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9. The future of an American ideal

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This book is based on a set of premises. Gazing into the future and prognosticating on private property, it is useful to restate these premises and offer a conclusion.

1. Private property was important to America's framers. It was understood as central to the very definition of a free and democratic society, polity and economy. It is through the ownership and control of private property (land) that individuals acquire freedom and are able to exercise their other social, political and economic rights.
2. Private property has changed in the more than 200 years since the time of America's founding, perhaps most dramatically in the last 100 years. The number of rights in the bundle that comprise property, and the very nature of those rights (their robustness) are different today than they were in the latter part of the 1700s. There are many ways to explain this change, but one way is to see the change as a function of American society having and choosing to respond to changing technology and changing social values. As technology and values have changed, society has reshuffled the bundle of rights in private property, through the vehicle of the courts and legislatures, to shift the balance of individual and social rights in property.
3. Therefore, it is reasonable to assume that in the course of the next 100 years private property will change again.

The questions that this last point raises are: (a) what will property look like 25, 50 and 100 years from now? what will be in the bundle of rights?, (b) what will drive this process of change? and (c) how much will the transformation of property matter in the twenty-first century?

The remainder of this closing chapter explores these questions.

BRAINSTORMING THE FUTURE OF PRIVATE PROPERTY

In May 2002 the contributors to this book came together for two days at the Lincoln House in Cambridge, Massachusetts under the sponsorship of the Lincoln Institute of Land Policy. The purpose of our gathering was to present the drafts of the chapters in this book in a closed-door-seminar format, and to open ourselves to a broad-ranging set of discussions, input and challenges from a disciplinarily and politically diverse group of colleagues, all of whom share a passion for the subject of private property. During this seminar we were joined by several of the senior staff at the Lincoln Institute.

Our discussion took shape into three broad themes, reflected in the book's organization: (1) the role of the courts (specifically, but not exclusively, the US Supreme Court) in the future of property rights; (2) the new forms that property might take; and (3) the broad-brush social forces (external to property) likely to impact upon property's content, form and direction.

With regard to point number 1, the discussion centered on the chapters by Bromley (Chapter 2), Kayden (Chapter 3), Fischel (Chapter 4) and Alexander (Chapter 5). In particular, Bromley asserts that the courts – US Supreme Court, state and local courts – do not so much define, refine and formulate property, property rights, and the content and form of the property rights bundle as affirm (stamp) social decisions already arrived at. Kayden sees a much stronger and consistent role for the legal system, especially the US Supreme Court, though he doesn't believe that the direction of the Court's jurisprudential activity will be dramatically different in the twenty-first century than it was in the twentieth. Likewise, Fischel sees the courts and the legal system playing a leading role in property's future, though he wonders why the courts are so wary of engaging the regulatory taking issue, which seems to him to be much clearer than it does to individual judges and courts. Alexander, however, wonders about this whole realm of argumentation. To some extent he agrees with Bromley, though for wholly different reasons. Alexander sees that legal practice may be abandoning its reliance on a legal paradigm and instead embracing an alternative, market-based paradigm, which is another way of talking about a way we formulate and assert social decisions.

With regard to point number 2, the chapters by Nelson (Chapter 6), Krueckeberg (Chapter 7) and Strong (Chapter 8) each in their own way evoked strong reactions. Different in discipline and political perspective, their arguments for emerging and new forms of private property (of and by local government in the case of Nelson, by non-profits in the case of Krueckeberg, and by marginalized and wronged peoples in the case of Strong) drew nods of agreement, shakes of the head, objections, endorsements. All three of the chapters brought forth serious reflection by the group as a whole.

Despite any individual objections, the group as a whole found legitimacy in the arguments put forth by the respective authors.

It was, however, when we got to point number 3 that discussion exploded. Participants laid bare their hopes, dreams and fears. Various assertions were made that were themselves interrelated, unrelated and sometimes contradictory. Among these were:

- In the first decades of the twenty-first century the nation-state itself will become ever-more irrelevant. As this happens, the centrality of land-based private property as an important social institution will decline.
- Private property issues will rise in importance, but they will be related to *intellectual* property, not land-based or grounded property.¹
- Social conflict over property will increase, as the social redefinition of property continues, especially as a function of environmental issues. This will result in a further polarization of opinion among the parties to this debate, and thus an increasing inability to reach any state of social consensus.

Given the nature of the contributors to this volume, these points evoked heated discussion, but no clear resolution.

WILL PROPERTY MATTER?

So, what does one make of this lack of resolution? I see a number of factors swirling around this issue.

- The urbanization of America. Private property in the twenty-first century means something different than it did in eighteenth- and nineteenth-century America. We are not, and have not been for nearly a century, the nation of Jefferson's yeoman farmers. Instead we are predominately a nation of suburban dwellers, in our single-family homes on small lots.
- Along with this now almost century-long change has come another, subtler shift. This is a shift from a focus on land for its use value (its value to us as a directly productive resource in the form of a farmstead, ranch, forest lot, family home) to land for exchange value (our purchase of property specifically focused on how it will appreciate in value, with an understanding that it represents primarily an economic investment). While both factors in land have always been present, the balance between the factors has shifted.²

- A homogenization of place that tends to reinforce the shift from use to exchange value. (If all places look and function the same, then the utility of a 'special' piece of land diminishes. We can exchange land as easily as we might exchange hotel rooms, and in the advertising words of a hotel chain several years ago, what we want are 'no surprises.')
- A movement towards global economic integration, which itself reinforces this trend toward the homogenization of place.
- A push, after 1989 and the fall of the Berlin Wall and with it the influence of the former Soviet Union, to establish democracy and markets globally, with the first step often being the establishment of a set of institutions related to private property.
- An ever-growing recognition by marginalized peoples that they might 'win' in their fights for recognition, place and property if they play by the rules of/redefine their grievance in the context/form of private property rights.

So to return to this chapter's opening section and set of questions – how much does and how much will private property matter in the twenty-first century? I believe it will matter a lot!

It will matter because despite a significant shift in property's focus from use to exchange value, use value still matters, and it may (at least for this period in the beginning of the century) matter more now than it has recently.

Why does it matter? It matters because despite the increasing homogenization of space in America, we care about and are defined by our places. Our homes, our neighborhoods, our ownership and management of private property act as one of many social cues to ourselves and others as to who we 'are,' that is, what social and economic class we belong to, and what values we hold.³

It matters because property still has significant legacy value. Whether it is the suburban family home or the family farm, property is the place of memories. It is a place we are rooted to, and can be uprooted from, and when this happens we can feel adrift.⁴ I offer two stories in this vein.

First, in the fall of 2002, Wisconsin elected a new governor. With the office comes an abode. The governor and his family decided that for the four-year period (and hopefully from his point of view eight-year period) it made sense to sell the house they had lived in for over 20 years. In the reporting focusing on the human-story side of the election, the local media played up the consternation of the young adult, out-of-the-house sons of the governor-elect in losing their family home – their home of memories.

Second, one of my former students is from Minnesota, Wisconsin's neighboring state. This woman is in so many ways fully Minnesotan that she can be the subject of playful teasing by her many friends about being a charac-

ter out of a Garrison Keillor, 'Prairie Home Companion', radio monologue about the righteous, honest, polite, shy and unassuming Norwegian-descended people of that state. When this woman was an adult, married with children, launched on her career, and with a home of her own, her parents sold the family home in Minnesota to move in retirement to Texas. The result for the woman in question was trauma. Why? She no longer had a home to go home to. That is, as much as she self-defined as a Minnesotan, there was no physical place to return to, no way to connect to her roots, no vehicle to share with her children the places that formed the memories and experiences of her life. She felt adrift, and let all of us know this!

But as much as property is about use value, it is also about exchange value. Traditionally, for most Americans the ownership of private property (a piece of real estate – a house and the land upon which it sits) is the most significant asset they control. In the 1990s, it became fashionable to talk about the move into the new economy, and the diversification of assets as more of middle-class America acquired stocks. However, with the bursting of the bubble in 2000, the rosy predictions about asset realignment are now being reassessed.

Soon into this new century, national newspapers were carrying articles about how 'small' investors were reassessing their confidence in the stock market and shifting their organization and assets into real-estate clubs for the purpose of buying and managing private property (Ward, 2002). Why? Partly because property is a tangible asset over which the investor can exercise some control.

undoubtedly concerned about volatility on Wall Street, (many) are turning their attention instead to Main Street and the physical assets that they can see, touch and drive by – from studio apartments to single-family homes to multi-unit apartment buildings. The Northwest Real Estate Investors, as the Oregon group is called, meets regularly, in almost support-group style, to trade tips and swap stories about real estate investing in the Portland region ... the popularity of these groups has been climbing rapidly.

National figures are hard to come by, but real estate investment clubs from New York City to Charlotte, N.C., to Portland say their ranks are swelling. The National Real Estate Investors Association, which offers services to clubs estimates that there are some 600 real estate investment groups nationwide, nearly double the number just two years ago. (Ward, 2002)

Finally, private property will matter in the twenty-first century for the reason it has mattered since the eighteenth century – its link to foundational democratic political and social theory. The rhetoric of America's Founders about the centrality of property to responsible and free citizenship is a oratory that makes intuitive sense to many Americans, even if the present America is as different from that of those who offered forth that oratory as can be imagined.

In many important ways, Americans still adhere to the Jeffersonian vision of themselves as people rooted to and freed by their relationship to the land they own. The passion that this relationship can take is evidenced in many forms. Institutionally there is the political and policy activity of the so-called private property rights movement (see, for example, my introductory chapter in this volume, Chapter 1, as well as Jacobs, 1998). More viscerally, though, this is brought home to me every time I give a talk on the subject of private property rights before a group of 'regular' citizens, especially those who are more rural than urban based, and who serve in local government positions. This is exactly what happened in early January 2003 as I was finishing this chapter. I spoke before 130 local government officials in northeastern Wisconsin on the historical and legal foundations of private property rights issues. To them, the ideas and words of John Adams, James Madison and Thomas Jefferson were as alive and relevant as they had ever been. They felt overwhelmed by the political power of Madison-based environmentalists and the bureaucratic force of the state capitol as it pressed upon their property and the property in the jurisdictions over which they had electoral management authority. They talked about feeling as if they were becoming serfs in a feudal state, because of how little actual control they could exercise over their own and others' property. For these people, and their constituents, it is the first principles of the Bill of Rights – as articulated and as they understand them – that provide the bastion against oppression. This type of feeling will not fade easily or quickly in America.

So, while many in the environmental community may decry the wise use/private property rights movement as a charade because it serves as a front for natural resource extraction industries and national and multinational capital (which may be true), this does not detract from the attraction of the movement to the many 'little people' – urban, suburban, and rural – who find themselves at the receiving end of what they feel to be unreasonable, uncalled for, and unduly demanding government regulation. These regulations result in reductions (often significant) in property value for actions that society at large deems to be in the public good. It is these people who provide the public face of the private property movement, the ones who appear to give angry, incredulous testimony at public meetings.

Will this change? I don't think so. My prediction is that the current policy and political schism over property rights is going to deepen, rather than heal. Why? In part because of the spread in America over political and social values and social and economic circumstances. This has been expressed and talked about in a number of ways. After the 2000 presidential election the national print media published a map which coded by red and blue the counties that voted for the Republican and Democratic Party candidates (George W. Bush and Albert Gore) respectively. The map showed a nation

whose political opinions were divided largely between those who resided in the coastal (more liberal) states and heartland (more conservative states) (Brooks, 2001). To some extent this division reflects social and economic circumstances. It was largely (though not exclusively) the residents of the blue states who enjoyed the economic boom of the 1990s, who were able to reposition their economic circumstances upward, and thus participate in further dividing America's economic classes (Krugman, 2002).

All of this has impacts on property rights issues. How? While property matters to all of us (for the emotional, non-financial reasons noted above in my two stories), as an individual becomes wealthier, the component of that person's financial profile directly tied to property decreases. This is only logical. As one's wealth increases, one tends to diversify one's holdings, and wealth is represented by real estate and other wealth instruments – stocks, bonds, art, precious metal, and so on. So it is not that the upper middle class and wealthy do not own larger homes, second (and third and fourth) homes, shares of golf and hunting club memberships, and the like, but rather that the proportion of one's wealth represented by this property decreases in the total wealth profile. So, while for the middle and lower middle class, it is the ownership of property (a house and lot) that is the primary form of wealth, for the upper middle class and wealthy, property is only one part of how they own and invest to secure their wealth.

The impact of all this for the social and political debate over private property and property rights is profound. If a proposed land-use or environmental program is going to impact upon property rights, it matters how important those property rights are to those being impacted. If those being impacted are wealthier, they can, quite literally, afford the impact; it matters less to them. If those being impacted have only their landed property, then land-use regulations which propose to take the value of that property for larger social values become more important to the individual, who has a significant incentive to resist those regulatory efforts and to work to preserve the integrity of their property rights bundle.

Environmental social scientists have long noted this phenomenon. That is, they have noted that those who tend to support the development and implementation of land-use and environmental policies and programs are those who can, quite literally, afford them. And they have noted that as there is an upward shift in economic circumstances, this shift leads to a focus on the promotion of a set of quality-of-life values that can become (often become?) translated as regulatory efforts to shape the use of other people's private property in the interest of pursuing larger, social values of environmental protection, growth management, smart growth and so on (some examples focusing on a set of cases in New York State are laid out in Heiman, 1988).

So if the observations and predictions offered by Brooks (2001), Krugman (2002) and others about the way America's social and economic classes are developing is correct, what we can expect is ever-more social conflict over property rights, as one group with resources seeks to secure more quality-of-life values (controlled growth, undivided farmland, pure trout streams, vibrant downtowns) and one group with some but marginal resources seeks to protect that sliver of investment they have in the American dream through investment in property (whether these be farmland owners, ranchers, wetland owners, or the owners of 'blighted' downtown neighborhoods slated for redevelopment even when these neighborhoods and homes may be socially and economically viable⁵).⁶ In other words, an era of social conflict over environmental values and resources is upon us, and one of its expressions will be heightened conflict over property rights.

But all of what has been said so far has a decidedly within-US-centric perspective to it. If one is going to pose the question as to whether private property will matter in the twenty-first century, an answer should have a global as well as national context. And here events seem to suggest an even more emphatically positive answer. Why? First, observations from two broadly defined regions.

In Western Europe since the end of World War II, property has had a decidedly less private feel to it than in the US. The state is stronger, and legally, administratively, culturally and historically the public sphere presumes an ability to act upon and reshape property in ways that are more 'radical' than normally tolerated by Americans. Yet as operative as this paradigm might be, it is not without substantial challenge. As Europe moves toward more functional economic and political integration, the occasion is provided to reassess a wide range of institutional arrangements. For many, one of the arrangements that require reassessment is the relationship of the state to private property. Since 1996 a series of regular meetings has been held in France for the express purpose of drawing together those with interests in a more market- and private-property-based perspective, to learn from the experiences of more market-based societies, and to explore such institutional forms in the new Europe (see Falque and Massenet, 1997, 2000; Falque *et al.*, 2002). A similar set of reassessments is occurring in Australia and New Zealand.

In the transition and developing worlds, we are seeing an embracing of property. In the act of nation building, it is property which often attracts initial attention. During the 1990s, among the very first acts of the new parliaments in places as different as Scotland, Albania and South Africa were acts to address issues of property – its restitution to former owners displayed under previous regimes, its creation for those who had not had access to it, and its integrity under the rule of law of the new political regimes.

America has had a great deal to do with these efforts. Drawing from its political and economic foundations in democracy and capitalism respectively, the US has promoted the creation of property, property registration systems and property markets as foundational to the viability of new (democratic) political and (market-based) economic systems globally in the post-Berlin Wall, post-Soviet Union world. Through the aegis of its international aid programs, the US has provided technical assistance funds and advisors to countries globally to help write private property clauses into new national constitutions and then translate these clauses into property creation and transfer laws. Then these same programs further the process along through the design of property registration and information systems and the training of personnel to manage those systems. And the message imbedded in these efforts is being heard.

In 2000 the international press carried a story on a massive political protest primed by the inaction of the Polish parliament relative to an expected redistribution of state-owned apartments and farmland to current users (AP, 2000). The protesters chant at their rally – 'There is no freedom without ownership!' This is a sentiment as fundamentally American and resonant of the American Founding Father Thomas Jefferson as one could imagine, and a sentiment fully in line with those US private property rights advocates who oppose government policy that restricts private property for, as they state, the same reason.

In this period a book burst upon the international scene whose main argument was about the centrality of property – its articulation, delineation and privatization – as the key to the economic improvement of poor countries and poor peoples (de Soto, 2000). While this perspective (and the author and book in particular) is not without critics, it is also not without its champions, including members of the development assistance community, and former influential national leaders, such as former US President Bill Clinton (Fallows, 2003).

Looked at from many angles, and for many reasons, I believe property will not only matter in the twenty-first century, but that in this early period of the century its importance to peoples in all parts of the world, including the US, will grow, rather than diminish. If this is true, than what will it look like?

THE FORM OF PRIVATE PROPERTY⁷

One way to describe the status of private property is to tell a story of a decrease in the robustness of the property rights bundle. Starting at some (mythical) point in the pre-twentieth-century period the property bundle was fuller, thicker and stronger than it is today. Then, beginning at some undeter-

mined point, but taking clear shape in the early part of the twentieth century, the property rights bundle came under assault from the state, as government was pressured to make the bundle narrower, leaner and weaker to fulfill public goals at the expense of the private property bundle.

The twentieth century was one in which the property rights bundle experienced waves of assault. At first the assault was a function of new technology and rapid urbanization. These phenomena continued through the century and were then joined later in the century's last half by an assault born of changing social values, rooted in new attitudes about racial, gender and then environmental relationships. With each wave of assault the property rights bundle diminished.

While this version of the story has a decidedly private property rights advocate slant to it, the facts are not in dispute. The property rights bundle has changed through the century; that is exactly the reason the private property rights movement can mount the type of social, political and policy campaign that it does.

What is interesting about this story is that each of these assaults is a change driven by a threat. In the early part of the century city spaces were changing as a function of inter- and intra-national immigration; traditional ideas about property did not seem to work as these changes occurred. In the mid-century, property seemed to be a barrier to ever-mounting calls for legal and social change in racial relationships. In the late century, claims to property's integrity appear to clash with new scientific findings about ecosystem functioning and maintenance.

The question is: what's next? Will there be new challenges to property analogous to those which have reshaped it in the twentieth century? The answer has to be yes. We continue technological development, and it continues to present challenges to our way of living and our concepts of property. Exactly what these developments will be, I won't venture. But they will come, and as they do, property will be asked, we will demand, that it bend and flex in response, just as we have done throughout the twentieth century. And we will continue to do the same in the social arena. As a society we will insist that property be reshaped as we discover ways in which old conceptions of property hold back the liberation and social integration of peoples once deemed invisible or irrelevant, or at least less deserving than property itself.

But this is an uncomfortable prediction, for at least two reasons. One is that it seems to suggest that there is no logical end to the reshaping of property, that instead property is always subservient to technology and social values. If this true, then how can the premise, the promise, of property as an establisher and enabler of the individual in a democracy be realized? That is, if technology and social values always trump property (and always do so absent compensation), then what is property's value?

What value does it serve as a bastion against the arbitrary power of the state? How does one prevent the tyranny of the majority? Are there first principles that are inviolate?

Also, these predictions fall into the trap of many predictions – assuming that the future will unfold as has the past. Instead, what we know about technological and social change is that there are periods of disjuncture, when something (or somethings) happens to completely reshape our world view and our abilities to live in the world as we have to that point. The difficulty is that few of us can imagine what these disjunctures might be, and what changes they might bring. Yet we know these disjunctures have happened in the past; they will happen again. These changes, whatever they will be, will impact property.

THE FUTURE OF AN AMERICAN IDEAL

Is there a future for private property in America? Yes. To those who are skeptical, I respond with a paraphrase of Mark Twain's famous quote of over a century ago: 'the report of my impending death is an exaggeration.' Private property is central to the very essence of the American experience, and it will continue to hold an important place in American economics, politics, law and social debate.

But this does not mean that private property will stagnate. It never has, and it will not now. Private property will continue to evolve in America; it has to. Private property is a social contract. It establishes the rights of the individual *and* it binds society. The balance point between individual and social rights in property will continually be renegotiated. As Americans continue to reinvent their concept of freedom, of what it means to have liberty, they will come to understand anew what it means to hold private property while living in a democratic society.

As part of this process we will continue to fight about property rights and takings; there is no reason we shouldn't; we always have (Treanor, 1995). I for one think it is a good thing. In fact, I have come to believe that it may be through the act of fighting that we come to understand not only property but ourselves as a people.

As we ponder private property's future it is important to acknowledge the very real emotional appeal of property rights protection to the American public. Rather than cynically dismissing the base of support for the property rights movement, proponents of land-use and environmental policy need to recognize the ambivalent feelings of many Americans toward private property rights *and* toward regulation. There *are* occasions of abusive administrative practices in the implementation of policies and programs to manage land and

environmental resources, and there are instances where the burden that individual landowners are asked to bear stretches the realm of credibility, even when a court is willing to find such an action constitutional. An active debate needs to occur about the mechanisms for the alleviation of undue burden which arise through the enforcement of land-use and environmental laws.⁸

Private property rights is an arena of social contention to Americans because it means so much to them. As an American, I am glad that we care. What is important now is to be certain that the debate about its form and role in the twenty-first century is not one-sided and that all perspectives (including, for example, those of future generations and the non-human species) are accounted for. If we believe in the promise of democracy, and the role that private property plays in establishing and continuing democratic societies, we will not shy away from the necessary political debate about property's future in our lives. I look forward to this debate, and the way it will help to further understand what it means to be Americans, democrats and private property owners.

NOTES

1. At the May meeting, Gregory Alexander told a story to back up this assertion. He related how in hiring new faculty to teach in law schools, there were many young scholars interested in property issues, all of them interested in intellectual property. In contrast, there were few interested in property in the way it is discussed throughout this volume, except as it might intersect with issues in environmental law. Alexander's story fits with an experience I had within the last few years sitting on an interdisciplinary hiring committee in the area of land use, and trying to hire someone in the area of land economics. For two years our committee was unable to identify a suitable candidate. Finally, at one meeting the frustrated department chair of the Department of Agricultural and Applied Economics said that the reason we could not find someone was that young scholars were not attracted to this area of study, research and teaching. That, in effect, no one was being trained in his discipline in this area anymore (and his discipline is the traditional source of land economists). What he did say, though, was that if we could redefine the position to be one in the area of environmental economics, there would be many candidates.
2. Use value and exchange value are common and classic Marxist-theory-based economic and sociological terms. Logan and Molotch (1987) provide an updating of these terms in the context of contemporary social conditions.
3. A classic study of this issue, focusing on the relationships of owners and renters, is Perin (1977).
4. A fascinating study of the use-value relationship to property is contained in Garber (2000).
5. One relatively recent and highly publicized example of the phenomenon of displacement for reinvestment is the case of the Poletown neighborhood in Detroit, Michigan, a viable ethnic working-class neighborhood whose owners had their properties condemned by the city's governing authorities to pursue an agenda of manufacturing investment-based economic development (Wylie, 1989). This case follows on many others; for example see Hartman (1974).
6. This characterization is not intended to affirm the perspective of either group. Especially with regard to the latter group, it may well be that this group does not understand the value-

added that comes to their property from regulatory efforts that shape the land-use and environmental and natural resource management decisions of their neighbors. Instead, it is easier to see the immediate, 'negative,' quantifiable impact of regulation on one's property; it is more difficult to articulate the parallel longer-term, positive impact of regulation of other people's properties, as they backwash to yours.

7. The ideas that form this section emerged from discussion in an advanced seminar I taught in the fall of 2002 at the University of Wisconsin-Madison. I heartily thank the participants in that seminar - Mike Carlson, Jenny Carney, Kathy Kilkus, Matt Mariola, Molly Martin, Tom Syring and Chi-fang Wu (all graduate students in the Gaylord Nelson Institute for Environmental Studies) - though they are not responsible for the ideas as they are presented.
8. This call is not unreasonable. Planners (city, regional, environmental, land-use and natural-resource) for example have long had internal debates about ways to, on the one hand, respect the integrity of private property, and, on the other hand, achieve public objectives in land and environmental planning and policy. Professional journals have been filled with ideas for doing just this, and numerous states and communities across the country have experimented with creative approaches, including mechanisms such as transfer of development rights, purchase of development rights, and the facilitation of non-profit, public interest land trusts (see, for example, Daniels and Bowers, 1997).

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- Agins v. City of Tiburon (447 US 225 (1980)) 25, 46, 47, 54
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- Berman v. Parker (348 US 26 (1954)) 37, 46
- Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics (403 US 388 (1971)) 48
- Block v. Hirsh (256 US 135 (1921)) 46, 47
- Boundary Backpackers, et al. v. Boundary County, et al. (913 P. 2d 1141 (1996)) 12
- Brown v. Board of Education (347 US 483 (1954)) 33, 37
- City of Monterey v. Del Monte Dunes, Ltd. (526 US 687 (1999)) 42, 46–7, 48
- Concrete Pipe & Products v. Construction Laborers Pension Trust (508 US 602 (1993)) 48
- Construction Industry Assoc. v. City of Petaluma (424 US 934 (1976)) 32, 38
- Cusack Co. v. City of Chicago (242 US 526 (1917)) 46
- Davis v. Passman (442 US 228 (1979)) 48
- Dolan v. City of Tigard (512 US 687 (1994)) 42, 46, 47, 48, 54, 70
- Eastern Enterprises v. Apfel (524 US 498 (1998)) 45
- Engel v. Vitale (370 US 421 (1962)) 37
- Euclid *see* Village of Euclid
- First English Evangelical Lutheran Church v. County of Los Angeles (482 US 304 (1987)) 43, 46, 47, 48, 55
- Goldberg v. Kelly (397 US 254 (1970)) 47
- Goldblatt v. Town of Hempstead (369 US 590 (1962)) 37, 41, 46
- Golden v. Planning Board of Ramapo (285 N.E. 2d 291, cert. denied 409 US 1003 (1972)) 32, 38
- Gorieb v. Fox (274 US 603 (1927)) 36, 46, 47
- Hadacheck v. Sebastian (239 US 394 (1915)) 25, 33–4, 35–6, 46
- Hawaii Housing Authority v. Midkiff (467 US 229 (1984)) 47
- Hills Development v. Bernards Township (510 A. 2d 621 (NJ 1986)) 66
- Hunter v. City of Pittsburgh (207 US 161 (1907)) 100–101
- Just v. Marinette County (201 N.W. 2d 761 (1972)) 13
- Kaiser Aetna v. United States (444 US 164 (1979)) 46, 47, 48
- Keystone Bituminous Coal Association v. deBenedictis (480 US 470 (1987)) 25, 46, 47, 48
- Lochner v. New York (198 US 45 (1905)) 47
- Loretto v. Teleprompter Manhattan CATV Corp. (458 US 419 (1982)) 25, 41, 46, 47, 54, 55
- Lucas v. South Carolina Coastal Council (505 US 1003 (1992)) 25, 41–2, 44, 46, 47, 48, 54, 55, 89