Land Use and Zoning Law

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Planning for Accessible Communities

SECOND EDITION

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For

Gina, Andrew, Cormick, Macklin, McKinley,
Giovanni, Whendy

Robin Paul Malloy

For

My Colleagues, Friends, Family, and, of course,
My Students

Dylan Oliver Malagrinò

Contents

Preface xv
Acknowledgements xix
Table of Cases xxi

Chapter 1 • Introduction to Planning and Zoning for Accessible Communities 3
A. Setting the Stage 3
Zoning: An Introduction to the History, Purpose, and Nature of Legislative Land Use Controls 3
Robin Paul Malloy, Land Use Law and Disability: Planning and Zoning for Accessible Communities 9
B. Basic Federal Law Addressing Accessibility 24
Discussion Problem 1.1 25
City of Edmonds v. Oxford House, Inc. 25
Questions for Consideration 34
Takeaway 34
Discussion Problem 1.2 34
Tennessee v. Lane 35
Questions for Consideration 44
Takeaway 44
C. A State Law Example 44
D. Practice Problems 45

Chapter 2 • Prelude to Modern Zoning 47
A. Introduction 47
B. Nuisance and Trespass 48
Hadacheck v. Sebastian 48
Questions for Consideration 54
Takeaway 54
Discussion Problem 2.1 55
Bove v. Donner-Hanna Coke Corp. 55
Questions for Consideration 60
Takeaway 60
Amphitheaters, Inc. v. Portland Meadows 61
Questions for Consideration 67
Takeaway 67

Prah v. Maretti 67
Questions for Consideration 74
Takeaway 74
City of New York v. Smart Apts. LLC 75
Questions for Consideration 79
Takeaway 80
MX Group, Inc. v. City of Covington 80
Questions for Consideration 86
Takeaway 86
Discussion Problem 2.2 87
C. Practice Problems 88

Chapter 3 • The Police Power and Its Limitations 91
A. Introduction to the Police Power 91
Thurlow v. Massachusetts 92
Questions for Consideration 93
Takeaway 93
Robin Paul Malloy, Land Use Law and Disability: Planning and Zoning for Accessible Communities 94
Questions for Consideration 98
Takeaway 98
B. A Facial Challenge 99
Village of Euclid v. Ambler Realty Co. 100
Questions for Consideration 109
Takeaway 109
Discussion Problem 3.1 111
C. An "As Applied" Challenge 111
Nectow v. City of Cambridge 112
Questions for Consideration 114
Takeaway 114
Figarsky v. Historic Dist. Com. 115
Questions for Consideration 121
Takeaway 121
Discussion Problem 3.2 121
D. Due Process and the Potential for a Regulatory Taking 122
Pennsylvania Coal Co. v. Mahon 122
Questions for Consideration 127
Takeaway 128
Preseault v. United States 128
Questions for Consideration 149
Takeaway 150
Discussion Problem 3.3 150
E. Zoning for an Aging Population 151
Maldini v. Ambro 151
Questions for Consideration 155
Takeaway 155

Allen v. Town of North Hempstead 156
Questions for Consideration 158
Takeaway 158
Discussion Problem 3.4 159
F. Conditional Zoning 159
Town of Rhine v. Bizzell 160
Questions for Consideration 166
Takeaway 167
Rise, Inc. v. Malheur County 167
Questions for Consideration 172
Takeaway 172
Discussion Problem 3.5 173
G. Local Power to Zone and Accessibility 174
Washburn v. Pima County 174
Questions for Consideration 178
Takeaway 179
Anderson v. City of Blue Ash 179
Questions for Consideration 190
Takeaway 191
Discussion Problem 3.6 191
H. Takings: A Balancing Test 191
Penn Central Transportation Co. v. City of New York 192
Questions for Consideration 214
Takeaway 215
Murr v. Wisconsin 216
Questions for Consideration 226
Takeaway 226
Discussion Problem 3.7 227
Pinnock v. International House of Pancakes 228
Questions for Consideration 232
Takeaway 232
D.O. Malagrinò, Among Justice Stevens's Landmark Legacies: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* 233
I. Practice Problems 235

Chapter 4 • Comprehensive Plans 237
A. Consistency in Zoning Pursuant to a Comprehensive Plan 238
Fasano v. Board of County Commissioners of Washington County 238
Questions for Consideration 243
Takeaway 244
Pinecrest Lakes, Inc. v. Shidel 244
Questions for Consideration 254
Takeaway 255
Foothill Communities Coalition v. County of Orange 255
Questions for Consideration 262

Takeaway 262
Discussion Problem 4.1 262
B. Planning and Takings 263
City of Monterey v. Del Monte Dunes 264
Questions for Consideration 268
Takeaway 268
Discussion Problem 4.2 269
Lucas v. South Carolina Coastal Council 270
Questions for Consideration 276
Takeaway 277
Kelo v. City of New London 277
Questions for Consideration 283
Takeaway 284
Discussion Problem 4.3 284
C. Planning for Accessibility 285
Olmstead v. L.C. 285
Questions for Consideration 294
Takeaway 295
Frame v. City of Arlington 296
Questions for Consideration 300
Takeaway 300
Foley v. City of Lafayette 301
Questions for Consideration 305
Takeaway 305
Discussion Problem 4.4 306
D. Practice Problems 306

Chapter 5 • Regulating Uses: Tension with other Fundamental Rights 309
A. Regulating Use Rather than Users 309
Sunrise Check Cashing v. Town of Hempstead 309
Questions for Consideration 311
Takeaway 311
B. Living Arrangements ("Family") 312
Village of Belle Terre v. Boraas 312
Questions for Consideration 319
Takeaway 319
Keys Youth Servs. v. City of Olathe 319
Questions for Consideration 325
Takeaway 325
C. Group Homes for People with Disabilities 326
City of Cleburne v. Cleburne Living Center 326
Questions for Consideration 335
Takeaway 335
Discussion Problem 5.1 336
D. Speech 336
City of Renton v. Playtime Theaters, Inc. 337

Questions for Consideration 345
Takeaway 346
Reed v. Town of Gilbert 347
Questions for Consideration 356
Takeaway 357
Burns v. Town of Palm Beach 357
Questions for Consideration 369
Takeaway 370
Discussion Problem 5.2 370
Discussion Problem 5.3 371
E. Disability and "RLUIPA" 372
Candlehouse, Inc. v. Town of Vestal 372
Questions for Consideration 386
Takeaway 386
Discussion Problem 5.4 387
F. Practice Problems 388

Chapter 6 • Additional Zoning Concepts 391
A. Use Permit 391
Innovative Health Systems, Inc. v. City of White Plains 392
Questions for Consideration 397
Takeaway 398
B. Special Use Permit 398
Wisconsin Community Services, Inc. v. City of Milwaukee 398
Questions for Consideration 408
Takeaway 409
C. Variances 409
Mastandrea v. North 411
Questions for Consideration 418
Takeaway 418
Bryant Woods Inn, Inc. v. Howard County 418
Questions for Consideration 425
Takeaway 425
Loren v. Sasser 425
Questions for Consideration 429
Takeaway 429
Austin v. Town of Farmington 429
Questions for Consideration 433
Takeaway 434
Discussion Problem 6.1 434
D. Accessory Dwelling and Use 435
Mortimer v. New Britain Township Zoning Hearing Board 435
Questions for Consideration 439
Takeaway 439
Discussion Problem 6.2 440
E. Nonconforming Use 440

Cigarrilha v. City of Providence 441
Questions for Consideration 443
Takeaway 443
Edelhertz v. City of Middletown 444
Questions for Consideration 447
Takeaway 448
Giurleo v. McCusker 448
Questions for Consideration 452
Takeaway 452
F. Spot Zoning 452
Discussion Problem 6.3 453
Discussion Problem 6.4 454
G. Floating Zone 454
Beyer v. Burns 455
Questions for Consideration 456
Takeaway 457
H. Vesting 457
Western Land Equities v. City of Logan 457
Questions for Consideration 463
Takeaway 463
I. Contract Zoning 464
Carlino v. Whitpain Investors 464
Questions for Consideration 465
Takeaway 465
J. Development Agreements 466
Santa Margarita Area Residents Together v. San Luis Obispo County 466
Questions for Consideration 469
Takeaway 469
K. Subdivisions 470
Town of Hollywood v. Floyd 471
Questions for Consideration 475
Takeaway 476
L. Linkage Programs and Inclusionary Zoning 477
Home Builders Ass'n v. City of Napa 477
Questions for Consideration 485
Takeaway 485
Holmdel Builders Ass'n v. Township of Holmdel 486
Questions for Consideration 492
Takeaway 493
M. Fair Housing 493
Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc. 493
Questions for Consideration 502
Takeaway 502
Virginia ex rel. Fair Housing Board v. Windsor Plaza Condo. Ass'n 503

Questions for Consideration 510
Takeaway 510
Discussion Problem 6.5 511
N. Existing Facilities: Historic Preservation 512
Molski v. Foley Estates Vineyard and Winery, LLC 512
Questions for Consideration 518
Takeaway 519
O. 1983 Actions 520
Bower Associates v. Town of Pleasant Valley 520
Questions for Consideration 525
Takeaway 525
P. Standing and Ripeness 526
RHJ Medical Center v. City of DuBois 526
Questions for Consideration 535
Takeaway 536
Rehabilitation Support Services v. City of Albany 536
Questions for Consideration 539
Takeaway 539
Q. Exactions and Unconstitutional Conditions 539
Nollan v. California Coastal Commission 540
Questions for Consideration 546
Takeaway 546
Dolan v. City of Tigard 546
Questions for Consideration 555
Takeaway 556
Koontz v. St. Johns River Water Management District 556
Questions for Consideration 561
Takeaway 561
California Building Industry Ass'n v. City of San Jose 562
Questions for Consideration 573
Takeaway 573
R. Right to Exclude 574
Cedar Point Nursery v. Hassid 574
Questions for Consideration 580
Takeaway 581
Discussion Problem 6.6 582
S. Dillon Rule, Home Rule, and the Police Power 583
T. Alternatives to Euclidean Planning and Zoning 584
U. Preemption 585
V. Practice Problems 586

Appendix **591**
Part I: Primer on Disability Law 591
Coverage of the ADA, RHA, and FHA 596
Anti-Discrimination Provisions 597

Methods of Demonstrating Discrimination 597
A. Disparate Treatment (Intentional Discrimination) 598
B. Disparate Impact 599
C. Failure to Provide a Reasonable Accommodation or Reasonable Modification 599
Reasonable Accommodation 599
Reasonable Modification 601
Additional Matters to Consider: ADA Title III 601
Some Additional Provisions for Housing 602
Standing 604
Remedies 604
Part II: Form for Evaluating a Reasonable Accommodation Petition 605
Part III: Form for An Area Variance Petition 608
Part IV: Form for a Use Variance Petition 610

Index 613

Preface

Our casebook is one that focuses on the key elements of the law of zoning, planning, and property development as needed for practice. We cover the cases and concepts that are most critical to the actual practice of zoning law. As part of our coverage, we include cases and materials on accessibility. This means that we integrate coverage of disability law and accessibility into every chapter of the book. Disability rights are becoming critical in the process of developing safe and sustainable communities that are accessible to everyone, and that are capable of supporting people as they age in place. This is an important element of planning and zoning as America has a rapidly aging population and because some 25% of Americans have a disability of one type or another. Disability law has a significant impact on how we practice zoning and planning law.

Our book is both traditional and unique. It is traditional in that it covers all of the basic elements of zoning and planning law. At the same time, our book is unique in that it includes cases on accessibility. We integrate zoning cases that include a disability law element in each chapter. These cases are mixed in with the standard and classic cases that are typical of a casebook in this area. This gives our casebook a contemporary relevance for understanding the requirements for making our communities accessible to a diverse population. In addition, our book offers other important features that enhance discussion of the materials in each chapter.

The five key features of each chapter in this book include:

1) **Cases that integrate Zoning Law with Disability Law.** While limited in number, these cases allow students to see issues of accessibility as a normal part of a zoning and land use practice. The cases enhance understanding of basic zoning and land use law while introducing important elements of our disability laws.

2) **Questions for Consideration.** These questions follow each case in the book. For the most part, these questions are designed to assist students in focusing on key aspects of the case that they are reading. This will improve their understanding of the case and prepare them to participate in class.

3) **Takeaways.** After each case we provide a section identified as Takeaway. Here we set out some key points that every student should understand after having read the case.

4) **Discussion Problems.** Within each chapter, we include Discussion Problems that set up hypothetical fact patterns that can be used in class. These problems facilitate class discussion and assist students in integrating concepts from

different parts of a chapter. These questions may be discussed orally in class or combined with having students draft answers in addition to the discussion. This provides multiple assessment opportunities.

5) **Practice Problems.** These Practice Problems get students to think about the kind of issues that come up in practice, and many of them require students to use a local zoning code to develop their answers. These practice problems provide an opportunity for students to develop important practice skills and serve as excellent tools for assessment and feedback.

Our book is designed to be a straightforward and easy to use casebook. As to our integration of materials on accessibility, the book is designed to be readily usable by people with little or no expertise in disability law. The primary aim of our inclusion of cases and materials on disability law in every chapter is to make students aware of the need to think about the accessibility of our built environment. To have sustainable cities and livable communities, we must plan for making them accessible to people of all abilities and all ages.

The key elements of disability law are addressed in the text, in the cases, and in an **Appendix** provided in the back of the casebook. The Appendix provides a clear and readily understandable overview of the key elements of disability law. The key provisions are set out along with definitions. Referring to the Appendix when reading relevant cases will make disability law understandable while informing students about the relevance of disability law to their zoning and planning law practice. In general, disability law addresses design issues that make the built environment more accessible, and it addresses land uses to ensure that everyone enjoys an equal opportunity to live in a neighborhood, and to enjoy the lawful use of their property in ways that are similar to that of people without disabilities.

The sections of disability law that are most important in land use and zoning are very limited in number. For the most part, they deal with matters of discrimination, and these discrimination issues are similar to claims raised in other courses in law school. In addition, disability law makes it a matter of discrimination to deny a person with a disability a reasonable accommodation or a reasonable modification. In particular, disability law requires providing a reasonable accommodation and modification to *programs, services, and activities* of local governments. This means that the disability laws apply directly to all planning and zoning functions, because courts have held that planning and zoning are *programs, services, and activities* of state and local governments. Knowing when an accommodation is required is important to a zoning and planning practice. We make this easy. There are three basic criteria to review when addressing a request for a reasonable accommodation and reasonable modification, and we cover all of them very clearly in our materials.

More generally, the overarching structure of the book is focused on land use and zoning law as an exercise of governmental police power. The book considers problems related to externalities, spillover effects, and the difficulties of self-coordination of land uses in an increasingly complex world. Chapter one provides an overview on

issues related to the process of zoning and gives an introduction to accessibility and the Americans with Disabilities Act (ADA). This chapter provides a clear context for the remaining materials in the book. Beginning with chapter two and continuing into chapter three, the materials focus on the exercise of the police power and its limitations. The traditional limits to the exercise of the police power discussed in chapter three include: due process, equal protection, and the Takings Clause. Chapter four covers the relationship between comprehensive planning and zoning. In chapter five, the material expands on our understanding of the limits of the exercise of the police power. The focus in chapter five is on limitations imposed by tensions with other fundamental rights, such as those related to free speech, freedom of association, freedom of religion, and the rights of people with disabilities. Chapter six addresses a variety of standard concepts central to a land use and zoning law practice. It also includes discussion of fair housing, discrimination, and the imposition of exactions. Takings law is discussed in several chapters rather than as a "stand alone" topic. In instances where a limited number of cases are used to illustrate a point, we have selected well-known classic cases and cases that discuss other key cases within their opinions. This permits greater coverage of important concepts with the use of fewer total cases.

The entire book should be able to be covered in a one semester course.

Learning Outcomes

We have designed our casebook to achieve certain learning outcomes.

1. Students will learn the rules, standards, and requirements of American zoning, planning, and development law.
2. Students will learn the requirements of American disability law and how these laws apply to a zoning, planning, and development law practice.
3. Students will sharpen their skills at parsing a case and analyzing a case opinion.
4. Students will learn the relationship among local, state, and federal law in dealing with zoning, planning, and development issues. This is particularly important given that local activities often have implications that extend beyond the boundaries of local government jurisdictions.
5. Students will learn the difficulty of dealing with negative externalities and spillover effects between and among various property owners.
6. Students will learn basic administrative law and standards of review in dealing with decisions of a zoning board of appeal.
7. By focusing on the *Questions for Consideration* after each case, students will improve their analytical skills.
8. By considering the *Takeaway* after each case, students will be able to assess their ability to extract key legal and practice pointers from a case.

9. By preparing and engaging in the *Discussion Problems*, students will improve their ability to synthesize materials from several cases.
10. By preparing and engaging in the work for our *Practice Problems* at the end of each chapter, students will learn to use a zoning code, a zoning map, and a comprehensive plan, and students will improve their ability to evaluate a situation and provide possible resolutions.
11. In responding to our various opportunities for answering *Questions for Consideration*, *Discussion Problems*, and *Practice Problems*, students will develop an improved ability to analyze, synthesize, and evaluate complex legal problems. Likewise, in preparing oral or written responses to these questions, students will improve their ability to effectively communicate with colleagues, clients, and others.

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For the Appendix much of the material is drawn from: Malloy, *A Primer on Disability for Land Use and Zoning Law*, 4 Journal of Law, Property, and Society 1 (2018).

Table of Cases

Adams v. City of Toledo, 64
Allen v. Town of North Hempstead, 156
American Broadcasting Cos. v. Siebert, 311
Amphitheaters, Inc. v. Portland Meadows, 61
Anderson v. City of Blue Ash, 179
Apfelbaum v. Clarkstown, 155
Armstrong v. United States, 200, 202, 210, 220, 226
Atchison, T. & S. F. R. Co. v. Public Utilities Comm'n, 202
Austin v. Town of Farmington, 429

Ballstadt v. Pagel, 72
Bangerter v. Orem City Corp., 322
Berman v. Parker, 118, 212, 280, 313, 315, 319
Beyer v. Burns, 455
Block v. Hirsh, 315
Board of County Commissioners of Brevard County v. Snyder, 249
Boomer v. Atlantic Cement Co., 96
Booth v. R., W. & O.T.R.R. Co., 56
Bove v. Donner-Hanna Coke Corp., 55
Bowditch v. Boston, 124
Bower Associates v. Town of Pleasant Valley, 520
Bryant Woods Inn, Inc. v. Howard County, 418, 428, 508
Buchanan v. Warley, 316, 496
Burns v. Town of Palm Beach, 357
Butler v. Frontier Telephone Co., 211

California Building Industry Ass'n v. City of San Jose, 562–572
Candlehouse, Inc. v. Town of Vestal, 372, 598
Carlino v. Whitpain Investors, 464
Cedar Point Nursery v. Hassid, 574
Central Hudson Gas & Electric Corp. v. Public Service Commission, 346, 355
Chicago, B. & Q.R. Co. v. Chicago, 218
Cigarrilha v. City of Providence, 441
City of Aurora v. Burns, 106
City of Cincinnati v. Discovery Network, 352
City of Cleburne v. Cleburne Living Center, 39, 40, 41, 286, 326
City of Edmonds v. Oxford House, Inc., 8, 25, 169, 428, 431
City of Jacksonville Beach v. Grubbs, 249
City of Monterey v. Del Monte Dunes, 264, 570
City of New York v. Smart Apts, LLC, 75
City of Renton v. Playtime Theaters, Inc., 337–345
Claremont, City of, v. Kruse, 88
Commonwealth v. Clearview Coal Co., 123
Crowley v. Glaze, 321

Demorest v. City Bank Co., 201
Dolan v. City of Tigard, 480–482, 546, 556, 560, 568, 569, 577, 579
Dur-Bar Realty Co. v. City of Utica, 165

Eastlake v. Forest City Enterprises, Inc., 7, 201, 204
Eastman v. Univ. of Mich., 321
Edelhertz v. City of Middletown, 444
Erznoznik v. City of Jacksonville, 342

Fasano v. Board of County Commissioners of Washington County, 238
Figarsky v. Historic Dist. Com., 115
First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 277
Foley v. City of Lafayette, 301
Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 73
Foothill Communities Coalition v. County of Orange, 255, 453
Frame v. City of Arlington, 296

Giurleo v. McCusker, 448
Goldblatt v. Hempstead, 120, 200–205, 207, 208, 212
Gorieb v. Fox, 201, 203
Griggs v. Allegheny County, 211
Guith v. Consumers Power Co., 63

Hadacheck v. Sebastian, 3, 48, 201, 204, 211, 212
Hairston v. Danville & Western Ry. Co., 124
Hawaii Housing Authority v. Midkiff, 280, 281
HDC, LLC v. City of Ann Arbor, 189
Hill v. Colorado, 349
Holmdel Builders Ass'n v. Township of Holmdel, 486
Home Builders Ass'n v. City of Napa, 477–485, 572
Hudson Water Co. v. McCarter, 202

Innovative Health Sys., Inc. v. City of White Plains, 378, 379, 392
Innovative Health Systems, Inc. v. City of White Plains, 392, 395

Katzenbach v. McClung, 229
Kelo v. City of New London, 277
Keys Youth Servs. v. City of Olathe, 319
Koontz v. St. Johns River Water Management District, 556 569, 570, 579

Lentini v. Cal. Ctr. for the Arts, 186
Loren v. Sasser, 425, 429
Loretto v. Teleprompter Manhattan CATV Corp., 139, 219, 273, 577
Lucas v. South Carolina Coastal Council, 54, 137, 219, 225, 233, 270, 230

Maher v. New Orleans, 118, 120, 204
Maldini v. Ambro, 151, 157
Marshall v. United States, 318
Mastandrea v. North, 411
McDonnell Douglas Corp. v. Green, 379
Miller v. Schoene, 201, 205, 211
Molski v. Foley Estates Vineyard and Winery, LLC, 512
Monongahela Navigation Co. v. United States, 213, 214
Moore v. East Cleveland, 8, 28, 202
Mortimer v. New Britain Township Zoning Hearing Board, 435
Mugler v. Kansas, 202
Muhlker v. Harlem R. Co., 201
Murr v. Wisconsin, 215, 216, 575
MX Group, Inc. v. City of Covington, 80, 83

National Refining Co. v. Batte, 63
Nectow v. City of Cambridge, 7, 112, 163, 201, 202, 205
New Orleans v. Dukes, 203
Nollan v. California Coastal Commission, 482, 549–552, 554–556, 540, 568, 577
Northend Cinema, Inc. v. Seattle, 341

Olmstead v. L.C., 285

Penn Central Transportation Co. v. City of New York, 120, 192, 271–273, 543, 575
Pennsylvania Coal Co. v. Mahon, 8, 120, 122, 137, 200, 202, 204, 207, 209, 212–214, 218, 267, 272, 273, 275, 550, 555, 576, 580

Pinecrest Lakes, Inc. v. Shidel, 244, 306
Pinnock v. International House of Pancakes, 228
Plymouth Coal Co. v. Pennsylvania, 124
Police Department of Chicago v. Mosley, 340
Portsmouth Harbor Land & Hotel Co. v. United States, 63, 211
Prah v. Maretti, 67
Preseault v. United States, 128, 130

Reed v. Town of Gilbert, 347
Rehabilitation Support Services v. City of Albany, 536
Reinman v. Little Rock, 52, 202
RHJ Medical Center v. City of DuBois, 526
Rise, Inc. v. Malheur County, 167
Rose v. Springfield-Greene Cnty. Health Dep't, 183
Roseta v. County of Washington, 238

Santa Margarita Area Residents Together v. San Luis Obispo County, 466
Seattle Title Trust Co. v. Roberge, 314
Shelburne, Inc. v. Crossan Corporation, 63, 65
Shepard v. Village of Skaneateles, 153
Smith v. County of Washington, 239, 242
State ex rel. Rudd v. Ringold, 64
Sunrise Check Cashing v. Town of Hempstead, 309
Swetland v. Curtiss Airports Corporation, 63

Tennessee v. Lane, 35
Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc., 493–502, 599
Thurlow v. Massachusetts, 92–93
Tovar v. Billmeyer, 339
Town of Hollywood v. Floyd, 471
Town of Rhine v. Bizzell, 160
Tsombanidis v. West Haven Fire Dept., 169, 170, 537
Tucker v. Tennessee, 186

Udell v. Haas, 152
United States v. Caltex, Inc., 200, 210
United States v. Causby, 63, 71, 200, 203, 206, 211
United States v. Central Eureka Mining Co., 200, 201, 576
United States v. Chandler-Dunbar Water Power Co., 201
United States v. Edward Rose & Sons, 45
United States v. General Motors Corp., 211, 576
United States v. Gettysburg Electric R. Co., 212
United States v. O'Brien, 338, 339
United States v. Willow River Power Co., 200

Village of Belle Terre v. Boraas, 8, 28, 152, 156, 312
Village of Euclid v. Ambler Realty Co., 3, 5, 7, 20, 27, 72, 94, 100, 112–114, 117, 154, 163, 164, 201, 204, 312, 316, 422, 458, 550, 559, 576, 584
Virginia ex rel. Fair Housing Board v. Windsor Plaza Condo. Ass'n, 493, 503

Walls v. Midland Carbon Co., 202
Washburn v. Pima County, 174
Welch v. Swasey, 4, 201, 203
West Bros. Brick Co. v. Alexandria, 206
Western Land Equities v. City of Logan, 457
Williamson v. Osenton, 321
Wisconsin Community Services, Inc. v. City of Milwaukee, 398
Wong v. Regents of Univ. of Calif., 171

Young v. American Mini Theatres, Inc., 207, 338, 345