A WORKABLE COMMON LAW BASELINE FOR REGULATORY TAKINGS

Adam J. MacLeod[*]

INTRODUCTION: AFTER *PENN CENTRAL*

Rights to use property are property rights. The Takings Clause of the Fifth Amendment requires governments to provide just compensation when they take property. In our constitutional republic, legislatures are competent to change the law, and legal changes sometimes alter private rights, including use rights. The Takings Clause does not forbid such legal changes. It only requires compensation for property rights taken as a result.

To give use rights the constitutional protection that the Takings Clause requires, courts need a baseline of rightful property use to show when a change in the law that adversely affects use rights amounts to a taking. This essay proposes replacing the balancing test of *Penn Central Transportation Co.* v. *New York City* with a common law baseline.[1] Two common law concepts and one common law institution will make the baseline work.

The first concept is the distinction between declaratory and remedial enactments, the most fundamental distinction in the taxonomy of statutes that common law jurists have used for centuries. Declaratory enactments neither add nor expropriate property rights but merely restate and clarify well-settled doctrines that determine the contours of an owner's right to use some resource. By contrast, remedial enactments change the law in some way. When they deprive owners and lawful users of existing use rights, they constitute takings.

The second conceptual distinction is between vested property rights and unvested interests. A legal change that abrogates a vested property use retrospectively is presumed to be remedial and thus a taking. The government may overcome the presumption as any complaining neighbor would, by proving to a jury that the use was unlawful before the challenged change in the law. By contrast, where the landowner has no vested use at stake, as in a facial challenge, it must bear the burden of proving that the challenged law takes away a vested liberty to make a particular use in the vicinage. The jury, a common law institution that has declared the scope of private rights from a time immemorial, is competent to make the ultimate determination.

---

[*] Professor of Law, St. Mary's University.

[1] *See* Penn Central Trans. Co. v. N.Y.C., 438 U.S. 104, 115-18 (1978).

Despite the U.S. Supreme Court's occasional resort to background principles of law, such as nuisance doctrine,[2] and common law definitions of personal property dating back to Magna Carta, scholars remain skeptical that any transcendent *ius commune* can supply an independent baseline for defining use rights.[3] Thus, it is generally assumed today that the baseline for regulatory takings is variable and contingent, depending as it does on "the state law in effect before the challenged law was enacted."[4] As one scholar has succinctly put it, "A regulation that constitutes an unconstitutional taking in Houston could pass constitutional muster if enacted in New York."[5] Other scholars point out that the Court's regulatory takings doctrine lacks both intrastate and interstate uniformity,[6] and its attempt to achieve equality is "entirely without independent content."[7]

In light of the prevailing academic skepticism of a transcendent *ius commune*, this essay begins by clearing some conceptual ground. It then briefly explains how a common law baseline would work. After this Introduction, Part I explains why a workable baseline must rest in legal authority independent of state sovereignty to change property rules. Part II summarizes the argument for the common law as a baseline and provides some examples of the common law at work. Part III describes the concepts and institution that would do the work in putting a common law baseline into practice.

I. THE POSITIVIST DILEMMA AND THE NEED FOR AN INDEPENDENT BASELINE

The legal standard proposed here employs legal concepts rooted in the history and tradition of America's fundamental law, the common law. It involves a shift away from the jurisprudential assumptions underlying *Penn Central* to an older, way of thinking about what law is.[8] The term "common law" in this essay does not mean law made by judges. Instead, it means the full set of rights, duties, and institutions that comprise the customary law of

---

2 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

3 Horne v. Dep't of Agriculture, 576 U.S. 350, 358 (2015).

4 Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206 (2004).

5 *Id.*

6 Some scholars think this is a feature of regulatory takings doctrine. Nestor M. Davidson and Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215 (2021). Others think it is a bug. Michael M. Berger, *What's Federalism Got to Do with Regulatory Takings?*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 9 (2019).

7 Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 5 (2008). *But see generally* John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003) (reconceptualizing property as a comparative right for regulatory takings purposes, securing equality of benefits and burdens).

8 *See generally* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

England and British North America,[9] bounded by what the jurists call "the law of reason," the law of natural rights and duties.[10] In this view, the rights and duties of the common law exist as legal reasons for both private and official action whether or not any particular jurist declares them.

The existence and intelligibility of common and natural law is defended at length elsewhere.[11] Common law jurisprudence is here proposed as an alternative to a jurisprudence that has its own problems, latent in Anglo-American jurisprudence since the time of positivists such as Hume and Bentham, and dominant in American law since the rise of Legal Realism. As Henry Smith observes, on the positivist and Legal Realists' view of property, "the state could always withdraw or alter its endorsement of an owner's decisional power."[12] The resulting problem is that property rights are whatever the highest political sovereign says they are, but constitutional property rights are supposed to impose meaningful limitations on the power of public officials to take property rights away. Call this the Positivist Dilemma.

This is a dilemma if the Takings Clause governs expropriation of all property rights and if the right to determine use of a resource is a property right.[13] The clause requires compensation where "property" is "taken."[14] A property right can be taken by a change in the law as much as by an exercise of the eminent domain power.[15] A government that enacts a new rule or renders a new judgment prohibiting a previously lawful use has deprived all persons who were lawfully making that use of their rights. From the perspective of a property user (e.g. an owner, tenant, bailee, licensee, or other person with a legal right to make some use), a right to make use of an owned resource is what makes property rights worth having.

We can see the dilemma at two levels of generality. First, at the level of constitutional law, positivist assumptions negate the rights declared in the Fifth and Fourteenth Amendments. Jeremy Paul called this the "problem of

---

[9] JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 68 (2003); Adam J. MacLeod, *Metaphysical Right and Practical Obligations*, 48 U. MEMPHIS L. REV. 431, 432 (2017).

[10] Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1571 (2003); ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS 24 (2024).

[11] See. e.g. Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527 (2019); Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337 (2017); ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON (2015); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011).

[12] HENRY E. SMITH, EMERGENT PROPERTY IN PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 320, 327 (James Penner and Henry E. Smith, eds. 2013).

[13] If the Takings Clause does not require compensation for all expropriations of property, or if use rights are not "property," then of course the dilemma is resolved in favor of an unfettered government power to terminate use rights. But the U.S. Supreme Court has maintained a doctrine of regulatory takings since the dawn of innovative land use laws in the Progressive Era. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

[14] *Supra* note 8 at 146.

[15] *Id.* at 124.

positivism."[16] Constitutional rights, such as property, cannot impose any limitations on official power if the state has unlimited power to redefine those rights.[17] But American constitutions forbid government deprivation and taking of property rights, and thus contemplate that "each citizen can call upon property law to protect herself against actions of the government itself."[18]

At the level of jurisprudence, the positivist logic is in principle fatal to all rights, which it renders as mere concessions of privilege from the sovereign.[19] A power to alter a private right entails the absence of any immunity for the right holder. Conversely, if rights are not mere concessions of privilege, then they are not whatever the government says they are. A government that is forbidden to abrogate a right has a disability to abrogate it, and therefore lacks the power to do so. A legal disability just is the absence of the legal power to abrogate the private right.

In short, unless they are immunized in some way against government abrogation, use rights cease to be "property" within the meaning of the Fifth and Fourteenth Amendments. But if they are so immunized then the positivist conception of property rights as entirely contingent on sovereign power, a conception shared by Legal Realists, must be false. Further, if positivist assumptions are true of rights to use property, then it is not at all clear why they are not also true of all other enumerated, constitutional rights. All the rights enumerated in American constitutions are immunized against abrogation. That is the point of constitutional rights. So, the case in favor of property use rights rests to some extent in the existence of constitutional rights of free speech, assembly, free exercise of religion, trial by jury, right to counsel, and many other enumerated constitutional rights.

That we need an independent baseline to identify takings does not alone entail that the common law should be the baseline. But it does entail that there must be *some* baseline, that the baseline must be independent of sovereign power to change the rules, and that the baseline must impose duties and disabilities on those who hold power. An independent baseline can dissolve the Positivist Dilemma if it anchors conceptually a limitation on the power of public officials to abrogate vested private rights.

II. THE COMMON LAW CAN BE A WORKABLE AND PRINCIPLED BASELINE

A common law baseline can do that job. As one skeptic of common law baselines has observed, the "baseline of permitted property use that is

---

16 Jeremy Paul, *The Hidden Structure of Takings Law*, 64 SO. CAL. L. REV. 1393, 1411 (1991).

17 *Id.* at 1410-11.

18 *Id.* at 1409.

19 *See* JEREMY BENTHAM, OF LAWS IN GENERAL, IN THE COLLECTED WORKS OF JEREMY BENTHAM 16 (H.L.A. Hart & J.H. Burns eds., 1970).

privileged over regulatory restrictions" is "found in the common law notion that, at least as regards land, an owner may make any use of his or her land that is not a nuisance."[20] The Takings Clause is meant to provide meaningful protection to use rights, rather than leaving them entirely contingent on legislative will. The common law is the source of law which the Fifth Amendment's drafters and ratifiers would most readily have consulted. It is the fundamental law that the Takings Clause takes as given.

The common law can be a workable and principled baseline because many of its norms and institutions are stable and knowable. Whether or not it is the *best* baseline, it has several advantages over alternatives. Three stand out. First, it has the advantage of being grounded in law. The law in which it rests was considered fundamental law at the time of ratification of the Fifth and Fourteenth Amendments. Second, it's familiar. While not all judges are trained in philosophy or economics, all judges have at least some training in the common law of nuisance, trespass, subjacent and lateral support, waste, and other doctrines that determine the scope of lawful property use. Third, and perhaps most significant when dealing with use rights, the common law contains proven concept, methods, and institutions for resolving ambiguities and indeterminacies. Chief among these is the jury trial. Use rights often have indeterminate boundaries because conflicting uses are defined by reference to standards of reasonableness rather than the clear trespassory rules that define exclusion rights and the estates of ownership that shape alienability rights. The contours of use rights are more context-dependent, though they remain meaningful rights.[21] This is where jury trials and legal presumptions come in. Where legal rules do not by themselves determine the scope of property rights, the jury clarifies or specifies the boundary between lawful and unlawful uses.

The Takings Clause is not unique in presupposing common law rights and institutions. Where a "pre-existing" right or wrong is at stake in a constitutional challenge, the U.S. Supreme Court looks to the common law to ascertain the meaning of the relevant term or legal concept.[22] For example, in *Horne* v. *Department of Agriculture*, the U.S. Supreme Court referred to common law doctrines of personal property to answer the question what resources count as property within the meaning of the Takings Clause.[23] In *Carpenter* v. *United States*, the Court referred to the common law in addressing the question when personal data are private property protected by the Fourth Amendment; two justices referred more precisely to the common law doctrine of bailment.[24]

---

[20] J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy*," 51 ALA. L. REV. 949, 957 (2000).

[21] ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 173-15 (2015).

[22] New York State Rifle and Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24, 46-47 (2022).

[23] Horne v. Dep't. of Agric. 576 U.S. 350, 357-61 (2015).

[24] Carpenter v. United States, 585 U.S. 296, 303-05, 361-64, 398-01 (2018) (Roberts, J., opinion of the Court, Alito, J., dissenting, and Gorsuch, J., dissenting).

To interpret the Takings Clause of the Fifth Amendment as incorporated against the states by the Fourteenth, the relevant common law doctrines are those governing in the United States in 1793 and 1868. Of particular importance, of course, are the terms "taken" and "property." To know the meaning of *taken* at the moment of that term's fixation in the constitutional text in 1793 (and its implicit extension to the states in 1868) is to know whether a new regulation which forbids a previously legal use of land is a taking within the meaning of the Takings Clause. The same logic motivates a study of the established meaning of "property" in our fundamental law in 1793 (and 1868). If property includes rights to use things, bounded by the common law doctrines governing use, then a new law that departs from the common law doctrine, removing some liberty or power enjoyed under the common law or adding some duty or legal disability not contained in it, deprives a lawful user of "property."

III. MAKING A COMMON LAW BASELINE WORKABLE

A. *Two Concepts and an Institution at Work*

A common law baseline for regulatory takings sits at the conceptual distinction between declaratory and remedial enactments. In short, declaratory enactments do not change the law or abrogate existing rights, and therefore do not constitute takings.[25] Remedial enactments do change the law and may cause regulatory takings. The baseline is made operational by a second distinction drawn from the common law, that between vested rights and unvested interests.[26] The classic concept of vested rights continues to operate in the law. Most simply, it establishes rebuttable presumptions. The law often presumes that established lawful uses remain lawful despite a change in the law.

This presumption would favor a landowner whose use is vested—who has for some time made a use which never was adjudicated to be a nuisance—and officials who abolish the law securing the right would bear the burden of proving that they have not taken vested property rights. Conversely, the law presumes that a landowner who is not actually making a use, or has been held liable to others for making the use, does not have a vested right to make the use. In a Takings Clause challenge, that landowner bears the burden of proving the land's intended use was lawful before the legal change.

Once a court establishes the starting presumption, proof is offered to the jury. The jury is competent to find what the law was before the disputed legal change, what local customs and mores filled in any gaps in the pre-existing

---

25 *See supra* note 8 at 145-146.

26 THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 121–22 (2d ed. 2012); THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 110–13 (2010).

legal rules, and the overall reasonableness of the land user's use under general nuisance and waste standards of reasonableness. The ultimate question for the jury to resolve will be whether the land user's use was lawful prior to the disputed enactment. If the use was lawful before the enactment and is now prohibited, then the enactment has caused a taking. If not, then not.

B. *Declaratory Versus Remedial Enactments*

The primary task in assessing a taking claim is to ascertain whether the challenged enactment is declaratory or remedial. This distinction has been architectonic in common law jurisprudence for centuries.[27] Remedial enactments change the law, and thus change the rights and duties of persons under the law, while declaratory enactments do not.

A remedial enactment alters some proposition of law and thus alters the rights or duties of some person or class of persons. Not all remedial enactments are takings. But if a remedial enactment abrogates vested property rights, then it constitutes a taking. For example, a statute or ordinance that abrogates a right to continue operating a home for disabled persons changes the law.[28] No neighbor has ever complained that the home adversely affects their own property rights in any way, so there is no cause to believe that the use constitutes a nuisance. The new ordinance is thus remedial, not declaratory of the common law of nuisance. It takes property.

By contrast, a declaratory enactment either merely restates or gives specific content to a pre-existing legal doctrine that defines the contours of rights. It does not cause a taking. For example, a constitutional or statutory enactment securing trial by jury declares a right that has been part of the common law from a time immemorial.[29] It confers no new rights on anyone and takes none away. In the property context, an ordinance that prohibits new manufacturing operations in an existing residential neighborhood may be understood to give specific form to common law nuisance doctrine insofar as a manufacturing plant would be a nuisance in a residential neighborhood.[30]

The conceptual distinction between declaratory and remedial enactments makes sense of the U.S. Supreme Court's least controversial takings cases. Consider first *Loretto* v. *Teleprompter Manhattan CATV*

---

[27] *See generally* Heydon's Case (1584) 26 Elizabeth 1; *see also* EDWARD COKE, THE SELECTED WRITINGS OF SIR EDWARD COKE 74, 78-84 (Steve Sheppard, ed. 2003); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *42, *54, *86–87, *91, *254 (1765); COLLECTED WORKS OF JAMES WILSON 1057-58 (Kermit L. Hall and Mark David Hall, eds. 2007); ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 209 (1966).

[28] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[29] *See, e.g.,* AMEND. VII; IOWA CONSTITUTION ART. I §9; MAINE CONSTITUTION ART. I §20; MARYLAND CONSTITUTION ART. 5(a)(1) ("That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law.").

[30] Hadacheck v. Sebastion, 239 U.S. 394, 412 (1915).

Corporation.[31] Unless invited by the owner or exercising a license granted by a common carrier or public accommodation, everyone has a duty not to trespass on another's real estate.[32] Loretto did not license any television cable carriers to enter her building.[33] Thus, the ordinance requiring Loretto to allow the television cables to be installed on her building took away Loretto's right to exclude.[34] It was remedial and a taking.[35]

The statute challenged in *Pennsylvania Coal Company* v. *Mahon* was also remedial.[36] Mineral rights are alienable and severable from surface estate rights. When they are severed, the owner of the surface estate retains rights of subjacent support, which correlate with the mineral estate owner's duty not to undermine the surface estate in his exercise of the mineral rights. But the mineral estates at issue in *Mahon* had earlier been conveyed without the duty of subjacent support because the surface owners had waived their correlative support right (presumably in consideration of a reduced purchase price) in private-party transactions.[37] In both natural law and common law jurisprudence, property rights are alienable.[38] So, the parties were free to assign the various subjacent support rights in this way. The later, public act requiring the mine operators to provide subjacent support thus transferred without compensation a subjacent support right from the mines back to the surface owners, which the surface owners had assigned to the mines at the time of the severance.[39]

C. *Trial by Jury*

The parties to a takings case will exploit ambiguities in the law and disagree about the alleged remedial character of an enactment. After courts return to the declaratory-remedial distinction, legislative bodies and administrative agencies are likely to adapt by characterizing all of their enactments as declaratory.[40] At the same time, every aggrieved landowner is likely to characterize every amendment to existing land use law as remedial and a taking.

This is where juries come in. A jury is competent to determine whether a land use is lawful under nuisance doctrine, alienability rules and other common law doctrines. Juries make factual findings. They also make assessments

---

31 *See generally* Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982).

32 *See id.* at 441.

33 *See id.* at 421-24.

34 *Id.* at 441.

35 *Id.*

36 *See generally* Pennsylvania Coal Co., 260 U.S. 393.

37 *Id.* at 412.

38 *Id.* at 412.

39 *Id.* at 412-14.

40 At least those regulatory officials will who do not have a "stupid staff." *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992).

of reasonableness where the law calls for that determination. Juries can thus resolve indeterminacies about the lawfulness of a use at any given time in the context of a particular neighborhood and community.

Juries are no less competent to make those findings and determinations in the context of a takings challenge. A jury verdict that a landowner's proposed use was unlawful before enactment of an ordinance prohibiting it is tantamount to a determination that the ordinance was declaratory as applied to the landowner and therefore does not constitute a taking. A verdict that the owner's use was not unlawful before enactment is tantamount to a verdict that the enactment is remedial. If the jury finds that the new rule abrogates the use, then it is a taking.

D. *Vested Use Rights and the Presumption of Lawful Use*

What remains is to decide who enjoys the presumption and who bears the corresponding burdens of proof and persuasion at trial. One size does not fit all. In a common law suit, for nuisance, facts on the ground, local mores and conventions, and the fact that a use is long established are all relevant and legitimate considerations. Those vary from case to case.

Here another classic juristic concept comes into play, the idea of a vested private right. The concept of vested private rights is, like the concept of remedial legislation, foundational to common law reasoning, especially in the United States.[41] The Takings Clause protects "property" rights. An expectation becomes a property right when it vests in a person. Before it vests it is either a mere interest or a liberty or privilege that is not immunized. It becomes a property right when and because it can no longer be divested or defeased; it is immunized. Immunization of the right makes it property in the fullest sense.

A vested property right may also be vested in a weaker sense.[42] A state may have power to take it away in the exercise of its eminent domain power or by exercising legislative sovereignty to change the rules of law that secure it. But when the state does perform a taking, it must pay compensation.

Takings are disfavored, and the state is never presumed to have intended them. A land user whose use is vested is entitled to a presumption that the use is lawful, and the government should bear the burden of proving that the use was already unlawful before enactment of the challenged ordinance. A landowner who has not made the prohibited use, or who has been held liable to others for making the use, is not entitled to a presumption and should bear

---

[41] Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1441–42 (1999); THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 357–413 (1868).

[42] *See* Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J. OF LAW & PUB. POL'Y. 253, 306 (2018) (explaining stronger and weaker instances of vested private rights).

the burden of proving that the challenged ordinance is remedial and expropriates the claimed use right.

The distinction between vested and unvested uses tracks the way many courts review due process challenges to land use regulations. In such cases, courts almost universally employ rational basis review. However, they employ different presumptions in different cases. Where a landowner brings a facial challenge and asserts no vested use, the landowner bears the burden of negating all rational bases for the ordinance.[43] By contrast, where a landowner has a vested use right at stake and challenges the new ordinance as applied to that vested use, courts often place the burden on the government not only to articulate a reasonable basis for prohibiting the use but also to come forward with evidence that the prohibition will actually serve the government's asserted end.

This practice has a long pedigree in U.S. Supreme Court practice, going all the way back to the dawn of remedial land use regulations in the 1920s. Famously, in *Village of Euclid v. Ambler Realty*, the Court upheld a legislative zoning code after the claimant failed to negate all rational bases for the code.[44] Just two year later, in *Nectow v. City of Cambridge*, the Court reversed a judgment in favor of a city that had rezoned the claimant's land.[45] Justice Sutherland wrote for the Court in both cases. In *Ambler Realty*, the landowner had not yet made any particular uses of the land.[46] In *Nectow*, the landowner had an enforceable contract to sell the land to a buyer for a particular, intended use that was prohibited neither by positive law nor by common law at the time of contracting.[47] The burdens of proof and persuasion fell on the claimant-landowner in *Ambler Realty* and on the city in *Nectow*.[48] In both cases, the initial presumption was dispositive, as the party that bore the burden could not satisfy it.[49]

There are good reasons for this differential treatment afforded to vested and unvested property uses. It makes sense when layered on top of the distinction between declaratory and remedial enactments. A vested land use that

---

[43] The distinction between facial and as-applied challenges is not entirely contiguous with the distinction between unvested and vested land uses, but the two sets of concepts are often related in practice. Courts generally defer entirely to local governments in facial challenges while employing higher levels of scrutiny when local government action is challenged as applied to particular property uses. That courts show less deference to unvested, intended uses of land and more deference to local rules and judgments that divest no established uses, may explain in part why. A facial challenge is abstract. To claim that a law is invalid on its face does not require a showing of concrete illegality. A plaintiff who brings a facial challenge, such as Ambler Realty Company, generally does not bother to prove that it has suffered any actual injury – any infringement or deprivation of its actual property rights, exercised and vested. And while not all as-applied challenges involve vested uses, many do. *See generally* Pennsylvania Coal Co., 260 U.S. 393. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[44] Village of Euclid, Ohio v. Ambler Realty Co. 272 U.S. 365, 396-97 (1926).

[45] *See* Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

[46] *See* Ambler Realty 272 U.S. at 368.

[47] *See* Nectow, 277 U.S. at 186-87.

[48] *See* Ambler Realty 272 U.S. at 397; Nectow 277 U.S. at 187-88.

[49] *See* Ambler Realty 272 U.S. at 397; Nectow 277 U.S. at 187-88.

has never been found to be a nuisance or otherwise unlawful (e.g. waste, trespass, undermining) is likely to be a use permitted under existing laws and local customs. The probability that it is lawfully permissible increases the longer it has been made on the situs. So, a new ordinance or land use decision that forbids a long-vested use is unlikely to be declaratory of existing law. Instead, it imposes a new duty on the land user. It forbids a use that law and custom have always previously permitted. In short, it takes someone's use right.

By contrast, where a land user identifies some intended, but not yet existent use, or challenges a local government action on its face, we cannot refer to facts on the ground in assessing whether the government action declares existing law or creates new duties. Faced with uncertainty of this kind, it is reasonable for courts to presume that the local government has acted lawfully. Indeed, to presume the lawfulness of local rules and judgments is consistent with centuries-old judicial practice, which employs canons of equitable construction to avoid the conclusion that a legislator has intended an unjust result, where that conclusion is avoidable. This presumption places the burden on the challenger to prove that the local government action is contrary to, or a departure from, existing law.

CONCLUSION

We need a baseline for regulatory takings. The baseline must be independent of the positive law it is meant to measure. Common law provides such a baseline, the distinction between declaratory and remedial enactments. Juries are competent to tell the difference after courts establish the burdens of proof and persuasion according to whether the person challenging the new law has a vested use or not.