the holding against Ambler Realty was limited to the procedural posture and facts of the case.¹⁴² Ambler Realty sought not merely damages but rather “an injunction against the enforcement of any of the restrictions, limitations or conditions of the ordinance.”¹⁴³ Such an injunction would set up a direct conflict between the federal trial court and the local government. Also, because Ambler Realty challenged the ordinance on its face, without identifying any particular land uses of which it had been deprived, the evidence did not show what effect the ordinance would have on the use or value of the land.¹⁴⁴ The record of the case “afforded no basis, apart from mere speculation, upon which to rest a conclusion that” the challenged ordinances “would have any appreciable effect” on any of Ambler Realty’s property rights.¹⁴⁵ Sutherland concluded,

¹³⁸ *Id.* at 387.

¹³⁹ *Id.* at 387–88.

¹⁴⁰ 1 BLACKSTONE, *supra* note 14, at *156–57, *161. If that is what Sutherland had in mind, then his assumption may be anachronistic. Land use scholars recognize that contemporary land use governance is much more like administrative regulation than it is like legislation. See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 588 (2017).

¹⁴¹ *Euclid*, 272 U.S. at 389.

¹⁴² *Id.* at 385.

¹⁴³ *Id.* at 396.

¹⁴⁴ *Id.* at 397.

¹⁴⁵ *Id.*

Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.¹⁴⁶

This modest ruling was consistent with the “policy of this Court” to refrain from deciding questions “beyond the necessities of the immediate issue.”¹⁴⁷

Just two years after his opinion in *Village of Euclid*, the same Justice Sutherland authored the opinion for a unanimous Court in *Nectow v. City of Cambridge*, reversing a judgment in favor of a city that had rezoned the claimant’s land.¹⁴⁸ The Court reversed a decision of the Massachusetts Supreme Judicial Court upholding the zoning decision, which cited the U.S. Supreme Court’s *Euclid* decision as authority.¹⁴⁹ Sutherland acknowledged that the challenged ordinance was “of the same general character as that considered by this Court” in the *Euclid* case and opined that in “its general scope it is conceded to be constitutional within” the ruling announced in *Euclid*.¹⁵⁰ Nevertheless, “as specifically applied to” Nectow, it deprived him of his property.¹⁵¹ Since a “necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.”¹⁵²

In *Nectow*, the Court reiterated the posture of deference it had adopted in *Euclid*:

that a court should not set aside the determination of public officers in such a matter unless it is clear that their action “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.”¹⁵³

But the Court required the city to justify its zoning actions as applied to Nectow by stating some valid reason, and there did “not appear to be any

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 277 U.S. 183, 183 (1928).

¹⁴⁹ *Nectow v. City of Cambridge*, 157 N.E. 618, 620 (Mass. 1927).

¹⁵⁰ *Nectow*, 277 U.S. at 185.

¹⁵¹ *Id.* at 185, 188.

¹⁵² *Id.* at 188–89.

¹⁵³ *Id.* at 187–88 (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

reason” for those actions.¹⁵⁴ Furthermore, the Supreme Court accepted the factual findings of a special master appointed by the Massachusetts trial court “that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question.”¹⁵⁵

In *Euclid*, the Court accepted the Village’s assertions that its zoning rules would produce salutary benefits, promoting health, safety, morals, and the general welfare.¹⁵⁶ In *Nectow*, by contrast, the Court scrutinized the factual grounds for the city’s asserted rational basis and found the evidence insufficient to support the rule change.¹⁵⁷ In both cases, counsel for zoning officials treated judicial scrutiny as an exercise in speculative reasoning, offering abstract characterizations of the intentions of zoning legislators and confident predictions about the order that could be expected to result from legal change.¹⁵⁸ Those abstractions and predictions persuaded the Court in *Euclid*;¹⁵⁹ they did not get the job done in *Nectow*.¹⁶⁰ The reason is familiar to all litigators. The Court placed the burden of proof on the landowner in *Euclid* and on the public officials in *Nectow*. Whereas in *Euclid* Justice Sutherland and the other Justices presumed that the city officials had acted lawfully, in *Nectow* the landowner enjoyed that presumption. In each case, the presumption and correlative burden of persuasion determined the outcome.

In subsequent cases, most notably *City of Cleburne v. Cleburne Living Center*,¹⁶¹ the U.S. Supreme Court, lower federal courts, and state courts have used meaningful scrutiny to review changes in land use law and particularized decisions of land use authorities.¹⁶² Though courts in such cases purport to employ the rational basis test declared in *Village of Euclid*, they begin with a presumption that the landowner is in the right, and they

¹⁵⁴ *Nectow*, 277 U.S. at 188.

¹⁵⁵ *Id.*

¹⁵⁶ *Euclid*, 272 U.S. at 383.

¹⁵⁷ *Nectow*, 277 U.S. at 188–89.

¹⁵⁸ *Euclid*, 272 U.S. at 394–95; *Nectow*, 277 U.S. at 184.

¹⁵⁹ *Euclid*, 272 U.S. at 394–95.

¹⁶⁰ *Nectow*, 277 U.S. at 188–89.

¹⁶¹ 473 U.S. 432 (1985).

¹⁶² See cases discussed *infra* Sections 5.2, 6.3. Nevertheless, the U.S. Supreme Court itself has largely ignored *Nectow* and deferred to local governments. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594–96 (1962); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 7–8 (1974).

accordingly place on zoning officials the burden to provide either a legal justification or evidence of factual justification, or both. They root out “indefensible reasons” for zoning actions and other government acts that divest persons of established property rights.¹⁶³ The explanation for this is that courts have a duty to protect vested constitutional rights.¹⁶⁴ That an official action divests a landowner or developer of rights vested under preexisting law gives rise to a presumption that the official action is arbitrary and capricious, and the burden shifts to the government to prove a nondiscriminatory basis that is not illegitimate or irrational.¹⁶⁵ “Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned action.”¹⁶⁶ The divesting of a vested right serves as a signal, putting courts on alert that the official action may not be rationally grounded in legitimate state interests. By contrast, where a posited law or official action does not affect vested rights, courts employ rational basis review deferentially, placing on complaining landowners the burden to negate all possible rational bases for the rule or decision, even when important constitutional rights are at stake.¹⁶⁷

This observation may dissolve an apparent inconsistency in the courts’ use of rational basis review. This apparent inconsistency perhaps contributes to a backlash against zoning regulations, which has gained momentum in recent decades.¹⁶⁸ Zoning decisions strike many people as arbitrary and subject to abuse and corruption, especially those which involve individualized assessments and other discretionary decisions, which empower local government officials to ignore or change the rules to suit the interests of the

¹⁶³ *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988).

¹⁶⁴ *Id.* at 215.

¹⁶⁵ *See Scott v. Greenville Cnty.*, 716 F.2d 1409, 1419–20 (4th Cir. 1983).

¹⁶⁶ *Altaire Builders, Inc. v. Vill. of Horseheads*, 551 F. Supp. 1066, 1069 (W.D.N.Y. 1982) (citing *S. Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir. 1974)).

¹⁶⁷ *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–271 (1977) (plaintiff developer challenging municipality’s refusal to rezone land to allow proposed development did not meet burden of proving that racial discrimination was motive); *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987) (citing *Euclid* and placing burden on plaintiffs to prove zoning action not rationally related to legitimate state interest); *see also* cases discussed *infra* Part 7.

¹⁶⁸ Opposition to zoning and support for reform recently motivated an act in California, the California Housing Opportunity and More Efficiency Act, SB9, which supersedes certain zoning regulations that make it difficult to increase housing supply. 2021 Cal. Stat. ch. 162.

moment.¹⁶⁹ Many scholars have discussed this apparent discrepancy in land use jurisprudence.¹⁷⁰ But the cases frustrate various attempts to discern a coherent principle or pattern. The closest thing to an explanatory principle is the distinction between facial challenges, which are supposed to be difficult to assert, and as-applied challenges, where judicial scrutiny may be more exacting.¹⁷¹ But courts do not always pay attention to this distinction; often, they muddle the distinction entirely.¹⁷²

Nevertheless, the distinction between facial and as-applied challenges suggests a different explanation. In as-applied challenges, the claimant must identify not only a particular person or class of persons whom the rule change burdens but must also identify a concrete right that the new rule infringes.¹⁷³ In such cases, courts may place a burden on the local government to produce competent evidence linking official zoning decisions to some rational basis.¹⁷⁴ This suggests that the character of the property right might influence judicial scrutiny. And in fact, the cases show that the presumption and scrutiny employed by reviewing courts often depend on two related facts about the land user's right. First, the presumption depends on the concreteness of the right asserted, whether it is an abstract liberty or a

¹⁶⁹ As one scholar summarized the problem, zoning boards “give scant attention to the relevant legal standards and inordinate attention to whatever concerns—parking, density, possibly rats—the few individuals who show up at a hearing choose to raise.” John J. Infranca, *Decoding Land Use Discretion*, 110 IOWA L. REV. 1755, 1757 (2025).

¹⁷⁰ See, e.g., 1 ANDERSON'S AMERICAN LAW OF ZONING § 3.01, at 78–79 (Kenneth H. Young ed., 4th ed. 1996); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1244–53 (1997); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 1–3 (1992); Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1095–97 (2008); Ilya Somin, *Federalism and Property Rights*, 24 U. CHI. LEGAL F. 1, 56–57 (2010); Ashira P. Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 725–738 (2008).

¹⁷¹ Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 60–61 (2013).

¹⁷² See Ostrow, *supra* note 170, at 725.

¹⁷³ As one court expressed the idea, “Although a zoning ordinance may be valid in its general aspects, it may nevertheless be invalid as applied to a particular piece of property or a particular set of facts.” *Ziman v. Vill. of Glencoe*, 275 N.E.2d 168, 171 (Ill. App. Ct. 1971).

¹⁷⁴ See, e.g., *Bd. of Cnty. Comm'rs v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993).

particular, known use.¹⁷⁵ Second, it turns on the lawfulness of the use prior to the disputed change in the law.¹⁷⁶

Where a landowner who challenges a land use regulation asserts an unspecified, abstract liberty by way of a facial challenge, as in the landmark case *Village of Euclid v. Ambler Realty*, courts place upon the landowner the burden to negate all possible rational bases for the regulation.¹⁷⁷ Critically, *Ambler Realty* had no vested use rights in its land.¹⁷⁸ It was making no particular use of the land and did not propose to make any particular use.¹⁷⁹ It asserted instead an abstract liberty to make any use of its land it wanted.¹⁸⁰ But one has no common-law right to use land in any way one wants. Use rights in real property are always bounded by the common law of rights and wrongs—nuisance, waste, trespass, subjacent and lateral support.

By contrast, where the property owner has a private right which is vested under long-standing law, courts often place the burdens of proof and persuasion on the state actors who have attempted to change the law retrospectively. The vested private right might be predicated on a lawful proposed use, such as a vested purchase and sale agreement where the buyer intends to make a use that the new regulation would prohibit.¹⁸¹ Or it might be an existing use that does not amount to public or private nuisance.¹⁸² Either way, courts treat it as presumptively valid and immunized. This shift of burden is outcome-determinative where the land use regulators did not include in their fact findings any evidence that the vested use causes injury to neighbors or the community. And the government bears this burden even in cases in which courts employ the so-called “rational basis” test announced in *Village of Euclid*.¹⁸³

The distinction between vested and unvested land uses thus resolves the apparent inconsistency in administrative and judicial land use decisions. It explains cases where courts have employed heightened scrutiny despite

¹⁷⁵ See *id.* at 475.

¹⁷⁶ See *Guy v. Town of Temple*, 956 A.2d 272, 280 (N.H. 2008).

¹⁷⁷ See 272 U.S. 365, 395 (1926).

¹⁷⁸ *Id.* at 395.

¹⁷⁹ *Id.* at 385.

¹⁸⁰ *Id.* at 384–85.

¹⁸¹ See *Nectow v. City of Cambridge*, 277 U.S. 183, 187–89 (1928).

¹⁸² See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985).

¹⁸³ 272 U.S. at 395.

purporting to use rational basis review. In many of those cases, the land user's right was vested. It seems that judges often defer less to state actions that deprive property owners of vested uses than to those that affect unvested liberties and place burdens of proof, persuasion, or both on the officials engaged in those retrospective actions.

3.3. Vested Rights Supply a Normative Explanation

Normatively, we need to know why presumptions are allowed to work in the law. The “why” is important because practical consequences are at stake. To be acceptable in legal practice, presumptions must be satisfactory enough that people will tolerate their use as a tiebreaker in cases where evidence is lacking or opposing legal arguments are of equal strength and persuasiveness.

Vested rights are not arbitrary. And presumptions are not random. They reflect deep and enduring commitments of our fundamental law. One commitment is that the law assumes the best about people, rather than the worst. The common law has long leaned toward an understanding that people tend to exercise their rights and liberties lawfully. This general posture of our fundamental law yields two standing presumptions. One, a presumption of innocence, is that no person should be presumed to have acted wrongfully toward other persons.¹⁸⁴ A second, a corollary of the first, is what we might call a presumption of liberty.¹⁸⁵ This presumption requires that governments must justify any efforts to restrain the freedom of persons to exercise their natural liberties, and generally requires that any such justification be linked to punishing wrongdoing or to providing a remedy for actionable harm.¹⁸⁶

¹⁸⁴ Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 106–07 (2003).

¹⁸⁵ Compare RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 260 (2013) (“The Ninth Amendment was written at a higher level of abstraction or generality—that of natural liberty rights—than any specific list of liberties and deliberately so.”), with JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 21 (2003) (“[T]he Ninth Amendment, a written tribute to unwritten rights, loses much of its uncertainty if understood from the common-law perspective. Then, it appears not as a license for inventive judges but as testimony to the unwritten store of rights discovered in common-law privileges and immunities.”).

¹⁸⁶ BARNETT, *supra* note Error! Bookmark not defined., at 264.

Together, these two presumptions form what may be called a presumption of lawful action. This presumption has several important and well-celebrated constitutional implications. Constitutions that codify the common-law presumptions of liberty and innocence, such as the constitutions of the United States and the several states,¹⁸⁷ place burdens of proof on citizens or government officials who seek to impose civil or criminal liability on fellow citizens and residents. Such constitutions allow officials to deprive persons of life, liberty, and property only after those persons are proven to have forfeited their rights by an act of wrongdoing in a proceeding that satisfies the guarantees of due process. Those guarantees include trial by jury, the opportunity to confront witnesses and contest evidence, and in some cases, representation by counsel.

Less dramatically but just as importantly, the presumption of lawful action structures judicial reasoning. Judicial officials may conclude that a person has acted unlawfully, but they may never begin with that presumption. They must reason to that conclusion and may reach it only when the facts and law require it. Otherwise, persons are deemed to be acting lawfully.

Sometimes the presumption of lawful action runs up against another, equally fundamental presumption. For centuries, judges have been obligated to interpret laws with a presumption that laws are rational—that the legislator or other authorized lawmaker had a rational objective in mind when promulgating the law and chose a reasonable means to achieve that objective.¹⁸⁸ This entails that, though all persons are entitled to a presumption that their actions are lawful, they are not entitled to a presumption that their actions are unconstrained by laws that restrict their liberty. To avoid liability for violating a law, a person must (usually) prove that the law is irrational. In other words, the government enjoys the initial presumption of legality.

Vested rights have two additional characteristics that may make courts more deferential toward them and more skeptical of laws that abrogate them. First is the specificity (in jurisprudential terms, the degree of determination)¹⁸⁹ of the land user's asserted right. An owner who asserts an

¹⁸⁷ See U.S. CONST. amends. V, IX, XIV.

¹⁸⁸ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388–89 (2003).

¹⁸⁹ These terms are not interchangeable in analytical jurisprudence, but for purposes of the legal analysis that follows, this article will use them interchangeably. Roughly, “specification” refers to the quantity of normative content that one can read off the assertion of a right. To say that A has a right to be paid is a less-specified right

abstract use liberty and who has no discernable intention to make any particular use, such as *Ambler Realty*, will find reviewing courts highly deferential to land use authorities.¹⁹⁰ By contrast, an owner or user who asserts a fully-specified, three-term Hohfeldian jural relation (identifying the right-holder, duty-bearer, and the action or omission that is required by the right)¹⁹¹ is entitled to a rigorous examination of the factual basis for the official action. *Nectow* and *Cleburne Living Center* both fit this model.¹⁹² Before the rule change, *Nectow* had a vested contract to sell the land, giving rise to a concrete claim right that would have been enforceable against the purchaser, whose plans for the land the rule change frustrated.¹⁹³ Similarly, *Cleburne Living Center* had negotiated a lease to the premises at issue.¹⁹⁴

Second, courts are also motivated by the lawfulness of an existing use, measured against what the U.S. Supreme Court has called “background principles” of private law,¹⁹⁵ i.e., settled doctrines of the common law of tort and property.¹⁹⁶ If a land use regulation is merely declaratory of an established common-law rule, or if a particularized land use decision is merely declaratory of a judgment that others might have obtained against the landowner for some cognizable legal wrong, then the land use is not lawful, and the land user has little ground to complain.¹⁹⁷ If on the other hand, a landowner has made a use for some time, or is known to intend a particular use,

statement than to say that A has a right to be paid five dollars by B. “Determination” is an older term. It played a significant role in Aquinas’s discussion of the creative content provision that lawmakers must perform when promulgating positive law. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, q. 91, art. 3, q. 95, art. 2 (Fathers of the Eng. Dom. Province trans., Benziger Bros., 1st Am. ed. 1947) (1274). The concept was earlier captured by Aristotle’s discussion of matters of indifference, which are not the same everywhere as matters of natural justice and which human law must settle conclusively by stating precisely what action is required or forbidden. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 1134b (Robert C. Bartlett & Susan D. Collins trans., Univ. Chi. Press) (c. 335 B.C.).

¹⁹⁰ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 385 (1926).

¹⁹¹ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 710 (1917).

¹⁹² See *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435–37 (1985).

¹⁹³ *Nectow*, 277 U.S. at 187.

¹⁹⁴ *City of Cleburne*, 473 U.S. at 435–37.

¹⁹⁵ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

¹⁹⁶ *Id.* at 1027–30.

¹⁹⁷ *Id.* at 1029; ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* 238 (2015).

and the neighbors have not successfully complained that the use is a nuisance or otherwise unlawful, then the use is presumed to be made according to law. In short, a use that is not a common-law wrong is presumed to be right. Here again, the principle accounts for the reasoning in *Nectow* and *Cleburne*. *Nectow*'s neighborhood had become industrial and commercial, expanding the class of uses that his purchaser might have made without committing a nuisance.¹⁹⁸ And the *Cleburne Living Center* did not propose to make any unlawful uses either.¹⁹⁹

More generally, these two factors can explain the persistence of the presumption of lawful use in certain as-applied challenges to zoning rule changes and particularized assessments. As explained below, courts often afford a presumption of vested lawfulness to land uses that precede some change in the law that renders them nonconforming. The presumption may sometimes be overcome by a showing that local officials acted to protect some particular aspect of the health, safety, morals, or general welfare of the community. But absent such a showing, the vested use prevails.

4. VESTED RIGHTS IN CASES OF ALLEGED PRIVATE PROPERTY WRONGS

In a private action to remedy an alleged trespass, nuisance, or other private wrong against property rights or by a person exercising property rights, the person alleging the wrong bears the initial burden of proof.²⁰⁰ To have standing to pursue the claim, the plaintiff must show that the alleged wrongdoer caused an injury to his or her own legal right.²⁰¹ And in modern tort law, he or she must also prove that the alleged wrongdoer committed some legal wrong that caused the injury to the plaintiff, in other words, that

¹⁹⁸ *Nectow*, 277 U.S. at 185–87.

¹⁹⁹ *City of Cleburne*, 473 U.S. at 436–37.

²⁰⁰ 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 165 (2d ed. 2011).

²⁰¹ JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 3–4 (2010) [hereinafter GOLDBERG & ZIPURSKY, *OXFORD INTRODUCTIONS*]. Goldberg and Zipursky argue that the correlation between an injured party's right and the wrongful conduct of the tortfeasor is an inherent aspect of tort liability because tort law is inherently private. Its function is to specify private duties owed to persons and remedies for breach of those duties. JOHN C. P. GOLDBERG & BENJAMIN ZIPURSKY, *RECOGNIZING WRONGS* 65–73 (2020) [hereinafter GOLDBERG & ZIPURSKY, *WRONGS*].

the defendant acted with fault.²⁰² Without a showing of wrongdoing and injury, any harm suffered by the plaintiff is *damnum absque injuria* (harmed without a recognized legal injury), and the person accused of wrongdoing remains at liberty to perform the act complained of.²⁰³

These observations seem so obvious that their implications may escape notice. But the implications are worth noticing. A person who makes use of property without causing anyone injury is at liberty to continue the use. And a person who uses his own property in a way that affects another person is presumed to be acting lawfully until proven otherwise. This is the sense of what Judge Wilkinson characterizes as the “presumption of civil innocence.”²⁰⁴ As the authors of a leading Torts treatise explain:

[U]nder our system of individual liberty and free enterprise, proceeding on legitimate activities with such knowledge [that it will cause injury to another] will constitute fault only if it is done in an unreasonable manner or if it is unreasonable to proceed with the enterprise at all, even with the taking of all reasonable precautions.²⁰⁵

To prevail in an action alleging a property wrong, therefore, a plaintiff must prove both that he was injured with respect to some identifiable property right and that the defendant performed a legally wrong act which caused the injury. So, for example, unless a plaintiff claiming to be injured in his possession right can prove a superior right of possession, the person in possession is deemed to be lawfully in possession.²⁰⁶ Unless a plaintiff alleging injurious use of property can prove that another’s use is unreasonable or otherwise an act of fault, the use is deemed to be lawful.²⁰⁷ And though trespass originally would lie for all purposeful acts that invaded the property

²⁰² GOLDBERG & ZIPURSKY, OXFORD INTRODUCTIONS, *supra* note 201, at 1–3; 1 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS 12–13 (3d ed. 2006).

²⁰³ Goldberg and Zipursky have demonstrated that one cannot explain the full panoply of recognized torts without recognizing some fault requirement tied to a showing of wrongdoing. GOLDBERG & ZIPURSKY, WRONGS, *supra* note 201, at 224.

²⁰⁴ Wilkinson III, *supra* note 11, at 590.

²⁰⁵ 1 HARPER, JAMES & GRAY, *supra* note 202, at 109.

²⁰⁶ Pierson v. Post, 3 Cai. 175, 177–79 (N.Y. Sup. Ct. 1805); Dapson v. Daly, 153 N.E. 454, 454 (Mass. 1926); Fleming v. Griswold, 3 Hill 85, 86 (N.Y. Sup. Ct. 1842).

²⁰⁷ 1 HARPER, JAMES & GRAY, *supra* note 202, at 9–10, 90–91; GOLDBERG & ZIPURSKY, OXFORD INTRODUCTIONS, *supra* note 201, at 37.

rights of another, modern law since at least the nineteenth century requires a showing of fault before it will impose liability for trespass; for example, proof that the defendant made an intentional entry on the plaintiff's land without consent or legal privilege.²⁰⁸

Even if the land user alleged to have caused an injury is the plaintiff, the vestedness of the challenged land use can place the burden on the other party to prove that the use constitutes a nuisance.²⁰⁹ So in one case, a landowner filed an action alleging that a city's declaration of his vested use as a public nuisance was a confiscation of his property.²¹⁰ The trial court reasoned that the city's declaration was not unreasonable because it invoked as authority zoning ordinances which rendered the plaintiff's preexisting land use nonconforming.²¹¹ The Michigan Supreme Court reversed.²¹² Noting that the plaintiff's nonconforming use was a vested property right, the court reasoned "that the existence of a nuisance is not to be inferred from proof of activities which do not comply with the zoning ordinance."²¹³ The city had to produce some other evidence that the use was a nuisance in fact.

The same jurisprudential principles are at work in disputes about conflicting uses of water. In an action for an alleged wrong concerning water rights, just as in property wrongs generally, a plaintiff must prove the wrong he has alleged.²¹⁴ Absent a showing of wrongful use of water, and that the wrongful use caused a cognizable injury to another, an owner's use or consumption of water is deemed lawful. All use of riparian land and water that is not proven to be unreasonable is *damnum absque injuria*.²¹⁵ All uses of water by riparian owners are vested in at least this weak sense, that the law begins with a presumption in favor of riparian use of water, and every

²⁰⁸ 1 HARPER, JAMES & GRAY, *supra* note 202, at 12–19; GOLDBERG & ZIPURSKY, OXFORD INTRODUCTIONS, *supra* note 201, at 36.

²⁰⁹ *Dusdal v. City of Warren*, 196 N.W.2d 778, 781–82 (Mich. 1972).

²¹⁰ *Id.* at 781.

²¹¹ *Id.*

²¹² *Id.* at 782.

²¹³ *Id.* at 781–82.

²¹⁴ JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND §§ 481–482, at 758–59 (3d ed. 1900).

²¹⁵ SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 294, at 453 (2d ed. 1908).

riparian owner is at liberty to make beneficial uses unless and until the use interferes with another's use and is proven to be unreasonable.²¹⁶

Water rights can be vested in the stronger sense that they cannot be divested by subsequent consumers. In first appropriation states, the vesting of water rights entitles the right holder to assert a claim against one whose water use would affect his own water use.²¹⁷ Higher-priority, earlier users enjoy a presumption of unlawful injury against lower-priority, later users, who bear the burden of proving that their asserted water right will not cause injury to the higher-priority right holder.²¹⁸

In states that adhere to riparian doctrine, water conflicts are treated much like nuisance disputes. Each existing use is presumed reasonable, so each person alleging an unreasonable use of water bears the burden of proving injury and unreasonable use, both questions of fact.²¹⁹ In this sense, at least in theory, all riparian owners have equal rights, and no riparian owner has priority over any other.²²⁰ But in practice, experts report that conflicting uses are often resolved by a presumption in favor of prior consumptive use over newer uses.²²¹

5. VESTED RIGHTS IN DUE PROCESS AND RATIONALITY CHALLENGES

5.1. Presumptions and Established Uses Matter

The first challenges to the then-novel comprehensive zoning ordinances and land use regulations of the Progressive Era were due process challenges.²²² The typical claim was that a new land use law deprived a landowner of a valuable property right, the liberty to make uses of land that the new ordinance or regulation forbade. This type of claim was asserted in both

²¹⁶ WILLIAM GOLDFARB, WATER LAW 7–8 (1984).

²¹⁷ *Shirola v. Turkey Cañon Ranch, L.L.C.* (In re Application for Water Rts. of Turkey Cañon Ranch L.L.C.), 937 P.2d 739, 755 (Colo. 1997).

²¹⁸ *Id.* at 754.

²¹⁹ GOLDFARB, *supra* note 216, at 7.

²²⁰ WIEL, *supra* note 215, at 453.

²²¹ GOLDFARB, *supra* note 216, at 8.

²²² See Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 TEX. L. REV. 1, 8–9 (2024).

Ambler Realty and *Nectow*.²²³ The presumption in such cases matters. As demonstrated above, the landowner lost in *Ambler Realty* because it bore the burdens of proof and persuasion and identified no established, vested use of which the new law deprived it and failed to negate all possible, rational bases for the zoning designation.²²⁴ And the landowner prevailed in *Nectow* because the local government bore the burdens of proof and persuasion and failed to prove a rational basis for depriving the landowner of his vested property right.²²⁵

In a small number of states, landowners affected by changes in land use regulations always bear the burden of proof.²²⁶ This is because not all state courts have followed the U.S. Supreme Court's lead in distinguishing between vested and unvested land uses. The New York Court of Appeals famously eliminated state constitutional immunity for vested, lawful land uses in *Harbison v. City of Buffalo*.²²⁷ The court's official doctrine is that, whenever a local government determines that "the benefit to the public has been deemed of greater moment than the detriment to the property owner," it may change the law to eradicate a lawful, preexisting use, and the New York Constitution provides no protection.²²⁸ The government must eliminate nonconforming uses "in a reasonable fashion."²²⁹ But this requirement imposes no meaningful obligations on government officials because landowners always bear the burden of proving that the challenged official action was unreasonable. Even a landowner or user who is making a lawful use that preexists the challenged legal change must bear the burden of unreasonableness by showing 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."²³⁰ Since the "public benefit" is an amorphous concept, always defined by the same

²²³ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928).

²²⁴ See *Euclid*, 365 U.S. at 395.

²²⁵ See *Nectow*, 277 U.S. at 188.

²²⁶ See Jesse J. Richardson, Jr., *Downzoning, Fairness and Farmland Protection*, 19 FLA. ST. U. J. LAND USE & ENV'T L. 59, 61–62 (2003).

²²⁷ 152 N.E.2d 42, 46–47 (N.Y. 1958).

²²⁸ *Id.* at 44.

²²⁹ *Syracuse Aggregate Corp. v. Weise*, 414 N.E.2d 651, 655 (N.Y. 1980) (citing *Modjeska Sign Studios, Inc. v. Berle*, 373 N.E.2d 255 (N.Y. 1977); *Harbison*, 152 N.E.2d 42).

²³⁰ *Modjeska Sign Studios*, 373 N.E.2d at 262.

government attempting to abrogate the owner's property right, this burden is impossible to meet.

Though the New York Court of Appeals has not expressly overturned its *Harbison* doctrine, it has since cast doubt on the logic of the doctrine, protecting some vested private rights against retrospective abrogation by the state legislature.²³¹ At least where the state has pledged its full faith and credit in support of the rights, the rights become vested and cannot thereafter be altered.²³² In explanation, the court insists that its "decision rests on the constitutionally based protection against legislative interference with vested rights, a doctrine with a long tradition."²³³

"[A] traditional principle applied in determining the constitutionality of such legislation is that the Legislature is not free to impair vested or property rights." This doctrine reflects the deeply rooted principles that persons should be able to rely on the law as it exists and plan their conduct accordingly and that the legal rights and obligations that attach to completed transactions should not be disturbed.²³⁴

The language about "transactions" suggests that what matters is that the state legislature has made a promise. On this logic, perhaps only laws impairing the obligation of contracts are unconstitutional. But the court's statement that people should be able to plan their actions in reliance on existing law seems to have much broader implications. Because the court did not attempt to reconcile this reasoning with its holding in *Harbison*, it is difficult to know how far it extends.

Like New York, California allows the "eventual liquidation of nonconforming uses within a prescribed period."²³⁵ Local governments "ordinarily" protect the "rights of the users of property as those rights existed under prevailing zoning conditions."²³⁶ But the California constitution does not require them to do so as long as they terminate existing, lawful uses "for proper

²³¹ All. of Am. Insurers v. Chu, 571 N.E.2d 672, 679 (N.Y. 1991).

²³² *Id.* at 679.

²³³ *Id.* at 679.

²³⁴ *Id.* at 678 (citations omitted).

²³⁵ Livingston Rock & Gravel Co. v. Cnty. of L.A., 272 P.2d 4, 8–9 (Cal. 1954) (citing Cnty. of S.D. v. McClurken 234 P.2d 972 (1951)).

²³⁶ *Id.* at 8 (citing Edmonds v. Cnty. of L.A., 255 P.2d 772 (1953)).

purposes of public health, safety, morals, and general welfare.”²³⁷ The Supreme Court of California does not recognize vested private rights, so an abrogation of an existing lawful use amounts to a mere “diminution of market value,” not a deprivation of a property right.²³⁸ California’s abrogation of vested rights doctrine thus gives public officials a free hand to divest property owners and lawful users of their rights.

At least in principle, Washington too allows local governments to terminate vested, nonconforming uses, as long as the local government does not terminate them immediately.²³⁹ But like New York, Washington places meaningful limitations on the powers of local governments to abrogate vested use rights. First, Washington has what its courts call a “vested rights doctrine” that amounts to vested liberty estoppel, protecting established nonconforming uses and proposed uses described in “a timely and complete land use application” against subsequent legal changes.²⁴⁰ So, though the mere preexistence of a lawful use is not by itself sufficient to cause the use to vest fully, official approval of the use under then-existing rules is sufficient.²⁴¹ Washington courts reason that this vested rights “doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property interests.”²⁴²

Second, the Supreme Court of Washington has ruled that a government may not terminate a vested, nonconforming use for cause of abandonment if the use is that to which the land is specially fitted, such as quarrying rock or mining minerals.²⁴³ Nonextraction of earth materials, with an intention to steward the resource and extract in the future, is deemed a “use” of the resource for the purpose of establishing a preexisting use of the land. The use right secured under this so-called “diminishing asset” doctrine is a

²³⁷ *Id.* at 9 (citing *Wilkins v. City of San Bernadino*, 175 P.2d 542 (1946); *Beverly Oil Co. v. City of L.A.*, 254 P.2d 865 (1953)).

²³⁸ *HFH, Ltd. v. Superior Ct.*, 542 P.2d 237, 243–44 (Cal. 1975).

²³⁹ *Rhod-a-Zalea & 35th, Inc. v. Snohomish Cnty.*, 959 P.2d 1024, 1028 (Wash. 1998) (en banc).

²⁴⁰ *Weyerhaeuser v. Pierce Cnty.*, 976 P.2d 1279, 1283–84 (Wash. App. 1999) (collecting cases).

²⁴¹ *Weinberg v. Whatcom Cnty.*, 241 F.3d 746, 753–54 (9th Cir. 2001).

²⁴² *Weyerhaeuser*, 976 P.2d at 1284 (citing *Vashon Island Comm. for Self-Gov’t v. Wash. State Boundary Rev. Bd.*, 903 P.2d 953 (Wash. 1995); *Erickson & Assocs., Inc. v. McLerran*, 872 P.2d 1090 (1994)).

²⁴³ *City of Univ. Place v. McGuire*, 30 P.3d 453, 458–59 (Wash. 2001).

vested property right.²⁴⁴ It is therefore alienable and succeeds to successors in interest of the land.²⁴⁵ Other states also adhere to this doctrine.²⁴⁶

5.2. Many States Protect Vested Rights with a Presumption of Lawfulness

Though their decisions are widely celebrated in law review literature advocating for plenary state power to define property rights and lamenting vested rights,²⁴⁷ New York, California, and Washington are in fact outliers.²⁴⁸ Several states have preserved the vested rights doctrine, in at least a weak form, by recognizing a vested use as presumptively lawful despite a change in the zoning regulations or an official action against the land user.²⁴⁹ This

²⁴⁴ *Id.* at 459.

²⁴⁵ *Id.*

²⁴⁶ Hansen Bros. Enters. v. Bd. of Supervisors, 907 P.2d 1324, 1336–37 (Cal. 1996); Cnty. of Du Page v. Elmhurst–Chi. Stone Co., 165 N.E.2d 310, 313 (Ill. 1960); Legrand v. Ewbank, 284 S.W.3d 142, 143–45 (Ky. Ct. App. 2008); Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651, 654–55 (N.Y. 1980); Ready Mix, USA, LLC v. Jefferson Cnty., 380 S.W.3d 52, 69–70 (Tenn. 2012).

²⁴⁷ See, e.g., Note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration*, 72 HARV. L. REV. 504, 542–43 (1959); David R. Schwiesow, *A Suggested Means of Determining the Proper Amortization Period for Nonconforming Structures*, 27 STAN. L. REV. 1325, 1326 (1975); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1223 n.1, 1236–38, 1240–41 (2009). A different zoning model may appeal to zoning advocates while doing less violence to established, vested land uses. So-called “transect” zoning, a tool of new urbanist governance models, regulates form and aesthetics rather than use, and therefore may be more compatible with legal and constitutional protections for vested use rights. See generally Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571 (2013) (describing transect zoning as regulating the aesthetics rather than function of buildings based on the property zone, ranging from urban to natural).

²⁴⁸ Serkin, *supra* note 247, at 1238 (“Even where amortization is permissible . . . it is a narrow and constrained exception to the general rule that the government cannot eliminate existing uses without paying compensation.”).

²⁴⁹ Budget Inn of Daphne, Inc. v. City of Daphne, 789 So. 2d 154, 159–60 (Ala. 2000); Town of Paradise Valley v. Gulf Leisure Corp., 557 P.2d 532, 541 (Ariz. Ct. App. 1976); Petruzzi v. Zoning Bd. of Appeals, 408 A.2d 243, 246 (Conn. 1979); McDonough v. Tusk Partners, 492 S.E.2d 206, 208–09 (Ga. 1997) (holding the trial court did not clearly err by finding, based on conflicting evidence, that zoning designation was “unsubstantially related to the public health, safety, morals, and welfare”); Nott v. Wolff, 163 N.E.2d 809, 813 (Ill. 1960); Kempf v. City of Iowa City, 402 N.W.2d 393, 399–400 (Iowa 1987); City of Miami Beach v. 8701 Collins Ave., Inc., 77 So. 2d

presumption may lead a court to place the burden of persuasion on local government officials to offer a rational basis for new laws that divest existing land uses, so that a failure by officials to identify a reason for their actions that is related to a legitimate public interest renders the official action void.²⁵⁰ Or it might entail placing the burden of proof on the public officials, so that a lack of competent evidence to support their justifications for divesting existing uses renders the official action void.²⁵¹ Or it might entail government officials bearing both the burdens of persuasion and proof.²⁵² These presumptions can be dispositive.²⁵³

428, 430–31 (Fla. 1954); *City of Middlesboro Plan. Comm'n v. Howard*, 551 S.W.2d 556, 557 (Ky. 1977); *Four States Realty Co. v. City of Baton Rouge*, 309 So. 2d 659, 673–74 (La. 1974); *Willingham v. City of Dearborn*, 101 N.W.2d 294, 295–96 (Mich. 1960); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390, 400–01 (Neb. 1994); *Brown v. Terhune*, 18 A.2d 73, 74 (N.J. 1941); *Thompson v. Union Cnty.*, 874 S.E. 2d 623, 630–32 (N.C. Ct. App. 2022); *Goldberg Cos. v. Council of Richmond Heights*, 690 N.E.2d 510, 512 (Ohio 1998); *Jenkintown Towing Serv. v. Zoning Hearing Bd.*, 446 A.2d 716, 723–24 (Pa. Commw. Ct. 1982); *Carter v. City of Bluefield*, 54 S.E.2d 747, 762 (W. Va. 1949).

²⁵⁰ See, e.g., *8701 Collins Ave.*, 77 So. 2d at 430–31 (holding that new restrictions added to zoning ordinance “are discriminatory, unconstitutional and void” as applied to the landowner because the city failed to justify the distinctions it drew between permitted and prohibited uses).

²⁵¹ *Petruzzi*, 408 A.2d at 246 (holding that “[i]n the absence of a finding that the plaintiffs’ proposed use of the building would endanger life or property,” the town was obligated to issue a building permit to plaintiff to allow him to renovate his vested, nonconforming structure); *Jenkintown Towing Serv.*, 446 A.2d at 723–24 (affirming trial court’s finding that township failed to show that natural expansion of vested nonconforming use would cause “substantial harm to the public welfare”); *Thompson*, 874 S.E.2d at 630 (holding that a county government that changed zoning regulations governing preexisting use of claimant’s land bore the “burden of proof to show the existence of a violation of the ordinance” (citing *Shearl v. Town of Highlands*, 762 S.E.2d 877, 881 (2014))); *James v. City of Greenville*, 88 S.E.2d 661, 663–64 (S.C. 1955) (holding that a city’s attempt to divest landowner of vested use by changing the zoning designation of his land was unconstitutional because city did not put “testimony in the record” that the land use was unlawful, unsanitary, or inconsistent with surrounding uses).

²⁵² *Marmah, Inc. v. Town of Greenwich*, 405 A.2d 63, 65 (Conn. 1978) (“The trial court reasonably concluded that in this case the commission failed to provide proper reasons for denying the site plan application, and that the reasons that were provided were not substantiated by the evidence before the commission.”).

²⁵³ See, e.g., *Thompson*, 874 S.E. 2d at 633 (deeming land use lawful after county government purged records of land’s previous zoning status, as the “absence of evidence of

Even state courts that show generous deference to local governments when vested uses are not at stake, and require landowners who challenge new land use regulations to negate rational bases for the regulations, will often place the burdens of proof or persuasion (or both) on the local government when a new law would divest an owner of a vested use.²⁵⁴ These states defer to local land use regulation in general, and often parrot the typical language of rational basis scrutiny that a change in the law is valid as long as it is rationally related to health, safety, moral, or general welfare,²⁵⁵ or language that means the same thing.²⁵⁶ But if a new law would divest an established or planned property use that was lawful when begun, then courts often place the burden on the government to prove a rational basis or that the vested use amounted to an unlawful nuisance.²⁵⁷

Some state courts have declared the presumption in favor of the vested land user to be irrebuttable.²⁵⁸ Laws divesting such uses retrospectively are per se unreasonable and invalid as a deprivation of property without due process.²⁵⁹ Alternatively, a court may rule that it does not matter

a permit should be held against the County, not the property owner” (citing *Shearl*, 762 S.E.2d at 882)).

²⁵⁴ See, e.g., *Kempf*, 402 N.W.2d at 399–400 (holding though a person asserting the general invalidity of a zoning ordinance “has the burden to demonstrate its unreasonable, arbitrary, capricious, or discriminating nature,” a legal change is “unreasonable” when used to divest an owner of “vested rights” unless the record shows that the legal change would “contribute to public health, safety, or welfare”).

²⁵⁵ See, e.g., *8701 Collins Ave.*, 77 So. 2d at 430; *Four States Realty Co. v. City of Baton Rouge*, 309 So. 2d 659, 672 (La. 1974).

²⁵⁶ *Oka v. Cole*, 145 So. 2d 233, 235 (Fla. 1962) (“[I]f the reasonableness of the legislative classification is fairly debatable it should be upheld.”).

²⁵⁷ *8701 Collins Ave., Inc.*, 77 So. 2d at 430–31; *James v. City of Greenville*, 88 S.E.2d 661, 663–64 (S.C. 1955).

²⁵⁸ See *Darlington v. Bd. of Councilmen*, 140 S.W.2d 392, 396 (Ky. 1940); *Dusdal v. City of Warren*, 196 N.W.2d 778, 781 (Mich. 1972) (holding that a “prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance” and the reasonableness of the zoning amendment is irrelevant).

²⁵⁹ *Darlington*, 140 S.W.2d at 396–97; *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753–55 (Mo. 1965); *City of Akron v. Chapman*, 116 N.E.2d 697, 700 (Ohio 1953); *PA Nw. Distributions, Inc. v. Zoning Hearing Bd.*, 584 A.2d 1372, 1376 (Pa. 1991).

how reasonable legal changes are; they “cannot operate to oust the property owner of his vested right.”²⁶⁰

The logic of these rulings is that vested uses are presumptively lawful because they are property rights in our fundamental law. Property includes rights to make lawful uses and not only rights of alienation and possession.²⁶¹ “If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.”²⁶² That would render constitutional safeguards for property “meaningless.”²⁶³ So in many states, a preexisting, lawful land use is a “vested property right” in the robust sense of being immunized; it “cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain.”²⁶⁴ This is the logic of the dissenting opinions in *Harbison*.²⁶⁵ The jurisprudential principle is that local governments “lack the power to compel a change in the nature of an existing lawful use of property.”²⁶⁶

In some states, the presumption in favor of the vested use takes the form of a burden on the local officials to offer a valid, legal reason for the change in the law and support its reason with evidence, so that the officials bear both the burden of persuasion and the burden of proof.²⁶⁷ In these states, a land user may bear the initial burden of proving the existence of a vested use. But then the local government bears the burden of showing that it has acted for some reason that is rationally related to health, safety, or

²⁶⁰ *Dusdal*, 196 N.W.2d at 781; accord *Clackamas Cnty. v. Holmes*, 508 P.2d 190, 191 (Or. 1973) (“It is not necessary for us to decide the validity of the zoning ordinance applicable to this case, because we find that defendants acquired a vested right to complete construction prior to the enactment of the ordinance.”).

²⁶¹ *Chapman*, 116 N.E.2d at 700.

²⁶² *Id.* (citing *Spann v. City of Dall.*, 235 S.W. 513 (1921); *O’Connor v. City of Moscow*, 202 P.2d 401 (1949)).

²⁶³ *Darlington*, 140 S.W.2d at 396.

²⁶⁴ *PA Nw. Distributions*, 584 A.2d at 1375 (citing *Gross v. Zoning Bd. of Adjustment*, 227 A.2d 824 (Pa. 1967)).

²⁶⁵ See *Hoffmann v. Kinealy*, 389 S.W.2d 745, 753 (Mo. 1965).

²⁶⁶ *PA Nw. Distributions*, 584 A.2d at 1375 (collecting cases).

²⁶⁷ See *Four States Realty Co. v. City of Baton Rouge*, 309 So.2d 659, 673–74 (La. 1974) (rejecting city’s proffered justification and holding that rezoning was “arbitrary and capricious” where evidence in record failed to establish a rational connection between rezoning and city’s goals stated in its comprehensive plan); *Petrosky v. Zoning Hearing Bd.*, 402 A.2d 1385, 1390 (Pa. 1979).

general welfare.²⁶⁸ Absent a showing that the government acted for sufficient reasons, a vested right will prevail over a subsequent, adverse official action.²⁶⁹

In a typical case of this sort, *City of Middlesboro Planning Commission v. Howard*, the Supreme Court of Kentucky placed the burden on a government to prove the rationality of an official action divesting a preexisting nonconforming land use.²⁷⁰ The Howards operated a trucking company in a residential neighborhood prior to and after enactment of a zoning ordinance that prohibited commercial uses in the zone.²⁷¹ The city required nonconforming users to purchase a “privilege license” to continue making their nonconforming uses.²⁷² It was undisputed that the Howards did not purchase a license, but the court held for them anyway.²⁷³ The court observed, “The penalty the city seeks to impose on the Howards for a violation of this section is to deprive them of a vested property right in the nonconforming use.”²⁷⁴ Rather than place on the Howards the burden of negating all possible rational bases, the court evaluated the city’s asserted justification and found it unreasonable.²⁷⁵ The city failed to prove that the termination provision of its zoning ordinance was rationally related to the purpose of the nonconforming use provision.²⁷⁶ The court also found that the city failed to prove as a matter of fact that the Howards intended to abandon their nonconforming use.²⁷⁷ That the Howards did not apply for a license was not competent evidence of their intention to discontinue their vested use.²⁷⁸

In other states, a court may preserve the presumption in favor of a vested right holder by placing a factual burden of proof upon a divesting

²⁶⁸ *Four States Realty Co.*, 309 So. 2d at 672–73; *E. Hempfield Twp. v. Brubaker*, 828 A.2d 1184, 1188–89 (Pa. Commw. Ct. 2003).

²⁶⁹ *Vanvoorhis v. Shrewsbury Twp.*, 176 A.3d 429, 433–34 (Pa. Commw. Ct. 2017).

²⁷⁰ 551 S.W.2d 556, 557 (Ky. 1977).

²⁷¹ *Id.* at 556.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 557.

²⁷⁵ *Id.* The court also held “that the penalty sought to be imposed on the Howards is so disparate to the ordinary penalty provided in the ordinance so as to render it void as discriminatory and arbitrary.” *Id.* It is not clear from the terse opinion who bore the burden of proving discrimination or non-discrimination.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

government.²⁷⁹ In Arizona, a government that is estopped from revoking a vested permit must investigate and proffer in the record evidence that the permitted use or development “would be adverse to the health, safety and welfare of” the community.²⁸⁰ Absent such proof, there is no “good cause” to revoke the permit.²⁸¹ Arizona also requires a municipality to prove abandonment of a vested, nonconforming use before termination of the use by providing evidence of some “conduct within the control of and attributable to the property owner[, which] must be a cause of the condition justifying the termination.”²⁸²

Even states whose high courts have disavowed the doctrine of vested rights in the strong, central sense continue to recognize vested rights in their assignments of presumptions and burdens. Alabama’s high court is generally hostile toward property rights. The court interprets the takings clause of Alabama’s constitution to allow all regulatory takings without any compensation.²⁸³ It reviews validity challenges to new land use laws under a deferential arbitrary-and-capricious standard.²⁸⁴ And it generally places on the party challenging the validity of a land use ordinance the burden of proving “that the ordinance was not a fairly debatable issue before the municipal governing body.”²⁸⁵ But in challenges to new laws that divest landowners of existing uses, the court places the burden on the local government to prove that the law is not arbitrary and capricious, as the court demonstrated in *Budget Inn of Daphne, Inc. v. City of Daphne*.²⁸⁶ A landowner asserting a vested use bears the initial burden of proving that the use was lawful before the new

²⁷⁹ *Henry Cnty. v. Tim Jones Props., Inc.*, 539 S.E.2d 167, 170 (Ga. 2000) (county produced no evidence of “public benefit” from its zoning decision); *Kempf v. City of Iowa City*, 402 N.W.2d 393, 399–400 (Iowa 1987) (city did not prove that its downzoning of claimant’s lot would “contribute to public health, safety, or welfare”); *Snake River Brewing Co. v. Town of Jackson*, 39 P.3d 397, 409 (Wyo. 2002) (“There is nothing in the record showing that the benefit to the Town from excluding Snake River is equal to the damage caused Snake River from the exclusion.”).

²⁸⁰ *Town of Paradise Valley v. Gulf Leisure Corp.*, 557 P.2d 532, 541 (Ariz. Ct. App. 1976) (citing *Vill. of Euclid v. Ambler Realty, Co.*, 272 U.S. 365 (1926)).

²⁸¹ *Id.*

²⁸² *City of Glendale v. Aldabbagh*, 939 P.2d 418, 421–22 (Ariz. 1997).

²⁸³ *Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 13–14 (Ala. 2012).

²⁸⁴ *Homewood Citizens Ass’n v. City of Homewood*, 548 So. 2d 142, 143 (Ala. 1989).

²⁸⁵ *Id.* at 144 (citing *Nw. Builders, Inc. v. Moore*, 475 So. 2d 153 (Miss. 1985)).

²⁸⁶ 789 So. 2d 154 (Ala. 2000).

land use law.²⁸⁷ If the owner meets this initial burden, then the municipality may prohibit the use only if the evidence shows that the landowner is attempting to alter the use in some way that renders it a different use; for example, by adding structural elements that would “extend the useful life” of a fixture.²⁸⁸ Otherwise, the municipality must prove that its action is justified by reference to a comprehensive plan.²⁸⁹

In *Budget Inn*, the Supreme Court of Alabama held that a city failed to provide an adequate justification for a new ordinance that divested existing signs of their vested, nonconforming use status if they were altered “in any manner.”²⁹⁰ As applied to an inn whose lawful, preexisting sign it rendered unlawful, the ordinance was therefore arbitrary and capricious and constitutionally invalid.²⁹¹ The court declared, “A municipality may not simply divest a property owner of a vested right, without compensation, and any attempt to do so violates the most fundamental principles of due process.”²⁹² The status of vested rights is thus conferred not merely by statute, nor by a specific constitutional text, but by principles of fundamental law that precede Alabama law and its constitution. From this general proposition, the court reasoned not that the city was absolutely prohibited from divesting existing, lawful uses, but that it must have a particular, strong justification.²⁹³ And the justification that the city offered for this divestment was inadequate.²⁹⁴

The city argued that the inn lost its vested use right when ownership of the inn changed hands.²⁹⁵ But the court rejected that argument:

This Court has acknowledged that a municipality, acting through a zoning ordinance, may pursue the objective of reducing gradually, and then eventually eliminating entirely, certain uses of property within certain areas. The reason a municipality enacts a zoning ordinance pursuant to a

²⁸⁷ Dixon v. City of Auburn, 391 So. 3d 877, 881 (Ala. 2023).

²⁸⁸ Bd. of Zoning Adjustment v. Tacala, Inc., 142 So. 3d 624, 632–33 (Ala. Civ. App. 2013).

²⁸⁹ *Budget Inn of Daphne*, 789 So. 2d at 158.

²⁹⁰ *Id.* at 160.

²⁹¹ *Id.* at 161.

²⁹² *Id.* at 159.

²⁹³ *Id.* at 158.

²⁹⁴ *Id.* at 159.

²⁹⁵ *Id.*

comprehensive plan is to create a planned consistency in land-use patterns. However, an existing nonconforming use is a vested property right that a zoning ordinance may not abrogate except under limited circumstances. The general rule is that a mere change in legal ownership or operating name is not one of those circumstances.²⁹⁶

The underlying reason for this doctrine is “that our system favors the free alienability of property.”²⁹⁷ To allow a city to divest a parcel of vested uses anytime the ownership of the parcel changed would be to make certain use rights inalienable.

Some states employ different presumptions in reviewing different kinds of zoning regulatory decisions. The Supreme Court of Nebraska is conflicted on the constitutional status of vested land uses. The court has “held that a zoning ordinance cannot take away a vested property right.”²⁹⁸ This means that “once a property owner has put property to a use authorized by existing zoning laws, the zoning laws cannot be changed to disallow that use.”²⁹⁹ However, in other cases the court has allowed amortization of nonconforming uses where the land user has interrupted or abandoned the use, or where the amortization period is long enough, in the judgment of local officials, to enable the land users “to amortize and minimize their losses.”³⁰⁰ In such cases, the burden rests on the land user to prove that the amortization is arbitrary or unreasonable.³⁰¹ The court has never made an effort to reconcile these different lines of cases, nor has the court expressly overturned either of them.

In a third line of cases, those involving discretionary use permits for uses not prohibited by law, the Supreme Court of Nebraska takes a different approach. It protects a planned land use, which was lawful when initiated, with a presumption of continued lawfulness. In *Whitehead Oil Company v.*

²⁹⁶ *Id.* (citations omitted).

²⁹⁷ *Id.*

²⁹⁸ *U.S. Cold Storage, Inc. v. City of La Vista*, 831 N.W.2d 23, 34 (Neb. 2013) (citing *City of Omaha v. Glissmann*, 39 N.W.2d 828 (Neb. 1949); *Cassel Realty Co. v. City of Omaha*, 14 N.W.2d 600 (Neb. 1944); *Baker v. Somerville*, 293 N.W. 326 (Neb. 1940)).

²⁹⁹ *Id.* (citing same).

³⁰⁰ *Wolf v. City of Omaha*, 129 N.W.2d 501, 515 (Neb. 1964); *accord City of Lincoln v. Bruce*, 375 N.W.2d 118, 120, 122 (Neb. 1985).

³⁰¹ *Wolf*, 129 N.W.2d at 508; *Bruce*, 375 N.W.2d at 122.

City of Lincoln, the city denied Whitehead Oil's application for a use permit to operate a gasoline service station and convenience store.³⁰² When Whitehead Oil acquired the parcel, service stations were permitted as of right.³⁰³ The city later amended its comprehensive plan and zoning ordinance to require use permits for commercial uses such as Whitehead Oil's.³⁰⁴ Whitehead Oil then applied for a use permit which the city denied after extensive deliberations.³⁰⁵

The Supreme Court of Nebraska began its analysis on appeal by reiterating the deferential standard of review for legislative zoning decisions—that a Nebraska court is to overturn a *legislative* zoning decision only if it is “illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.”³⁰⁶ And a reviewing court should uphold a legislative zoning action absent “evidence of fraud, informality or illegality in proceedings, or absence of jurisdiction.”³⁰⁷ Nevertheless, the court declared, when reviewing discretionary zoning decisions, such as whether or not to grant a use permit, the standard of review is less deferential.³⁰⁸ “Decisions concerning the issuance of use permits involve the exercise of discretion in the application of use standards to the specific characteristics of the property in question. Such decisions are therefore quasi-judicial in nature”³⁰⁹ In such cases, “the reviewing court reviews the action *de novo* on the record and reaches a conclusion independent of the factual findings of the lower court.”³¹⁰

Furthermore, Nebraska employs vested liberty estoppel to protect reliance by property owners. While a landowner “has no vested right in the continuity of zoning in a particular area so as to preclude subsequent amendment,” a new zoning ordinance may not be applied retrospectively “where

³⁰² 515 N.W.2d 390, 396 (Neb. 1994).

³⁰³ *Id.* at 393.

³⁰⁴ *Id.* at 394.

³⁰⁵ *Id.* at 395–96.

³⁰⁶ *Id.* at 392–93 (quoting *Bowman v. City of York*, 482 N.W.2d 537, 544 (Neb. 1992)).

³⁰⁷ *Id.* at 392.

³⁰⁸ *Id.* at 392–93.

³⁰⁹ *Id.* at 393 (citing *Mossman v. City of Columbus*, 449 N.W.2d 214 (Neb. 1989)).

³¹⁰ *Id.* (citing *Rigel Corp. v. Cutchall*, 511 N.W.2d 519 (Neb. 1994); *Vill. of Brady v. Melcher*, 502 N.W.2d 458 (Neb. 1993)).

an applicant has substantially changed position in good-faith reliance upon the existing zoning.”³¹¹ The court explained,

This substantial reliance exception is basically an application of the rule that a zoning ordinance may not, without providing a reasonable plan for discontinuance, operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the prohibitory ordinance.³¹²

Whitehead Oil had not done enough to be vested in the strong sense that it would “deprive the city of the right to exercise its police power.”³¹³ But the lawfulness of its proposed use was sufficient to raise the issue whether the city “acted arbitrarily and unreasonably or in bad faith.”³¹⁴ And though the court parroted dicta from earlier decisions that the city was entitled to a presumption that it acted in good faith,³¹⁵ the court placed the burden on the city to show that its denial of Whitehead Oil’s permit was motivated by “a legitimate governmental interest in conformance with the comprehensive plan.”³¹⁶ The record contained no evidence that the city acted for the general welfare, and the court therefore drew the inference that the city “merely thwarted Whitehead Oil’s previously permissible planned use” and concluded that “the city acted arbitrarily and capriciously.”³¹⁷

Courts often presume the lawfulness of an established or proposed use where it appears that local officials are not applying general rules equally to all affected land users.³¹⁸ Before bright-line rules against so-called “spot

³¹¹ *Id.* at 397 (quoting *Whitehead Oil Co. v. City of Lincoln*, 451 N.W.2d 702, 706 (Neb. 1990)).

³¹² *Id.* (quoting *Whitehead Oil Co.*, 451 N.W.2d at 706).

³¹³ *Id.*

³¹⁴ *Id.* at 397–98 (quoting *Whitehead Oil Co.*, 451 N.W.2d at 707).

³¹⁵ *Id.* at 398.

³¹⁶ *Id.* at 400.

³¹⁷ *Id.*

³¹⁸ *See, e.g.*, *Miller v. City of Albuquerque*, 554 P.2d 665, 668–69 (N.M. 1976) (holding that failure by a local government to follow its own rules for change of zoning ordinance was a violation of procedural due process); *Nasierowski Bros. Inv. v. City of Sterling Heights*, 949 F.2d 890, 891, 896–97 (6th Cir. 1991) (holding that landowner had procedural due process right to a hearing on the proposed amendment where landowner made substantial investments in proposed use its property right was vested and when city councilman “moved to arbitrarily reclassify” landowner’s parcel “[w]ithout stating a rationale”).

zoning” developed, courts dealt with zoning decisions that appeared discriminatory by requiring officials to justify the decisions by reference to neutral, generally applicable rules or principles or changes in the facts on the ground.³¹⁹ Where local officials failed to offer a rational basis for a zoning ordinance amendment divesting a vested use right, or for refusing to issue a permit, and it appeared that similarly situated land users were not so divested, courts concluded that the official action was unreasonable and therefore void.³²⁰ Even California adheres to this practice.³²¹ It was not always clear in those early decisions why the courts reversed the usual presumption in favor of local governments. It may have been that the established or proposed land use was vested. Or it may have been a concern about equal protection of the laws. Or it might have been both. But in all such cases, the asserted land use was lawful at the time it was made or proposed, and that seems to have been an important consideration.³²²

6. VESTED RIGHTS IN TAKINGS CASES

6.1. Different Showings in Different Cases

Vested uses play a more complex role in takings clause claims, such as those asserted by property owners in inverse condemnation actions. Constitutional provisions that require governments to pay just compensation for expropriations of private property, such as the Takings Clause of the Fifth Amendment to the Constitution of the United States and analogous state constitutional provisions, do not fully immunize property rights.³²³ Indeed,

³¹⁹ *Miller*, 554 P.2d at 668 (holding though landowner had no vested right in any particular zoning classification, a down-zoning can only be justified upon a showing that the previous, more favorable zoning classification was a mistake).

³²⁰ *Nott v. Wolff*, 163 N.E.2d 809, 813–14 (Ill. 1960); *Com. Props., Inc. v. Peternel*, 211 A.2d 514, 518–19 (Pa. 1965).

³²¹ *Sunset View Cemetery Ass’n v. Kraitz*, 16 Cal. Rptr. 317, 322 (Ct. App. 1961) (“Nothing in the record in the instant case indicates that the ordinance formed any part of a zoning plan . . . the enactment of the ordinance stemmed from the county’s attempt to frustrate respondent’s [sic] plans”).

³²² *Wolff*, 163 N.E.2d at 813–14; *Com. Props., Inc.*, 211 A.2d at 519; *Miller*, 554 P.2d at 668–69.

³²³ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

they expressly contemplate that sovereign governments retain the power of eminent domain and may take private property under the authority of appropriate legislation.³²⁴ However, state and federal constitutional takings clauses partly immunize private property rights by requiring governments to pay a price for taking property in the amount of just compensation to the owner.³²⁵

In a substantial class of takings cases, the first question arises whether an official action has taken an owner's property rights at all. Sometimes called "regulatory takings" cases, these cases typically involve an official action that does not resemble eminent domain on its face but nevertheless has the effect of depriving an owner of some right, usually a use right, that the owner enjoyed before the official act.³²⁶ In such cases, someone must first bear the burden of proving that the owner has been deprived of a property right, or not.³²⁷ Then someone must show whether any property interest is the kind of property right that is protected by constitutional takings clauses.³²⁸ If the owner does have some property interest or expectation at stake, it might not be a vested use. For example, a preexisting, now nonconforming use would not be vested if the owner has abandoned, interrupted, or changed it to a different use.³²⁹ Nor would an owner's intention to make a use establish a vested use right without an actual use of the land as intended, so a court may need to decide whether an aggrieved landowner took action sufficient to vest the right.³³⁰

Even if the owner lost a valuable use right as a result of official action, however, some state constitutions may not require compensation unless the

³²⁴ See *id.*

³²⁵ See, e.g., *Bell v. Town of Wells*, 557 A.2d 168, 176–79 (Me. 1989) (holding that a Maine statute that conferred on the public a new recreation easement over private oceanfront land, which exceeded the scope of the intertidal easement recognized at common law, was a taking as a matter of law under both Maine and United States constitutions).

³²⁶ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008–09, 1014–15 (1992).

³²⁷ See *Neifert v. Dep't of the Env't*, 910 A.2d 1100, 1121–22 (Md. 2006).

³²⁸ *Nekrilov v. City of Jersey City*, 45 F.4th 662, 669–70 (3d Cir. 2022).

³²⁹ See, e.g., *City of Lincoln v. Bruce*, 375 N.W.2d 118, 120–22 (Neb. 1985).

³³⁰ *Glissmann*, 39 N.W.2d at 833–34.

owner has suffered a “total” or “substantial” deprivation of use.³³¹ So someone must show and a court must determine how much of the use right was abrogated. If the alleged taking is an exaction or conditional appropriation, then the government may avoid paying compensation only if the condition it requires is rationally related and roughly proportionate to a legitimate state interest.³³² This is another juncture at which burdens of proof matter, as the U.S. Supreme Court has expressly recognized.³³³ Also, if there is a taking, then there must be a determination of how much compensation is just or due.³³⁴ Courts must decide who bears the burdens of proof or persuasion on all of these issues.³³⁵

6.2. States that Have Weakened Vested Rights for Takings Claims

Not all states recognize vested property rights as property protected by constitutional just compensation provisions. Different state constitutions provide different degrees of protection for expropriation of property rights, and different state supreme courts interpret similar state constitutional takings clauses differently. Just as some states have abolished vested rights protections for due process purposes, some provide little or no compensation guarantee for established, lawful uses that are abrogated by a retrospective change in the law. The Supreme Court of Alabama does not recognize compensable, regulatory takings at all.³³⁶ Some state supreme courts, such as Montana’s and New Mexico’s, interpret their state constitutions’ takings clauses to be coterminous with the Takings Clause of the Fifth Amendment

³³¹ Barton v. City of Norwalk, 161 A.3d 1264, 1271 (Conn. 2017); *Nekrilov*, 45 F.4th at 669–70 (stating that a taking occurs under the federal Constitution when a regulation denies a property owner all economically beneficial use of his or her property).

³³² Dolan v. City of Tigard, 512 U.S. 374, 386, 390–91 (1994).

³³³ *Id.* at 395–96.

³³⁴ See, e.g., *Juliano v. Montgomery–Otsego–Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 328–29 (N.D.N.Y. 1997).

³³⁵ See, e.g., *Dolan*, 512 U.S. at 395 (holding that the city failed to meet its burden of proving rational relationship to one exaction and rough proportionality of the other); *F.P. Dev., LLC v. Charter Twp. of Caton*, 16 F.4th 198, 206 (6th Cir. 2021) (holding that the local government “fail[ed] to carry its burden to show that it made the required individualized determination” justifying exaction).

³³⁶ *Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 13–14 (Ala. 2012).

and employ the balancing tests employed by the U.S. Supreme Court to evaluate regulatory takings claims arising under their state constitutions.³³⁷

The Supreme Court of Mississippi is of two minds on the question whether vested uses are property for just compensation purposes. In a 2001 decision, it declared that a local government may destroy vested use rights without paying compensation as long as it uses its police power rather than the eminent domain power.³³⁸ On that ground, it affirmed a trial court ruling that a local government owed no compensation to a landowner for enacting an ordinance divesting the landowner of vested rights to maintain signs on the premises.³³⁹ But as the dissent pointed out, the same court in an earlier case held that vested, nonconforming uses are property rights and are protected by the Mississippi Constitution.³⁴⁰ The court has not overturned that earlier precedent nor called it into question.³⁴¹ And indeed, the court later cited that earlier precedent as (distinguishable) authority in 2014.³⁴²

6.3. States that Presume Vested Uses are Compensable Property

Here again, state decisions that provide *no* protection against abrogation of vested use rights are outliers. Many states presume that a lawful, established use is a property right and that a legal change which divests such a use is a taking that requires compensation.³⁴³ Though the government may prove otherwise,³⁴⁴ the burden rests upon the government.³⁴⁵ As the Texas

³³⁷ *Buhmann v. State*, 201 P.3d 70, 85 (Mont. 2008); *Miller v. City of Albuquerque*, 554 P.2d 665, 667 (N.M. 1976).

³³⁸ *Red Roof Inns, Inc. v. City of Ridgeland*, 797 So. 2d 898, 900–03 (Miss. 2001).

³³⁹ *Id.* at 903.

³⁴⁰ *Id.* at 904 (McRae, Presiding J., dissenting) (citing *Barrett v. Hinds Cnty.*, 545 So. 2d 734, 737 (Miss. 1989)).

³⁴¹ *Id.*

³⁴² *Pearson's Fireworks, Inc. v. City of Hattiesburg*, 212 So. 3d 778, 785 (Miss. 2014).

³⁴³ *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 432 P.3d 976, 986 (Idaho 2018); *Muskin v. State Dept. of Assessments & Tax'n*, 30 A.3d 962, 973–74 (Md. 2011); *James v. City of Greenville*, 88 S.E.2d 661, 663–64, 669 (S.C. 1955); *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953).

³⁴⁴ *Collins v. City of Spartanburg*, 314 S.E.2d 332, 333 (S.C. 1984) (holding that the city met its burden by proving that amortized nonconforming use was “breeding grounds for rats and other vermin and the properties were unsightly due to accumulated trash, debris, and weeds”).

³⁴⁵ *James*, 88 S.E.2d at 663–64, 669; *Allen*, 254 S.W.2d at 761.

Supreme Court explained, where vested non-conforming uses “are not shown to constitute nuisances, and do not appear to be harmful in any way to public health, safety, morals, or welfare,” to compel their abrogation or removal to another district “would be an unreasonable exercise of [a local government’s] police power and would constitute a taking of their property in violation of” the Texas Constitution.³⁴⁶

In some states, the presumption is irrebuttable that a preexisting, lawful use is vested property for which compensation is due.³⁴⁷ These states recognize preexisting, lawful land uses as vested property rights within the meaning of constitutional takings doctrines and require just compensation when a change in zoning law abrogates such uses.³⁴⁸ Nor can a local government avoid the duty to pay compensation by allowing an amortization period for the vested use.³⁴⁹ The zoning authority who attempts to terminate a vested, nonconforming use must make the choice “of allowing the property owners to continue the nonconforming use or compensating the property owner for the value of the taken use.”³⁵⁰

So, for example, a Florida court ruled in favor of a private landowner who claimed property in soil accreted to its riparian land after placing on the government the burden of proving that the accreted soil was not property of the landowner.³⁵¹ The court observed that title to accreted lands vests in the owner of the abutting land at common law.³⁵² The law recognizes an exception “where the riparian himself causes the accretion” because that

³⁴⁶ *Allen*, 254 S.W.2d at 761.

³⁴⁷ *See Muskin*, 30 A.3d at 974; *Hoffmann v. Kinealy*, 389 S.W.2d 745, 754–55 (Mo. 1965).

³⁴⁸ *Ailes v. Decatur Cnty. Area Plan. Comm’n*, 448 N.E.2d 1057, 1060 (Ind. 1983), *overruled by*, *Bd. of Zoning Appeals v. Leisz*, 702 N.E.2d 1026 (Ind. 1998); *Hoffmann*, 389 S.W.2d at 753–55; *Town of Midland v. Wayne*, 773 S.E.2d 301, 309 (N.C. 2015). The Indiana Supreme Court has since overruled the holding in *Ailes* that the termination of the claimant’s lawful, vested use was per se invalid as a violation of due process. *Leisz*, 702 N.E.2d at 1032. But the court seems not to have overturned the holding that such termination constitutes a taking of property for which compensation is owed.

³⁴⁹ *Hoffman*, 389 S.W.2d at 754–55.

³⁵⁰ *Odegard Outdoor Advert., LLC v. Bd. of Zoning Adjustment*, 6 S.W.3d 148, 150 (Mo. 1999) (citing *City of Monett v. Buchanan*, 411 S.W.2d 108, 115 (Mo. 1967)).

³⁵¹ *Bd. of Trs. of the Internal Improvement Tr. Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 212, 214–15 (Fla. Dist. Ct. App. 1973).

³⁵² *Id.* at 211–12.

would be tantamount to theft of the land from the state, which owns below the mean high water mark.³⁵³ The government produced no evidence that the landowner did anything to cause the accretion, and the court presumed the accretion to be lawful.³⁵⁴ The court also placed on the government the burden of providing legal reasons for quieting title in the state, a burden that the government did not meet.³⁵⁵

Arizona has codified the presumption in favor of just compensation for abrogation or expropriation of vested property rights. After the U.S. Supreme Court handed down its controversial decision in *Kelo v. City of New London*,³⁵⁶ which allows governments to take property for any public “purpose” and defers to local governments on what purposes are public,³⁵⁷ Arizona adopted a more restrictive law limiting lawful exercises of eminent domain.³⁵⁸ The law also requires compensation for regulatory takings of vested property rights.³⁵⁹ The measure secures “existing rights to use, divide, sell or possess private real property” against “any land use law enacted after the date the property is transferred to the owner” which diminish the value of the real estate.³⁶⁰ The statute expressly places on the “state or the political subdivision of this state that enacted the land use law” the burden of proving that the new law is declaratory of a common-law nuisance or meets one of the other statutory exemptions.³⁶¹

In takings cases, as in validity challenges, states protect vested property uses even though they generally allow uncompensated abrogation of unvested liberties. For example, Connecticut generally requires compensation for termination of use rights only where “the property cannot be utilized for any reasonable and proper purpose,” as evidenced by the complete or

³⁵³ *Id.* at 212 (citing *Brundage v. Knox*, 117 N.E. 123 (Ill. 1917); *State v. Sause*, 342 P.2d 803 (Or. 1959)).

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 214.

³⁵⁶ 545 U.S. 469, 489–90 (2005).

³⁵⁷ *Id.* at 480. The text of the Fifth Amendment takings clause permits takings only for a public use. U.S. CONST. amend. V.

³⁵⁸ Alan Stephenson & Rob Lane, *Arizona's Regulatory Takings Measure: Proposition 207*, 60 *Plan. & Env't L.* 12, 12 (2008).

³⁵⁹ *Id.* at 13.

³⁶⁰ ARIZ. REV. STAT. ANN. § 12-1134(A) (2006).

³⁶¹ *Id.* § 12-1134(C).

near-complete destruction of the parcel's fair market value.³⁶² The “underlying principle is that land use regulation is constitutionally permissible as long as it does not amount to practical confiscation or inverse condemnation of a property, and a confiscation or inverse condemnation ordinarily does not occur unless the landowner is deprived of any reasonable use of the property.”³⁶³ Nevertheless, “a landowner has a constitutionally protected property right to the *continued* use of an existing, legally nonconforming building.”³⁶⁴ The “deprivation of that right by regulation” is “an inverse condemnation of the landowner’s vested property right in the existing, legally nonconforming use or structure, even if the landowner could use the property for some other reasonable purpose,” and a government that abrogates the right owes the owner just compensation.³⁶⁵

7. USES THAT ARE NOT VESTED

7.1. No Vested Use, Burden on Land User

When land users have no vested use rights, courts generally place the burden on them to disprove the rationality of new land use regulations or to make a *prima facie* showing that a state action constituted a taking of property for which it owes compensation.³⁶⁶ In validity challenges, such as those arising under due process and law of the land clauses, an owner whose use is not vested “has the burden to establish by a preponderance of the evidence that the decision by the governmental body to deny the variance has no substantial relationship to public health, safety, morals, or general welfare of the municipality.”³⁶⁷ Courts will therefore uphold a legal change as valid as long as it rests on any rational basis, sometimes with, sometimes without,

³⁶² *Barton v. City of Norwalk*, 161 A.3d 1264, 1271 (Conn. 2017) (quoting *City of Bristol v. Tilcon Materials, Inc.*, 931 A.2d 237, 256 (Conn. 2007)). A diminution of 80% is enough to require compensation. *Id.* at 1272.

³⁶³ *Mayer-Wittmann v. Zoning Bd. of Appeals*, 218 A.3d 37, 48 (Conn. 2019) (citing *Rural Water Co. v. Zoning Bd. of Appeals*, 947 A.2d 944 (Conn. 2008)).

³⁶⁴ *Id.* at 49 (citing *Petruzzi v. Zoning Bd. of Appeals*, 408 A.2d 243 (Conn. 1979)).

³⁶⁵ *Id.* at 49, 51.

³⁶⁶ *See e.g.*, *Gackler Land Co., Inc. v. Yankee Springs Twp.*, 398 N.W.2d 393, 396–97 (Mich. 1986).

³⁶⁷ *Toups v. City of Shreveport*, 60 So. 3d 1215, 1218 (La. 2011) (citing *Palermo Land Co. v. Planning Comm’n*, 561 So. 2d 482, 493 (La. 1990)).

evidentiary support for the local government's proffered reasons.³⁶⁸ In takings cases, such as inverse condemnation actions, the land user must prove that some state action or change in the positive law deprived him of a property right. Otherwise, the local government that changed the law owes the land user no compensation.

Consider Iowa. Where a down-zoning decision of a local government would deprive an owner or land user of an established, lawful use, the Iowa Supreme Court has declared that the use rights are vested, and has placed the burden on the government to prove that its action would "contribute to public health, safety, or welfare."³⁶⁹ By contrast, where a down-zoning decision adversely affects owners' liberty to make a later development of undeveloped tracts of land, the property has "no vested right" at stake.³⁷⁰ The court in such cases requires the local government to provide its reasons for the change in law but will rule in favor of the local government if the reasons offered are "debatably reasonable."³⁷¹ A tie goes to the zoning authority; if there is some evidentiary basis for the rule change and minds can reasonably differ on its justification, then the new rule is valid.³⁷²

A use or intended use may not qualify as a vested use right for various reasons. In a common case, the landowner has never made the use and is asking for a permit, variance, or change in the law to allow the use in the future or has made the use in the past but not lawfully.³⁷³ At least four different reasons are offered for placing the burden on the landowner in such cases. These are (1) that the owner was not making a preexisting use of the type asserted, (2) that the use was unlawful even before the change in positive law, (3) that the use was made as a matter of privilege, not right, and (4) that the right asserted is not part of an owner's estate under settled common-law doctrines.³⁷⁴

³⁶⁸ See, e.g., *Stone v. City of Wilton*, 331 N.W.2d 398, 402–03 (Iowa 1983).

³⁶⁹ *Kempf v. City of Iowa City*, 402 N.W.2d 393, 400 (Iowa 1987).

³⁷⁰ *Neuzil v. City of Iowa City*, 451 N.W.2d 159, 164 (Iowa 1990).

³⁷¹ *Id.* at 166.

³⁷² *Id.* at 167.

³⁷³ See e.g., *Toups v. City of Shreveport*, 60 So. 3d 1215, 1216–17, 1220 (La. 2011) (affirming denial of zoning amendment to allow a proposed liquor store).

³⁷⁴ See discussion *infra* Sections 7.2–7.5.

7.2. No Existing Use and No Reliance

First, a use is not vested if the landowner has not yet made it and has not relied to his detriment upon any official permission to begin making it.³⁷⁵ If there is no history of the particular use on that particular parcel in that particular neighborhood prior to a change in the law or official action prohibiting the use, and no record of the neighbors tolerating it as reasonable and lawful (or not), then it cannot be vested.³⁷⁶ An “inchoate scheme” or “forward-looking” plan to make a particular use on a particular parcel of land does not establish a vested right to make the intended use.³⁷⁷ For a nonconforming use to vest, it must “be commenced prior to the enactment of the ordinance restricting such use.”³⁷⁸ At the very least, the landowner must have undertaken to begin the use before the zoning rules changed.³⁷⁹

In a typical case, a landowner, tenant, or buyer challenges a land use enactment not on the ground that it affects a particular use already existing on the land but that by placing the tract in a less permissive zone than it occupied before, the enactment has limited the scope of uses that *might* be made on the land, or which it hoped to make, and thus reduces its fair market value.³⁸⁰ In one such case, the California Supreme Court reviewed a takings challenge to a moratorium that narrowed the scope of allowed uses on a parcel.³⁸¹ The court observed, “Plaintiffs do not allege that this moratorium interfered with any use of the land which they then planned nor do they allege that they then challenged this reclassification.”³⁸² Citing *Euclid*, which involved “allegations almost identical” to the case before it,³⁸³ the court held

³⁷⁵ See, e.g., *Bevan v. Brandon Twp.*, 475 N.W.2d 37, 45–46 (Mich. 1991); *Gackler Land Co. v. Yankee Springs Twp.*, 398 N.W.2d 393, 398–99 (Mich. 1986); *Russell v. Flathead Cnty.*, 67 P.3d 182, 188 (Mont. 2003); *Brazos Land, Inc. v. Bd. of Cnty. Comm’rs*, 848 P.2d 1095, 1097 (N.M. Ct. App. 1993); *Clayland Farm Enters. v. Talbot Cnty.*, 987 F.3d 346, 354–55 (4th Cir. 2021).

³⁷⁶ *City of Las Cruces v. Huerta*, 692 P.2d 1331, 1334–35 (N.M. Ct. App. 1984).

³⁷⁷ *Houston v. Bd. of City Comm’rs*, 543 P.2d 1010, 1019 (Kan. 1975); accord *Nekrilov v. City of Jersey City*, 45 F.4th 662, 670 (3d Cir. 2022).

³⁷⁸ *Goodwin v. City of Kan. City*, 766 P.2d 177, 181 (Kan. 1988) (citing *Huerta*, 692 P.2d 1331).

³⁷⁹ *Seguin v. City of Sterling Heights*, 968 F.2d 584, 591 (6th Cir. 1992).

³⁸⁰ See *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1193 (Me. 2004).

³⁸¹ *HFH, Ltd. v. Superior Ct.*, 542 P.2d 237, 239 (Cal. 1975).

³⁸² *Id.*

³⁸³ *Id.* at 241 (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

that an inverse condemnation action would not lie for a “mere reduction of market value.”³⁸⁴ To make the action succeed, the owner must first show that he possessed “a right to continue a *use* instituted before the enactment of a more restrictive zoning.”³⁸⁵ The plaintiffs in the case “failed to allege any existing use that was in nonconformity with the residential zoning classification now in effect.”³⁸⁶

7.3. Use Contrary to Law

Second, a use is unvested where it was never lawful; there is no property right to vest if the desired use would be a legal wrong.³⁸⁷ The use might be unvested because it constitutes a legal wrong at common law, such as a nuisance, or because it was not allowed as a matter of right under the preexisting positive law when proposed or begun, or both.³⁸⁸ A “use which from its inception violated a zoning ordinance” enjoys no immunity from the ordinance because it is protected by “no lawful right to continue.”³⁸⁹ And a use that could have been restrained “in a common-law action,” such as for public nuisance, cannot be vested because it “was already contrary to existing law.”³⁹⁰ Under the U.S. Supreme Court’s interpretation of the Fifth Amendment Takings Clause, even a “complete deprivation of use will not require compensation if the challenged limitations ‘inhere . . . in the restrictions that background principles of the State’s law of property and nuisance already placed upon land ownership.’”³⁹¹

³⁸⁴ *Id.* at 240 (emphasis removed).

³⁸⁵ *Id.* at 242.

³⁸⁶ *Id.* at 242 n.12.

³⁸⁷ See, e.g., *Goodwin v. City of Kan. City*, 766 P.2d 177, 182 (Kan. 1988); *City of Las Cruces v. Huerta*, 692 P.2d 1332, 1334 (N.M. Ct. App. 1984); See *Neifert v. Dep’t of the Env’t*, 910 A.2d 1100, 1122 (Md. 2006).

³⁸⁸ See, e.g., *Mutschler v. City of Phx.*, 129 P.3d 71, 76–77 (Ariz. Ct. App. 2006) (holding that the operation of a “live sex act business” was lawfully prohibited by new ordinance because it was a public nuisance at common law and city did not expressly authorize it by ordinance or permit).

³⁸⁹ *Goodwin*, 766 P.2d at 181 (citing *Hudson v. Paradise*, 143 A.2d 421 (N.H. 1958)).

³⁹⁰ *Mutschler*, 129 P.3d at 76–77 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992)).

³⁹¹ *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017) (alteration in original) (quoting *Lucas*, 505 U.S. at 1029).

Arizona’s statutory rule requiring compensation when a new law abrogates a vested property right retrospectively does not apply to any law that, among other things, restricts “the use or division of real property commonly and historically recognized as a public nuisance under common law.”³⁹² This exemption makes sense on the classic theory of vested rights—that an act which would be wrongful at common law was never part of an owner’s estate and therefore cannot be a vested right. Significantly, though the government bears the burden of proving that the regulated use was unlawful at common law if the use was vested,³⁹³ Arizona courts continue to place the burden of proof on a landowner or land user whose asserted right is not vested.³⁹⁴ In a validity challenge, such as one alleging a due process violation, “courts presume that zoning ordinances are valid,”³⁹⁵ and an unvested user “objecting to an ordinance carries the burden of demonstrating its unconstitutionality.”³⁹⁶ In reviewing a regulatory taking claim for loss of an unvested use, the trial court is supposed to conduct a *Penn Central* balancing analysis.³⁹⁷ That analysis requires a landowner to prove that the regulation interfered with an investment-backed expectation.³⁹⁸

7.4. Privilege, Not a Right

Third, privileges to use, whether created by positive enactments or by permits, are not vested rights.³⁹⁹ A landowner has “no vested right in existing or anticipated zoning ordinances.”⁴⁰⁰ Nor are officially-issued permits immune from subsequent revocation “because a permit issued under the police

³⁹² ARIZ. REV. STAT. ANN. § 12-1134(B)(2) (2006).

³⁹³ *Id.* § 12-1134(C).

³⁹⁴ *Coconino Cnty. v. Calkins*, No. 1 CA-CV 18-0098, 2019 WL 1076238, at *4 (Ariz. Ct. App. Mar. 7, 2019); *Bonito Partners, LLC v. City of Flagstaff*, 270 P.3d 902, 906 (Ariz. Ct. App. 2012).

³⁹⁵ *Calkins*, 2019 WL 1076238, at *4 (citing *City of Phx. v. Oglesby*, 537 P.2d 934 (Ariz. 1975)).

³⁹⁶ *Bonito Partners*, 270 P.3d at 906 (citing *City of Phx. v. Fehlner*, 363 P.2d 607, 611 (Ariz. 1961)).

³⁹⁷ *Id.* at 908–09.

³⁹⁸ *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 121, 136 (1978).

³⁹⁹ *Heeter*, *supra* note 88, at 67; *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 294 (Minn. 1980).

⁴⁰⁰ *HFH, Ltd. v. Superior C.t.*, 542 P.2d 237, 242 (Cal. 1975) (emphasis removed) (quoting *Morse v. Cnty. of San Luis Obispo*, 55 Cal. Rptr. 710 (Dist. Ct. App. 1967)).

power confers no rights upon the permittee.”⁴⁰¹ So, for example, liquor licenses and permits to operate adult entertainment enterprises are not vested and a municipal government may refuse to renew them without constitutional consequence.⁴⁰² No one has a vested right to receive a particular public service, such as sewer services.⁴⁰³ Nor does any landowner have a vested right to be included in a particular municipality or taxing authority.⁴⁰⁴

A right may be unvested because it is not grounded in any fundamental law and is therefore contingent entirely upon positive law.⁴⁰⁵ No person has a vested right in the continuation of a posited rule that the legislative authority has the power to alter.⁴⁰⁶ Therefore, no one has a vested property right in any posited zoning classification or rule, even if a local government subsequently changes the rule “shabbily and unfairly.”⁴⁰⁷

Alternatively, a use may be unvested because the permission needed to allow the proposed use is within the discretion of the legislative authority within the community, and is thus a matter of privilege.⁴⁰⁸ As long as it remains discretionary, the party seeking permission does not act reasonably in relying upon it.⁴⁰⁹ Also, the right to exercise a permitted privilege is contingent upon the privilege holder’s satisfaction of any conditions placed on it. So an Arizona court held that a land user had no vested right in a special-use permit whose conditions the land user violated; the land user had falsely represented that it would operate its business within the stated conditions.⁴¹⁰

⁴⁰¹ Heeter, *supra* note 88, at 67.

⁴⁰² *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 361 (Ga. 1997); *Davidson v. City of Clinton*, 826 F.2d 1430, 1434 (5th Cir. 1987) (“Clearly, one cannot claim a vested property right in a license to sell beer, since a license is but a revocable permit or alienable privilege.” (citing *Miller v. Bd of Supervisors*, 94 So. 2d 604 (Mo. 1957))).

⁴⁰³ *Neifert v. Dep’t of the Env’t*, 910 A.2d 1100, 1122 (Md. 2006).

⁴⁰⁴ *U.S. Cold Storage, Inc. v. City of La Vista*, 831 N.W.2d 23, 34 (Neb. 2013).

⁴⁰⁵ *Ridgewood Dev.*, 294 N.W.2d at 294-95 (“It has long been accepted that there are no vested rights in privileges granted by statute.” (collecting cases)).

⁴⁰⁶ *Stone Mountain Indus., Inc. v. Wilhite*, 144 S.E.2d 357, 358 (Ga. 1965); *Ridgewood Dev.*, 294 N.W.2d at 295.

⁴⁰⁷ *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 131 (2d Cir. 1998).

⁴⁰⁸ See, e.g., *Goldrush II v. City of Marietta*, 482 S.E.2d 347, 359 (Ga. 1997); *Metro. Dev. Comm’n v. Pinnacle Media, LLC*, 836 N.E.2d 422, 427-28 (Ind. 2005).

⁴⁰⁹ *Goldrush II*, 482 S.E.2d at 359-61.

⁴¹⁰ *Ariz. Motorsports Park, LLC v. Maricopa Cnty.*, No. 1 CA-CV 08-0464, 2009 WL 2634645, at *2 (Ariz. Ct. App. Aug. 27, 2009).

7.5. Not a Property Right at Common Law

Fourth and finally, the asserted right may not be vested, even if it is not contrary to law, because it is not a property right as a matter of fundamental law.⁴¹¹ An owner's right is not vested if it is not a common-law property right because the common law defines which incidents are part of an owner's estate. For example, an owner does not have the right to exclude those who are exercising authority to avoid a threat to life and limb in cases of necessity, such as a fire that threatens to destroy the neighborhood.⁴¹² The reason is that necessity justifies an unconsented entry at common law, rendering it non-trespassory.⁴¹³ So the Alaska Supreme Court ruled that landowners were not deprived of a vested right and did not suffer a taking of property when the state Department of Forestry burned part of their land to arrest the advance of a forest fire.⁴¹⁴

8. CONCLUSION

Presumptions matter in disputes about private rights, just as they do in criminal cases. Vested property rights determine presumptions in civil actions between property owners about alleged trespass and nuisance. They also determine presumptions in land use regulation cases, such as validity

⁴¹¹ See, e.g., *Seidemann v. Pro. Staff Cong. Loc. 2334*, 432 F.Supp.3d 367, 389 (S.D.N.Y. 2020) (no vested rights in a cause of action until it becomes a final judgment).

⁴¹² *Bowditch v. Boston*, 101 U.S. 16 (1879); *Carter v. Thomas* [1893] 1 QB 673 at 674–78 (Eng.); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922).

⁴¹³ Blackstone summarized the justifications that can render an unconsented entry non-trespassory:

In some cases trespass is justifiable, or, rather, entry on another's land or house shall not in those cases be accounted trespass; as if a man comes thither to demand or pay money there payable, or to execute in a legal manner the process of the law. . . . So a landlord may justify entering to distrain for rent; a commoner, to attend his cattle commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. Also, it hath been said that, by the common law and custom of England, the poor are allowed to enter and glean upon another's ground after the harvest without being guilty of trespass: which humane provision seems borrowed from the Mosaical law.

3 WILLIAM BLACKSTONE, COMMENTARIES *212–13 (citations omitted).

⁴¹⁴ *Brewer v. State*, 341 P.3d 1107, 1114–18 (Alaska 2014).

challenges under due process guarantees and takings claims. This article has surveyed land use decisions from federal and state courts over the last century. The survey demonstrates that the existence or nonexistence of a vested land use explains legal and factual presumptions better than more formal explanations, such as courts' use of so-called "rational basis" review. This makes sense and is justified insofar as long-established uses that have never been adjudicated wrongful are unlikely to be unlawful. Constitutional protections for vested property rights must mean something. They have meaning if they are understood to secure vested private rights as property. The correlation between vested use rights and decisions placing burdens of proof and persuasion on government officials suggests the existence of a general, standing presumption that existing land use rights are vested as long as they are not contrary to fundamental law.