

Index

alienation, 244 Coleman, Jules, 24 common interest communities altruism distinguished from other-regarding, 114 and decision making, 65 anticommons common law described, 39 and causal requirements, 296 and well-functioning markets, 279 characteristics of, 294 compared with legislation, 294-99 and harm requirement, 296 belief systems as important for cooperation, 78 common pool resources. See common property: and institutions, 83 shared resources and tragedy of commons, 220 common property and value formation, 84 and co-owners, 214 Bell, Alexander, 277 and co-users, 218 Berman v. Parker, 284 and Elinor Ostrom's ideas, 219 Boomer v. Atlantic Cement, 140 shared resources, 213, 225 bundle of sticks metaphor. See theories of comparative institutional analysis, 38-41. See also institutional analysis property burdens and benefits condominiums. See common interest and alienation, 244 communities cooperation as defining property, 130 and due process, 302-10 and belief systems, 84 generally, 55-59 and co-owners, 217 and land use regulation, 255 and co-users, 219 as a unifying theory, 130 and exit, 213, 220 and fable of exchange, 89-91 Categorical Imperative and individual decisions, 67 and finding a maxim, 124 and invisible hand theories, 86 and the liberal commons, 222 and universality, 125 Chapman, Nathan, 254 and other regarding behavior, 114 City of Monterey v. Del Monte Dunes at and reciprocal benefits, 295 Monterey, Ltd., 301 and severance, 218 Claeys, Eric, 277 cooperatives. See common interest Coase Theorem. See Coase, Ronald communities Coase, Ronald, 31, 32, 33, 186, corrective justice, 22-26 187, 204 and communitarian theory, 36

330 Index

```
Demsetz, Harold
                                                  exit. See cooperation
  and private property, 96
                                                  externality, 32, 33, 189
distributive justice
  and communitarian theory, 36
                                                  Fifth Amendment. See Takings Clause; Due
  relationship to corrective justice, 22-26
                                                          Process Clause
Due Process Clause
                                                  First English Evangelical Lutheran Church v.
  and burdens and benefits, 310
                                                          County of Los Angeles., 269
  and limits on legislation, 310
                                                  Florida Rock Industries v. United States, 302
  as policing lawmaking process, 293
                                                  Fontainebleau, 200
                                                  Foster v. Preston Mills Co, 202
  and regulatory takings, 266
  and separation of powers, 254, 293
                                                  future interests
                                                     and the market, 230-33
  and takings, 300
duty
                                                     and Rule Against Perpetuities, 238
  and the categorical imperative, 124
                                                     and uncertainty, 238
  in contracts, property and tort, 27
  and the duty to repair, 133
                                                  Hand formula, 28, 29, 110
  generally, 115-23
                                                  Hawaii Housing Authority v. Midkiff, 283
  implied by decisions to use, 168
  implied by purchase, 173
                                                  information cost theory, 41-44
  as limitation on right to exclude, 166
                                                     and the right to exclude, 178
                                                  institutional analysis, 37
  and limits of common law, 295
  and no duty, 116, 295
                                                     and belief systems, 83
  no duty principle
     source of right to exclude, 163
                                                  Jacque v. Steenberg Homes Inc, 182
  and nuisance, 196
  and right to exclude, 260
                                                  Kaiser Aetna v. United States, 288
  and temporal coordination, 232
                                                  Kant, Immanuel
Dworkin, Ronald
                                                    and the Categorical Imperative, 124
  and the duty to rescue, 117
                                                     equality principle, 20
  equality principle, 20
                                                  Komasar, Neil, 38
                                                  Krier, James, 74
eminent domain. See Takings Clause
Epstein, Richard, 277
                                                  land use regulation
                                                    and burdens and benefits, 255
equality
  and assent, 229
                                                     as distinct from takings, 256
  and burdens and benefits, 131
                                                     and equality, 255, 290
  and due process, 302
                                                     and right to exclude, 264
                                                  law and economics, 28-31
  and fault, 143-49
  and freedoms, 228
                                                  legislation
  and land use regulation, 255, 290
                                                     and abuse of process, 304
  the principle, 20
                                                     central competencies, 298
essentialist theories. See theories of property
                                                     compared with common law, 294-99
evolution of property rights, 34, 75, 98
                                                     due process limitations, 299-310
  and belief systems, 84
                                                  Lochner, 260
  and common property, 219
                                                  Lucas v. South Carolina Coastal Council,
  generally, 92-96
                                                          264, 268, 308
  and invisible hand theories, 75, 79
  and social recognition, 48-51
                                                  markets
  and statist theories, 75, 80, 100
                                                    and blocked exchanges, 245
exclusion, 261. See also duty; right to
                                                     as coordinating devices, 244
       exclude
                                                     and property destruction, 237
```



Index 331

as proxy for future owners, 230–33 and public use, 280 and right to exclude, 263, 286 and servitudes, 239 McConnell, Michael, 254 Merrill, Thomas, 42, 161, 234, 277 Merryman, John Henry, 234 Michelman, Frank, 277 Miller v. Schoene, 267 Moore v. Regents of the University of	Pareto efficiency and indeterminate outcomes, 77 and perfect competition, 86 Parfit, Derek and veil of ignorance, 154 Pennsylvania Coal Co. v. Mahon, 269 permanent physical occupation. See Takings Clause Posner, Richard, 234 possession
California, 51, 245 moral rights	and rights of co-owners, 216 private law
as problem of temporal	and decision making, 71
coordination, 228	distinguished from public law, 47
	and public law, 252
necessity	public law
and the right to exclude, 175	and decision making, 72
Nectow v. City of Cambridge, 303	and private law, 252
norms	public use, 279
as developed through cooperation, 87 and the division of gains, 91	current theories, 276–79
and entitlements, 207	reasonable person
nuisance	and decision making, 68
and duty, 196	and the duty to investigate, 181
generally, 185–211	and duty to repair, 132
and insignificant harms, 206	and the equality principle, 149
	and Hand formula, 28
obligations. See duty	and Kant, 124
Ostrom, Elinor, 219	and location decisions, 193
other regarding behavior	and other-regarding decisions, 122, 123
and altruism, 114	and strict liability, 140
and cooperation, 114	as unifying ideal, 139
and co-owners, 215	regulatory takings
generally, 54–55	and diminished value, 263
and the rational person, 113	distinguished from permanent physical
and waste, 235	occupations, 287
owner as decision maker	and due process clause, 266 and exactions, 260
and alienation, 244 co-owners, 212	generally, 257
co-users, 212	and government torts, 260
and eminent domain, 274	as guarantor of value, 267
as essentialist theory, 64	and just compensation, 275
generally, 47–48	and Lochner, 269
as mediating device, 67–69	and Mahon, 269
and motive, 71	to protect Takings Clause, 257
and owner rights, 62	remedies
shared resources, 213	in exclusion cases, 179
as unifying device, 313	Restatement of Servitudes, 243
and waste, 235	right to destroy
ownership	and future interests, 237
meaning of, 311	as nuisance, 237



332 Index

right to exclude strict liability distinguished from right to use, 263 as unworkable concept, 134 and duty, 166 Sturges v. Bridgman, 204 and eminent domain, 283 generally, 161-84 Takings Clause and land use regulation, 264 current theories, 276-79 and Mahon, 270 distinct from land use regulation, 256 and markets, 263 and eminent domain regulations, 287 and necessity, 175 and market failure, 279-82 and no duty principle, 163 permanent physical occupations, 287-88 and remedies, 179 and Takings Clause, 286-88 protecting right to exclude, 257 rights theories and right to exclude, 259, 286-88 inadequate as behavior theories, 62 and value of property, 276 theories of property and land use regulation, 250 underspecified limitations, 5 bundle of sticks theories, 38 underspecified origins, 14 communitarian theories, 35 Ripstein, Arthur and constrained decision making, 66 and the no duty principle, 119 essentialist theories, 38, 64, 66 owner as decision maker, 47-48 Rule Against Perpetuities. See future interests invisible hand theories, 75 Scanlon, Thomas libertarian theories, 34, 229 and veil of ignorance, 154 possession, 77 separation of powers statist theories, 35 and due process, 254 tragedy of the commons. See cooperation; servitudes common property generally, 239-43 transactions cost economics, 31 and markets, 239 severance uniust enrichment and cooperation, 218 and the fault principle, 137 Shaprio, Scott, 74 Smith, Adam veil of ignorance, 21, 24, 29, 56, 110, 133, 155, and veil of ignorance, 154 157, 210 Smith, Henry, 42, 161 generally, 154-57 social recognition and nuisance, 208 basic idea, 81 Vincent v. Lake Erie Steamship Co., 134, 139, and Demsetz theory, 98 196, 207 generally, 48-53 by judges, 51 waste, 234 and legislation, 250 wealth maximization by legislatures, 53 and the assignment of entitlements, 150 and markets, 107 as indeterminate, 6, 76