

## Index

References to specific cases, statutes, and constitutional clauses may be found in the Tables of Cases and of Legislative Materials, at pages xv–xxii and xxiii–xxiv.

- “absentee owners,” 152
- absolute, as characteristic of theory of morality, 130–31, 136, 201, 231
- absolute ownership
  - balancing of competing interests and, 130–31, 202–3
  - component rights and, 201, 299
  - conventional property rights and, 136
  - egalitarian property theory, misconception in, 86, 93–94
  - exclusion and, 121–22
  - personal property and, 148
  - sufficiency proviso and, 93–94
- abuse of right, 163
- accession
  - accessories, 179
  - legal doctrine, 176–77, 180, 193–94
  - theoretical concept describing legal rules that consolidate resources in single *res*, 181–82
- Ackerman, Bruce, 19–20, 23
- “act”-consequentialist reasoning, 24
- ad coelum*
  - aerial trespass and, 160
  - minerals and, 177, 187, 189
  - shale oil and gas and, 194–95
- adverse possession
  - claim communication requirement and, 161–62
  - Nozickian natural rights and, 131
- aerial trespass, 159–61, 171
- affirmative waste, 213
- agency, 76
- alcohol regulation, 252–53
- Alexander, Gregory, 128, 131, 205
- ameliorative waste, 212–16
- animals
  - acquisition or capture of, 96
  - increase doctrine, 176, 192
  - individual *res*, 174, 176
  - property running by operation of law, 180
  - thing design and, 174, 176, 192
- applied philosophical perspective on property, 17–18
- appropriative rights
  - as *in rem* rights, 118
  - use facilitation and, 120–21
  - as usufructs, 115–17
- Aquinas, Thomas
  - generally, 16–17
  - communitarianism and, 51–52
  - on “community of goods,” 83
  - on natural law, 43–44, 61–62
  - on property, 146
- architecture
  - Aristotle on, 12, 17
  - property rights, architectural system analogy, 147, 151, 302
  - rights-based approach to property, architectural system analogy, 300
- Aristotle
  - on architecture, 12, 17
  - on ethics, 12
  - moral theory and, 17
  - on ownership, 152
  - on property, 146
- artifacts
  - as fixtures, 178–79, 190
  - institutional artifacts (*see* institutional artifacts)

- assembly cases, 284–86, 288–89, 293
- assigned seats, property rights in, 114
- asylum. *See* immigration
- authority. *See* legitimacy/legitimate authority
- autonomy
  - natural rights and, 124, 129–30, 134–35
  - Nozickian natural rights and, 13–14, 131–32
  - ownership and, 154–55
  - productive use requirement and, 134
  - right to destroy and, 132
  - utilitarian property theory and, 131
- average reciprocity of advantage
  - assembly cases and, 289
  - coal mining regulation and, 255
  - distribution of benefits to all regulated persons, 254–55
  - eminent domain and, 9, 253, 275, 278–80
  - Euclidean zoning and, 269
  - factors in determining, 8–9
  - forced pooling and, 9–10, 253, 287
  - need to reorder positive law rights, 254
  - overview, 8
  - police power and, 246, 253–55, 279–80
  - regulatory takings and, 264–65
- background principles rule, 264–65
- Banner, Stuart, 3
- Barnett, Randy, 245, 248
- battery. *See* bodily security
- beach spaces, property rights in, 114
- beehives, 188
- Bentham, Jeremy
  - on natural law, 19, 61
  - on property, 19, 59
- billboards, 246–57, 259–60
- Blackstone, William
  - generally, 16
  - on accession, 181
  - on autonomy, 132
  - on eminent domain, 165, 283, 286
  - on implied rights of way, 166
  - on just compensation, 282
  - personal versus property rights, 76–77
  - on property, 112–13, 145
  - on usufructs, 114
- blighted land
  - eminent domain-supported economic development and, 10, 33–34
  - harm prevention and, 290–91
- bodily security
  - claim-rights and, 40
  - limits on right to, 41
  - other normative rights and, 40
  - right to, 36
  - vaccinations and, 36, 40–41
- body tissues and organs, property rights in, 78
- Bramwell, George, 229–31
- brick factories, 246–59
- Brougham, Henry, 209–10
- Buckle, Stephen, 85, 94
- “bundles of rights” metaphor
  - “bundles of sticks,” 23–24, 105
  - competing interpretations of, 123
  - innocuous interpretation of, 123–24
  - institutional artifacts and, 106
  - as list of rights and responsibilities, 123–24
  - overview, 301
  - skepticism regarding content of property based on, 123–24
  - structural composite, property as, 123
- burial ordinances, 251–52
- Calabresi, Guido, 238, 241
- capture rules
  - animals and, 96
  - consequentialism and, 132–33, 135–36
  - fluids and, 97–98
  - Nozickian natural rights and, 129, 132–33
  - personal property and, 96–98
  - private property, applicability to, 188
  - shale oil and gas and, 194–98
  - utilitarian property theory and, 132–33
  - whaling and, 97, 135–36
- categorical moral theories, 44
- cedar trees, destruction of, 246–57
- changed conditions doctrine, 211
- charity proviso. *See* necessity proviso
- China, failure of Communism in, 20
- claim communication requirement
  - adverse possession and, 161–62
  - aerial trespass and, 160–61
  - community baseline of resources and, 89
  - component rights and, 205–10, 299
  - flourishing and, 82
  - hypotheticals in criticism of property, insufficient in, 99–100
  - intangible resources and, 90
  - by occupancy, 89–90
  - overview, 12, 89–90, 102
  - personal property and, 96–98
  - by possession, 89–90
  - real property and, 94–95
  - reasonable notice, 89
  - “snow dibs” and, 65
  - thing design and, 175, 184–85, 299
  - by use, 89

- claim-rights, 39–40, 117
- coal mining, 255–56
- Coase, Ronald, 22, 129, 222–23. *See also* Coasean law and economic theory
- Coasean law and economic theory
  - centralized versus decentralized property law systems, 240
  - common law contrasted, 238–39
  - critique of, 238–42
  - economic harm versus legal harm, 239–40
  - legitimacy of law and, 240–41
  - noise nuisance and, 237
  - overview, 236–37
  - police power in, 261
  - reciprocal harms, 237
  - rights-based approach to property versus, 303–4
  - smoke nuisance and, 237
  - use-based rights contrasted, 238
- Coke, Edward, 187–88
- common carriers
  - limitation of property rights, 167–68
  - public use requirement for eminent domain and, 284
- common law. *See also specific topic*
  - Coasean law and economic theory contrasted, 238–39
  - harms and duties (*see* harms and duties)
  - nuisance (*see* nuisance)
  - railroad sparks doctrine, 225, 235–36
- commonness, 164–65
- communes, 152
- Communism, failure of, 20
- communitarianism, natural rights and, 51
- communities
  - closed political communities, 49–50, 136
  - common good in, 48–49
  - community baseline of resources, 83–84, 89
  - flourishing and, 48
  - indirect promotion of flourishing in, 49
  - individuals versus, 34–35
  - limits on, 43
  - socialization of members, 49–50
  - vaccinations and, 43
- community baseline of resources, 83–84, 89
- “community of goods,” 83
- community welfare-based approaches, 66–68
- comparative fault, 224
- component rights
  - absolute ownership and, 201, 299
  - ameliorative waste and, 212–16
  - balance of competing interests and, 202–3
  - changed conditions doctrine, 211
  - claim communication requirement and, 205–10, 299
  - correlative rights and duties, 211–12
  - cotenancies as, 203–4
  - covenants running with the land as, 201, 203–4
  - easements as, 201–2
  - forced pooling compared, 215–16
  - forms and, 209–10
  - fragmentation problems, 210–11
  - freehold estates as, 202–3
  - future interests as, 201–3
  - leaseholds as, 201–3
  - legitimacy of, 302
  - moral foundations for, 202
  - mortgages as, 201, 204
  - natural property rights as justifying, 204–6, 216
  - necessity proviso and, 206
  - Nozickian natural rights and, 205
  - ordering rights and responsibilities, 202
  - overview, 14
  - pragmatism and, 214
  - principled limits on, 202
  - productive use requirement and, 206
  - recordation and, 202, 208–9
  - rights-based approach to property and, 213–14
  - Rule Against Perpetuities and, 210–11
  - skepticism regarding, 205
  - standard terms and, 205–8
  - Statute of Frauds and, 208–9
  - sufficiency proviso and, 206–7, 210, 299
  - third parties and, 202, 210
  - use facilitation and, 207–8
  - utilitarian property theory and, 205
- conceptual analysis, 107–8, 297–98
- confusion doctrine, 176, 180, 193–94
- consent, 90–91
- consequentialism
  - “act”-consequentialist reasoning, 24
  - capture rules and, 132–33, 135–36
  - as family of theories prioritizing community welfare over individual rights, 46, 66, 155, 257, 289
  - as family of theories regarding consequences as fundamental, 45–48
  - flourishing, consequences as subordinate to, 47–48
  - natural law and, 45–48, 60
  - nonconsequentialist theories, 47
  - normative theories of, 45–48
  - Nozickian natural rights and, 132
  - overview, 46
  - practical reasoning and, 66–68
  - rights-based approach to property and, 66

- consequentialism (cont.)
  - right to use land and, 230–31
  - “rule”-consequentialist reasoning, 24, 187, 189–90
- contributory negligence, 224
- conversion, 147–48
- Cooley, Thomas, 284
- “copy view” of morality, 62, 101–2, 150–51
- core cases
  - boundaries, property rights organized around, 261
  - necessity proviso and, 92, 112
  - ownership and, 150–52
  - parking spaces, 64–65
  - practical reasoning with, 62–63, 301
  - right to use land and, 94–95
  - specification and, 206
  - sufficiency proviso and, 112
- cotenancies
  - as component rights, 203–4
  - use facilitation, 208
- Couto, Alexandra, 41
- covenants running with the land
  - as component rights, 201, 203–4
  - in personam* obligations, not deemed to be, 204
  - as *in rem* immunized claim-rights, 204
  - use facilitation, 207–8
- Dagan, Hanoch, 51
- Daintith, Terence, 195
- Daley, Richard, 64
- dams, 279–80
- Demsetz, Harold, 152
- Den Uyl, Douglas, 46, 84–85, 94
- deontological normative theories
  - as family of theories prioritizing individual rights over community welfare, 66
  - as family of theories regarding as fundamental logical structure of moral obligations, 46
- design of property rights. *See* thing design
- determinacy/determine
  - coal mining regulation and, 255
  - filling in details of morality in practical reasoning, 15–16, 68
  - police power and, 245–46, 250–51, 255
  - regulatory takings and, 263, 265
  - skepticism toward natural law and natural rights regarding, 59–60
- determination, 61–62
- disabilities, 39
- District of Columbia Renewal Act, 10
- ditch easements, 191
- Douglas, William, 33–34
- duties, 39
- easements
  - as component rights, 201–2
  - ditch easements, 191
  - as *in rem* rights, 118
  - not core property rights, 113
  - overview, 106
  - rights of way, 166–67, 289–90
  - use facilitation and, 207
  - as usufructs, 114, 117
- egalitarian property theory
  - absolute ownership, misconception regarding, 86, 93–94
  - criticism of natural law, 99
  - overview, 22–23
  - ownership and, 170
  - rights-based approach to property versus, 301, 303
  - sufficiency proviso and, 93–94
- Ellenborough, Lord (Edward Law), 167
- Ellickson, Robert
  - on Coase, 222
  - on Euclidean zoning, 268, 270
  - law and economic theories and, 22
  - on ownership, 151–52
  - on usufructs, 86–87
- emblems doctrine, 174–93
- eminent domain
  - addressing skepticism regarding, 288–92
  - assembly cases, 284–86, 288–89, 293
  - average reciprocity of advantage and, 9, 253, 275, 278–80
  - defined, 274
  - discretion, dangers of, 295
  - economic development, in support of (*see* eminent domain-supported economic development)
  - efficiency arguments, 276
  - guidance supplied by property law, 299
  - irrigation and, 289
  - just compensation requirement, 282
  - justifying, 281–82
  - legitimacy of, 302
  - limits on, 274–75
  - mining rights of way and, 289–90
  - normative arguments, 276–77
  - police power distinguished, 275–76, 279–80, 286–88
  - pragmatism and, 276
  - pro-assembly analyses, 276
  - public use requirement (*see* public use requirement for eminent domain)
  - purposes of, 280–81
  - reconciliation with natural rights, 274–75
  - rights-based approach to property and, 274

- skepticism regarding, 287–88
- test cases, 277–78
- tradeoffs in, 293
- eminent domain-supported economic development
  - average reciprocity of advantage and, 9
  - blighted land and, 10, 33–34
  - dangers of, 10
  - forced pooling compared, 7–8, 277–78
  - law and economic theories and, 21, 276, 284–86
  - legitimacy of, 287
  - necessary versus indispensable, 9
  - opposition based on natural rights, 34
  - overview, 4–6
  - politics of, 33–34
  - race and, 294–96
  - socioeconomic status and, 294
  - urban renewal and, 33–34, 290–91, 293–94
- encroachments, 163, 278–79
- “enough and as good.” *See* sufficiency proviso
- Environmental Protection Agency (EPA), 291–92
- Epstein, Richard, 131, 205, 279, 286, 293
- Essert, Christopher, 77
- estoppel, 119
- Euclidean zoning
  - aesthetics and, 269
  - average reciprocity of advantage and, 269
  - co-option by factions, 268, 270
  - criticisms of, 268
  - enabling acts, 267–68
  - harm prevention and, 269
  - “homevoters” and, 268
  - NIMBY and, 268
  - overview, 267
  - rights-based approach to property and, 270
- eudaimoneia*, 42–43. *See also* flourishing; happiness
- exactions, 256
- exclusion
  - absolute ownership and, 121–22
  - as essential feature of property, 122–23
  - form versus function, 122
  - normative problems with, 121
  - overview, 105
  - ownership compared, 168–70
  - use precluding exclusion, 121–22
  - usufructs and, 107, 122
- exclusive control over resources
  - harms and duties and, 221
  - ownership and, 147–48
  - as property, 112–13
- exigibility, 118
- extralateral rights, 186–89
- factions
  - Euclidean zoning and, 268, 270
  - police power and, 249, 266–67
- family resemblance, defining institutional artifacts in relation to, 112
- fast land, 289–90
- Federalist Papers*
  - on factions, 249, 266
  - on protection of property rights, 3, 49
  - on rationality, 266
  - on “regulation,” 249
- fee simple, 112–13, 155
- Feinberg, Joel, 39–40
- “fine-print” rights-claims, 38–39
- Finnis, John, 48, 283
- Fischel, William, 268
- fixtures, 178–79, 190
- Fletcher, George, 67
- flourishing
  - claim communication requirement and, 82
  - communities and, 48
  - consequences as subordinate to, 47–48
  - eudaimoneia* and, 42–43
  - happiness and, 42–43
  - indirect promotion of flourishing in communities, 49
  - natural law and, 10–11, 46
  - productive use requirement and, 82
  - property rights as grounded in, 20
  - rights-based natural law theory and, 53
- fluids, capture rules and, 97–98
- focal cases. *See* core cases
- Foner, Eric, 137–38
- Foot, Philippa, 44
- forced pooling
  - average reciprocity of advantage and, 9–10, 253, 287
  - component rights compared, 215–16
  - eminent domain-supported economic development compared, 7–8, 277–78
  - legitimacy of, 287
  - overview, 6–7
  - police power and, 8
- forests, 153
- fracking, 6, 194–95, 197
- freehold estates
  - as component rights, 202–3
  - use facilitation, 208
- Fretwell, Holly, 153
- Freyfogle, Eric, 131
- fruits
  - emblems doctrine, 174–93
  - thing design and, 174–93
- fugacious minerals, 177, 186

- future interests
  - ameliorative waste and, 214–15
  - as component rights, 201–3
  - use facilitation, 208
- Glackin, Shane, 124
- Glendon, Mary Ann, 51
- Gordley, James, 90, 93
- government-owned property, 165
- Grey, Thomas, 19, 106
- Grotius, Hugo
  - generally, 16–17
  - claim communication requirement and, 89–90
  - on “community of goods,” 83
  - on consent, 90–91
  - necessity proviso and, 91–92
  - property law and, 3
  - on right to fluids, 97
- happiness
  - eudaimoneia*, 42–43
  - as fundamental to moral reasoning, 42–43
  - greed distinguished, 45
- harbor laws, 254
- harm prevention
  - addressing skepticism regarding, 290–92
  - blighted land and, 290–91
  - Euclidean zoning and, 269
  - monopolies and, 291
  - pesticides and, 291–92
  - police power and, 246, 251–53, 255–56, 278
  - regulatory takings and, 263–65
  - right to destroy and, 278
- harms and duties
  - delegation, 226–27
  - enforcement of duties compared to enforcement of rights, 226
  - enumeration of duties compared to enumeration of rights, 226
  - exclusive control over resources and, 221
  - natural property rights and, 222–23, 225–26
  - nuisance and, 221–22, 225
  - overview, 14–15
  - railroad sparks doctrine and, 225
  - skepticism regarding, 223
  - substantive legal rights compared, 222
- Hart, H.L.A., 109
- Hegel, Georg Wilhelm Friedrich, 20, 88
- Heller, Michael, 119–20
- Hinduism, widows’ shares of estates in, 62
- Hohfeld, Wesley, 39–40, 123–24, 298
- Hohfeldian normative relations
  - claim-rights, 39–40, 117
  - disabilities, 39
  - duties, 39
  - immunities, 39, 117–18
  - liabilities, 39, 154
  - no-rights, 39
  - powers, 39, 149
  - privileges, 39
- Holmes, Oliver Wendell, Jr., 209, 255
- Holt, John, 37, 47
- “homevoters,” 268
- Honoré, A.M., 123–24, 149–50, 298
- Hume, David, 181
- hyperplane model of rights, 132, 134
- hypothetical moral theories, 44
- immigration
  - limited nature of rights of non-citizens to be naturalized, 38
  - Nozickian natural rights and, 133
  - property law distinguished, 76
- immunities, 39, 117–18
- implied rights of way, 166–67
- improvements, 163
- increase doctrine, 176, 192
- individuals
  - communities versus, 34–35
  - justifying individual rights to property, 84
  - productive use requirement, individual rights and, 85
- informal property rights, 106, 114
- information cost studies, 303
- injunctions, 148
- in personam* obligations
  - covenants running with the land not deemed to be, 204
  - licenses ad, 119
  - partnerships and, 118
- in rem* immunized claim-rights
  - covenants running with the land as, 204
  - as feature of property rights, 106, 116
  - obligations *in rem*, 118
  - overview, 298
  - ownership and, 149
- institutional artifacts
  - “bundles of rights” metaphor and, 106
  - characteristic function of, 111
  - core instances, defining in relation to, 112
  - defined, 106
  - devalued currency example, 109–10, 112
  - dog training example, 109
  - family resemblance, defining in relation to, 112
  - institutional status of, 111
  - legitimate authority and, 109
  - necessary and sufficient features, defining in relation to, 112

- overview, 13
- property rights as, 298, 301
- retail sale example, 108–9
- skepticism regarding, 106
- as social concepts, 108–9
- typical form of, 111
- intellectual property, 77, 114
- interest balancing, 130–31
- interest-based rights
  - “fine-print” rights-claims, 38–39
  - “large-print” rights-claims, 38–39
  - Nozickean natural rights distinguished, 136–39, 170, 202
  - overview, 35, 297
  - ownership and, 146–47
  - social obligations and, 41–42
  - will-based rights versus, 41, 133–34
- interests
  - defined, 40
  - interest-based rights (*see* interest-based rights)
  - natural law and, 11
  - overview, 12
  - in resources, 12
  - in using things, 75–76, 78–80
- inventions, 77
- inverse condemnation, 264
- irrigation, 93, 289
- Jacobs, Jane, 293
- Jefferson, Thomas, 114, 146
- jus abutendi*. *See* right to destroy
- justification of property rights, 14, 42. *See also specific topic*
- Justinian, 164
- Kaldor–Hicks efficiency, 22
- Kamm, Frances, 47
- Kant, Immanuel, 44
- Kantian normative theories, 10, 46–47, 66
- Kent, James, 16, 249, 251, 281
- Krier, James, 132–33
- labor
  - Locke, labor theory of, 85–87, 98–99, 301
  - productive use requirement and, 85, 153–54
- “large-print” rights-claims, 38–39
- law and economic theories
  - as approach to property rights, 20–22
  - Coasean law and economic theory (*see* Coasean law and economic theory)
  - efficiency and, 21–22
  - eminent domain-supported economic development and, 21, 276, 284–86
  - ownership and, 152
  - rights-based approach to property versus, 223, 301
  - thing design and, 175, 183
- “law of things,” 77–78
- leaseholds
  - as component rights, 201–3
  - not core property rights, 113
  - use facilitation and, 207
- legal services organizations, 129–30, 134–35
- legitimacy/legitimate authority
  - Coasean law and economic theory, legitimacy of law and, 240–41
  - of component rights, 302
  - of eminent domain, 302
  - of eminent domain-supported economic development, 287
  - of forced pooling, 287
  - of institutional artifacts, 109
  - of natural property rights, 84
  - of nuisance law, 302
  - of ownership, 302
  - of police power, 247–48, 302
  - of property generally, 297–302
  - of property law, 18–19, 147
  - of thing design, 302
- liabilities, 39, 154
- libertarian property theory
  - on community baseline of resources, 83–84
  - erroneous conflation with natural rights, 128
  - natural property rights and, 52–53
  - “night-watchman state” rights, 128
  - overview, 24–25
  - police power and, 252
  - rights-based approach to property versus, 303–4
  - sufficiency proviso and, 94
- licenses, 112–13
- lien objection, 101
- life estates, 203, 213–15
- Lifshitz, Yael, 181–82
- limitation of property rights
  - abuse of right, 163
  - aerial trespass, 159–61, 171
  - common carriers, 167–68
  - commons, 164–65
  - government-owned property, 165
  - implied rights of way, 166
  - mistaken encroachments or improvements, 163
  - multiple colorable claims to resources, 163
  - overview, 14
  - principled limits on ownership, 159
  - progressive taxation, 168
  - public assistance, 168
  - safety-net policies, 168
  - wills and trusts, right to destroy as limited by, 163
- littoral rights, 250–51

“live and let live” principle, 229–31, 233–34

Locke, John

generally, 129

charity proviso and, 91

on “community of goods,” 83

on consent, 90–91

criticism of, 98–99

justification for property, 16–17

labor theory of, 85–87, 98–99, 301

necessity proviso and, 92

on ownership, 147, 154–56, 163

on productive use, 85–88

on productivity, 153

on property, 146

on protection of property rights, 3, 58

on right to real property, 94–95

on usufructs, 146

lost profits, 149

MacCormick, Neil, 75–77

MacLeod, Adam J., 17, 86–87

Madison, James

on autonomy, 154

on factions, 249, 266, 268

on police power, 249

on protection of property rights, 16, 49

on rationality, 266

on usufructs, 146

Marshall, John, 133

Mattei, Ugo, 90

McCall, Grant, 156

Merrill, Thomas

on accession, 181–82

on capture rules, 132

on component rights, 202–3, 205

on exclusion, 122

on law and economic theories, 21, 240

on ownership, 170

on shale oil and gas, 195

thing design and, 183

Merryman, John, 212, 214, 216

metaethics, 46

meteors, 188–89

Michelman, Frank, 257

mill acts, 279–80

mining and minerals

*ad coelum* and, 177, 187, 189

coal mining, 255–56

extralateral rights, 186–89

fugacious minerals, 177, 186

mining rights of way, 289–90

oil-bearing sand, 197–98

shale oil and gas (*see* shale oil and gas)

mistaken encroachments or improvements, 163

modified rule of ownership in place, 195–98

monopolies, 291

morality

absolute as characteristic of theory of, 130–31,

136, 201, 231

component rights, moral foundations for,

202

“copy view” of, 62, 101–2, 150–51

law versus, 16

practice versus, 58–59

property law and, 298

moral reasoning

domains of, 43

happiness as fundamental to, 42–43

moral theories

categorical moral theories, 44

hypothetical moral theories, 44

mortgages

as component rights, 201, 204

use facilitation and, 207

multiple colorable claims to resources, 163

Native American sovereignty

Nozickian natural rights and, 129, 133, 136–39

seller claims, irreconcilability with, 137–38

tribes as distinct political associations, 138

naturalization, limited nature of rights of

non-citizens, 38

natural law

basic foundations of, 46

closed political communities and, 49–50

consequentialism and, 45–48, 60

egalitarian property theory, criticism from, 99

flourishing and, 10–11, 46

individuals versus communities, 34–35

interests and, 11

as justifying natural rights, 35

legitimacy of property law and, 18–19, 147

natural law-based theory of property rights, 25

overview, 3

positive law versus, 61

property rights justified by, 4

relation to natural rights, 50–51

rights-based natural law theory (*see* rights-based natural law theory)

skepticism toward (*see* skepticism toward natural law and natural rights)

social obligations based in, 34–35

unease regarding, 33

natural property rights

claim communication requirement (*see* claim communication requirement)

component rights, as justifying, 204–6, 216

consent not required, 90–91



- criteria for government reordering of property rights, 24
- harms and duties and, 222–23, 225–26
- legitimacy of, 84
- legitimacy of property law and, 18–19, 147
- libertarian property theory and, 52–53
- misconceptions regarding, 128–29
- opposition to eminent domain based on, 34
- overriding of, 42, 53, 82 (*see also* necessity proviso; sufficiency proviso)
- overview, 3
- ownership, as justifying, 146, 151
- productive use requirement (*see* productive use requirement)
- as providing backbone for property law, 299–300
- reconciliation with eminent domain, 274–75
- thing design, as supplying guidance regarding, 175
- will-based rights versus interest-based rights, 133–34
- natural rights
  - autonomy and, 124, 129–30, 134–35
  - communitarianism and, 51
  - defined, 50
  - interest-based rights (*see* interest-based rights)
  - libertarian property theory, in contrast with, 128
  - natural law as justifying, 35
  - natural property rights (*see* natural property rights)
  - Nozickean natural rights (*see* Nozickean natural rights)
  - partnerships and, 51
  - priority in social and political discourse, 51
  - property rights justified by, 4
  - relation to natural law, 50–51
  - rights-based approach to property (*see* rights-based approach to property)
  - skepticism toward (*see* skepticism toward natural law and natural rights)
  - social obligations and, 41–42, 53
  - thing design, as supplying guidance regarding, 182–84
  - trusting citizens with, 51–52
  - unease regarding, 33
  - unfair competition and, 51
  - well-being and, 40
  - will-based rights versus interest-based rights, 41
- necessary and sufficient features, defining institutional artifacts in relation to, 112
- necessity proviso
  - boat docking in storm example, 92
  - component rights and, 206
  - core cases and, 92, 112
  - dire need, 91–92
  - overview, 13, 91, 102
  - ownership, as limit on, 165–66
  - sufficiency proviso compared, 94
  - thing design and, 185–86
  - trespass to land and, 169–70
  - “new essentialism,” 107, 121
- Newman, Christopher, 77, 89, 174, 181, 185
- New York City Landmark Preservation Law, 262–63
- Nichols, Philip, 284
- “night-watchman state” rights, 128
- NIMBY (“not in my backyard”), 268
- noise nuisance, 237
- non-citizens
  - claim-rights and, 40
  - limited nature of rights of non-citizens to be naturalized, 38
  - universality and, 136
- no-rights, 39
- normative approach to property rights, 15–17, 297
- Northwestern Fertilizing Company, 248
- Nozick, Robert
  - generally, 13, 83
  - hypotheticals regarding property, 99–101
  - on inviolability of rights, 128–29
  - libertarian property theory and, 25
  - lien objection and, 101–2
  - Locke, criticism of, 98–99
  - natural rights and, 51–52
  - property, criticism of, 105
  - on sufficiency proviso, 94
  - on utilitarian property theory, 52
- Nozickean natural rights
  - adverse possession and, 131
  - autonomy and, 13–14, 131–32
  - capture rules and, 129, 132–33
  - component rights and, 205
  - consequentialism and, 132
  - immigration and, 133
  - interest-based rights distinguished, 136–39, 170, 202
  - Native American sovereignty and, 129, 133, 136–39
  - overview, 13–14, 128–29
  - rights-based approach to property versus, 303–4
  - right to destroy and, 129
  - superiority of, 132
  - trespass to land and, 129
  - universality of, 133, 136
  - as will-based rights, 131
- nuisance
  - brick factories, 246–57
  - causation and, 237, 239–40
  - Coasean law and economic theory objections to (*see* Coasean law and economic theory)

## nuisance (cont.)

- coming to nuisance, 224, 246–58
  - double effect, 235
  - harms and duties and, 221–22, 225
  - intention in, 234–35
  - interference requirement, 224, 232
  - legal issues, 224
  - legitimacy of nuisance law, 302
  - “live and let live” principle, 229–31, 233–34
  - locality rule, 224
  - noise, 237
  - overview, 223–24
  - pollution as, 233–34
  - pragmatism and, 23–24, 222
  - public nuisance, 223
  - right to destroy and, 278
  - skepticism toward natural law and natural rights
    - and, 236–37, 240–41
  - slaughterhouses, 248
  - smoke, 237
  - strict liability, 234
  - sunlight blockages as, 232–33
  - transaction costs and, 222
  - unreasonableness, 233–34
- numerus clausus*, 202, 210

## oil-bearing sand, 197–98

## ownership

- “absentee owners,” 152
- absolute ownership (*see* absolute ownership)
- autonomy and, 154–55
- clear property rights in, 151–52
- consent and, 90–91
- core cases and, 150–52
- egalitarian property theory and, 170
- exclusion compared, 168–70
- exclusive control over resources and, 147–48
- incidents of, 149–50
- in rem* immunized claim-rights and, 149
- interest-based rights and, 146–47
- “just cause” limitation on, 170
- justification of, 146, 151
- law and economic theories and, 152
- legitimacy of, 302
- natural property rights as justifying, 146, 151
- necessity proviso as limit on, 165–66
- overview, 145, 298–99
- powers and, 149
- practicality of, 159
- principled limits on, 159
- private property distinguished, 145
- productive use requirement and, 152
- productivity and, 153–54
- property rights, model of, 147

## resource stewardship and, 152–53

- right to destroy and, 148–49
- security of, 156
- sufficiency proviso and, 150, 166–68
- trespass to land and, 169–70
- use facilitation and, 151
- usufructs compared, 146, 149–50
- utilitarian arguments for, 155–56
- whose interests protected, 155

paradigm cases. *See* core casesparking spaces. *See* “snow dibs”

## partnerships

- affirmative rights in, 37–38
  - natural rights and, 51
  - other normative rights and, 40
  - in personam* obligations and, 118
  - rights of partners, 37–38
  - social obligations in, 41–42
- “party walls,” 253–55

## Penner, James

- on “bundles of rights” metaphor, 123
- on exclusion, 122–23
- on ownership, 149–50
- on personality-rich versus personality-light resources, 76–77
- on separability, 75

## perfectionist normative theories, 46–47

## permissive waste, 213

## personality rights, 78

## personal property

- absolute ownership and, 148
- capture rules and, 96–98
- claim communication requirement and, 96–98
- fixtures, 178–79, 190
- productive use requirement and, 96, 98
- recaption doctrine, 178, 190–91

## pesticides, 291–92

## plants

- individual *res*, 174
- thing design and, 174

## police power

- addressing skepticism regarding, 257–62
- alcohol regulation, 252–53
- average reciprocity of advantage and, 246, 253–55, 279–80
- balancing test, 258
- benefits versus harms, 261–62, 265–66
- billboards, 246–57, 259–60
- boundary rules and, 261
- brick factories, 246–59
- burial ordinances, 251–52
- certainty and, 256
- coal mining regulation, 255–56

- in Coasean law and economic theory, 261
- condemnation through, 8, 275, 278–80
- confiscation, regulation as, 255–56
- determinacy and, 245–46, 250–51, 255
- distribution of benefits to all regulated persons, 254–55
- eminent domain distinguished, 275–76, 279–80, 286–88
- exactions, 256
- factions, danger of, 249, 266–67
- forced pooling and, 8
- guidance supplied by property law, 299
- harbor laws, 254
- harm prevention and, 246, 251–53, 255–56, 278
- lack of rationality, danger of, 266
- legitimacy of, 247–48, 302
- libertarian property theory and, 252
- limits on, 250–52, 254
- need to reorder positive law rights, 254
- ossification, danger of, 267
- “party walls,” 253–55
- as positive law, 245
- possible constitutional sources, 247
- pragmatism and, 246, 252
- as protecting freedom, 248–50
- regulatory capture, danger of, 266–67
- regulatory takings versus, 24, 256–57
- in rights-based approach to property, 257–62
- skepticism regarding, 246, 256–57
- slaughterhouses, 248
- time and place restrictions, 253
- tree destruction, 246–57, 260–61
- undue hardship cases, 278–79
- utilitarian property theory and, 258
- pollution
  - as nuisance, 233–34
  - right to use land and, 230
- positive law
  - discretion to create, 15–16
  - natural law versus, 61
  - need to reorder positive law rights, police power and, 254
  - police power as, 245
- Powell, Richard Roy, 130–31
- powers, 39, 149
- practical reasoning
  - aerial trespass and, 161
  - consequentialism and, 66–68
  - with core cases, 62–63, 301
  - determinacy in, 68
  - determination, 61–62
  - discretion to create positive law, 15–16
  - as distinct field of reasoning, 60
  - overview, 12, 59, 300
  - persons authorized to engage in, 63
  - persons bound by, 63
  - “snow dibs” and, 63–66
  - specification, 60–61
- practice, morality versus, 58–59
- pragmatism
  - as approach to property rights, 23–24
  - component rights and, 214
  - eminent domain and, 276
  - nuisance and, 23–24, 222
  - police power and, 246, 252
  - regulatory takings and, 24
  - rights-based approach to property versus, 301, 303
- Prettyman, E. Barrett, 10, 23, 294
- prior appropriation doctrine, 179
- Pritchett, Wendell, 294
- privileges, 39
- productive use requirement
  - administration of law and, 85–86
  - aerial trespass and, 160–61
  - autonomy and, 134
  - component rights and, 206
  - consumption of resources for survival, 87
  - flourishing and, 82
  - gopher hole-flooding example, 86
  - hypotheticals in criticism of property, productive use insufficient in, 99–100
  - individual rights and, 85
  - justness of claims and, 85
  - labor and, 85, 153–54
  - limits on uses, 86
  - making money, 88
  - non-owner interests in public use, 162–65
  - overview, 12, 82, 102
  - ownership and, 152
  - personal property and, 96, 98
  - personal versus impersonal use, 88
  - prospering from deployment of resources, 87
  - real property and, 94–95
  - search for new resources, 87–88
  - seller claims and, 137
  - “snow dibs” and, 65
  - thing design and, 175, 184–85, 299
  - usufructs and, 86–87
  - waste or spoliation prohibited, 86
- profession, right to practice, 36–37
- progressive taxation, 168
- property
  - “bundles of rights” metaphor (*see* “bundles of rights” metaphor)
  - exclusion (*see* exclusion)
  - exclusive control over resources as, 112–13
  - as “law of things,” 77–78

## property (cont.)

- limits of separability, 78
- as relations regarding resources, 112
- as right to action, 84–85
- separability of resources and, 75–76, 80
- slavery and, 79–80
- using things, interests in, 75–76, 78–80
- usufructory rights as, 113

## property rights

- architectural system analogy, 147, 151, 302
- artefactual function, 105–6, 116
- egalitarian approach to, 22–23
- entitlement, 105, 116
- flourishing, as grounded in, 20
- in rem* immunized claim-rights (*see in rem* immunized claim-rights)
- as institutional artifacts, 298, 301
- institutional status, 105, 116
- interest balancing and, 130–31
- law and economic approach to, 20–22
- libertarian property theory and, 24–25
- limitation of (*see* limitation of property rights)
- natural law, justified by, 4
- natural law-based theory of, 25
- natural property rights (*see* natural property rights)
- natural rights, justified by, 4
- ownership, model of, 147
- partly institutionalized claims, 116–17
- pragmatic approach to, 23–24
- resources, structuring in relation to, 7–8
- rights-based approach to property (*see* rights-based approach to property)
- use facilitation (*see* use facilitation)

## prostitution, 78

## Proudhon, Pierre-Joseph

- on ownership, 121, 151
- property, criticism of, 86–87, 105, 145
- on sufficiency proviso, 150
- on usufructs, 145

## public assistance, 168

## public nuisance, 223

## public roads, 165, 283, 286

## public use requirement for eminent domain

- assembly cases, 284–86, 288–89, 293
- common carriers and, 284
- extinguishing user rights, 283
- government functions, 284
- nominal public uses, 284
- overview, 275, 282–83
- private use versus public use, 275–76, 287–88
- public commons, 283

## Pufendorf, Samuel von

- generally, 16–17
- claim communication requirement and, 89–90

- on commonses, 165
- on “community of goods,” 83
- on consent, 90–91
- property law and, 3
- punitive damages, 148, 169

## questions of first impression, 304

## race

- eminent domain-supported economic development and, 294–96
- school segregation and, 34
- slavery and, 79–80

## Radin, Margaret Jane, 131–32

railroad sparks doctrine. *See* sparks doctrine

## Rasmussen, Douglas, 46, 84–85, 94

## Rawls, John, 48, 66

## Raz, Joseph, 40–41

## real property

- active versus passive uses, 95–96
- beehives on, 188
- claim communication requirement and, 94–95
- enclosure, 95–96
- fugacious minerals on, 177, 186
- meteors on, 188–89
- productive use requirement and, 94–95
- thing design generally, 174, 177

## reason for action, 38–39

## recaption doctrine, 178, 190–91

reciprocity of advantage. *See* average reciprocity of advantage

## recordation statutes, 202, 208–9

## regulatory capture, 266–67

## regulatory takings

- average reciprocity of advantage and, 264–65
- background principles rule, 264–65
- balancing of circumstances, 262
- determinacy and, 263, 265
- factors considered, 262
- harm prevention and, 263–65
- inverse condemnation, 264
- per se* rule, 264–65
- police power versus, 24, 256–57
- pragmatism and, 24
- “regulatory touchings,” 264–65
- Rehnquist, William, 263–64

## remedies

- injunctions, 148
- lost profits, 149
- for mistaken encroachments or improvements, 163
- punitive damages, 148, 169
- right to destroy and, 148–49
- trespass to land, 148

reputations, 77

*res*

accession and, 181–82

animals and, 174, 176

fugacious minerals and, 177

overview, 77

plants and, 174

public roads and, 182

thing design and, 179–82, 184–86

resources

adequacy of theory of property for, 17

appropriation of unowned tangible resources, 83

community baseline of, 83–84

exclusive control over resources as property,

112–13

limits of separability, 78

multiple colorable claims to, 163

ownership, resource stewardship and, 152–53

personality-rich versus personality-light

resources, 75–76, 300

productive use requirement (*see* productive use requirement)

property rights structured in relation to, 7–8

public versus private property, 299

separability of, 75–76, 80

tangible versus intangible resources, 15

use facilitation providing guidance regarding, 120

*Restatement (First) of Property*, 214

*Restatement (First) of Torts*, 23–24, 222

revocable licenses, 112–13, 119

rights-based approach to property

architectural system analogy, 300

Coasean law and economic theory versus, 303–4

community welfare-based approaches

contrasted, 66–68

component rights and, 213–14

consequentialism and, 66

egalitarian property theory versus, 301, 303

eminent domain in, 274

Euclidean zoning and, 270

law and economic theories versus, 223, 301

libertarian property theory versus, 303–4

Nozickian natural rights versus, 303–4

police power in, 257–62

pragmatism versus, 301, 303

utilitarian property theory versus, 66, 155–56

rights-based natural law theory

flourishing and, 53

limiting government to modest goals, 53

limits on communities, 43

overview, 34–35

prioritization, 43

survival and, 53

rights of way, 166–67, 289–90

right to destroy

autonomy and, 132

harm prevention and, 278

Nozickian natural rights and, 129

nuisance and, 278

ownership and, 148–49

remedies and, 148–49

trusts as limiting, 134, 163

wills as limiting, 134, 163

right to exclude. *See* exclusion

right to use land. *See also* nuisance

“bothering” neighbors, 227

community interests and, 230–32

consequentialism and, 230–31

core cases and, 94–95

discretion of landowner, 229–30

general parameters, 228–29

pollution and, 230

reasonability, 229–31

tradeoffs, 230

riparian water rights

dams and, 279–80

ditch easements, 191

as *in rem* rights, 118

mill acts and, 279–80

overview, 106

prior appropriation doctrine, 179

rights incident to land, 179–80

sufficiency proviso and, 93

thing design and, 179, 191–92

use facilitation and, 120

as usufructs, 115–17, 165

watersheds and, 179

Rowland, John, 4

Rule Against Perpetuities, 210–11

“rule”-consequentialist reasoning, 24, 187, 189–90

rule of capture. *See* capture rules

running covenants. *See* covenants running with the land

safety-net policies, 168

Sax, Joseph, 257, 288

school segregation, 34

seats, assigned, property rights in, 114

security interests, 201, 204

Sedgwick, Theodore, 226

separability/separable, 12–13, 75–76, 80

servitudes, 202–4

shale oil and gas

*ad coelum* and, 194–95

capture rules and, 194–98

fracking, 194–95, 197

modified rule of ownership in place, 195–98

Shaw, Lemuel, 249

- Shiffrin, Seana, 84
- Shoked, Nadav, 212
- sic utere tuo ut non alienum laedas*. *See also*
- nuisance
  - application of, 228
  - overview, 79
- Simmons, A. John
- on claim communication, 89
  - hypotheticals and, 98–99
  - on natural rights, 50–51
  - on sufficiency proviso, 92, 94
- Singer, Joseph, 166
- skepticism toward natural law and natural rights
- addressing skepticism, 99–102
  - astronaut hypothetical, 101
  - boundary problems, 100–1
  - claim communication insufficient in
    - hypotheticals, 99–100
  - determinacy, regarding, 59–60
  - driftwood hypothetical, 100
  - fence hypothetical, 101
  - fly-by survey hypothetical, 101
  - hard hypotheticals, 98–99
  - harm-benefit distinction and, 237, 239, 256–57, 261–62, 292
  - lien objection, 101–2
  - nuisance law and, 236–37, 240–41
  - overview, 3, 19–20, 83, 301
  - productive use insufficient in hypotheticals, 99–100
  - sea hypothetical, 99–100
  - sidewalk hypothetical, 99–100
- slaughterhouses, 248
- slavery, 79–80
- Smith, Henry, 21, 123, 240
- smoke nuisance, 237
- “snow dibs”
- claim communication requirement and, 65
  - as partly institutionalized rights, 116–17
  - practical reasoning and, 63–66
  - productive use requirement and, 65
  - sufficiency proviso and, 65
  - thing design and, 182
  - as usufructs, 114, 117, 165
- social obligations
- based in natural law, 34–35
  - interest-based rights and, 41–42
  - natural rights and, 41–42, 53
  - overview, 45
  - in partnerships, 41–42
- South Carolina Beachfront Management Act, 265
- Soviet Union
- devaluation of currency in, 109–10, 112
  - failure of Communism in, 20
- sparks doctrine, 225, 235–36
- specification
- core cases and, 206
  - mistaken encroachments or improvements, 163
  - in practical reasoning, 60–61
  - thing design, specification doctrine and, 176–77, 179–80, 193–94
- speed limits, 58–59, 63, 245
- spoliation, productive use requirement
- prohibiting, 86
- state constitutions, protection of property rights in, 3
- Statute of Frauds, 208–9
- Strahilevitz, Lior, 132
- strict liability for nuisance, 234
- subdivision of property rights. *See* component rights
- sufficiency proviso
- absolute ownership and, 93–94
  - component rights and, 206–7, 210, 299
  - core cases and, 112
  - egalitarian property theory and, 93–94
  - irrigation and, 93
  - libertarian property theory and, 94
  - line-drawing and, 94
  - necessity proviso compared, 94
  - overview, 13, 92–94, 102
  - ownership and, 150, 166–68
  - riparian water rights and, 93
  - scarcity and, 92–93
  - seller claims and, 137
  - “snow dibs” and, 65
  - thing design and, 185–86
- survival, rights-based natural law theory and, 53
- takings
- confiscation, regulation as, 255–56
  - eminent domain (*see* eminent domain)
  - exactions, 256
  - inverse condemnation, 264
  - police power, condemnation through, 8, 275, 278–80
  - regulatory takings (*see* regulatory takings)
  - “regulatory touchings,” 264–65
- taxi cab medallions, 77–78
- telepossession, 96
- telos*, 44–45
- testamentary directives, 134, 163
- thing design
- accession (*see* accession)
  - animals and, 174, 176, 192
  - baseline, 184
  - claim communication requirement and, 175, 184–85, 299

- confusion doctrine, 176, 180, 193–94
- defined, 181
- fruits and, 174–93
- increase doctrine, 176, 192
- lack of scholarship, 174–75
- law and economic theories and, 175, 183
- legitimacy of, 302
- natural property rights as supplying guidance
  - regarding, 175, 182–84
- necessity proviso and, 185–86
- overview, 14
- plants and, 174
- policy overview, 184–86
- productive use requirement and, 175, 184–85, 299
- real property and (*see* real property)
- res* and, 179–82, 184–86
- riparian water rights and, 179, 191–92
- “snow dibs” and, 182
- specification doctrine, 176–77, 179–80, 193–94
- sufficiency proviso and, 185–86
- transaction costs and, 183–84
- third parties, component rights and, 202, 210
- Tierney, Brian, 49
- torts
  - comparative fault, 224
  - contributory negligence, 224
  - conversion, 147–48
  - guidance supplied by property law, 299
  - harms and duties (*see* harms and duties)
  - nuisance (*see* nuisance)
  - property law distinguished, 76
  - trespass to land, 147–48
- train sparks. *See* sparks doctrine
- transaction costs
  - nuisance and, 222
  - thing design and, 183–84
- transferable development rights (TDR), 264
- tree destruction, 246–57, 260–61
- trespass to land
  - aerial trespass, 159–61, 171
  - necessity proviso and, 169–70
  - Nozickean natural rights and, 129
  - ownership and, 169–70
  - punitive damages for, 169
  - remedies, 148
  - tort of, 147–48
  - will-based rights and, 131
- trusts, right to destroy as limited by, 134, 163
- unfair competition
  - natural rights and, 51
  - property law distinguished, 76
  - right to practice profession and, 37, 47
- unitization, 6
- universality
  - closed political communities and, 136
  - non-citizens and, 136
  - of Nozickean natural rights, 133, 136
- urban renewal, 33–34, 290–91, 293–94
- use facilitation
  - appropriative rights and, 120–21
  - component rights and, 207–8
  - cotenancies, 208
  - covenants running with the land, 207–8
  - easements and, 207
  - freehold estates, 208
  - future interests, 208
  - justification of property rights and, 119
  - leaseholds and, 207
  - legal norms and, 120–21
  - mortgages and, 207
  - overview, 119
  - ownership and, 151
  - resources, guidance regarding, 120
  - riparian water rights and, 120
  - standards for property rights, 119–20
- using things, interests in, 75–76, 78–80
- usufructs
  - appropriative rights as, 115–17
  - as claim-rights, 117
  - defined, 113–14
  - easements as, 114, 117
  - exclusion and, 107, 122
  - informal property rights as, 114
  - intellectual property, 114
  - lien objection and, 101
  - overview, 299
  - ownership compared, 146, 149–50
  - productive use requirement and, 86–87
  - property, usufructory rights as, 113
  - riparian water rights as, 115–17, 165
  - “snow dibs” as, 114, 117, 165
  - when more appropriate than ownership, 165
- utilitarian property theory
  - autonomy and, 131
  - capture rules and, 132–33
  - component rights and, 205
  - interest balancing in, 130–31
  - overview, 46–47
  - ownership, utilitarian arguments for, 155–56
  - police power and, 258
  - rights-based approach to property versus, 66, 155–56
- vaccinations
  - bodily security and, 36, 40–41
  - communities and, 43

- vaccinations (cont.)
  - natural rights and, 51–53
  - no-rights and, 39–40
- Veatch, Henry, 44
- vested future interests, 201
- Virginia Constitution, 3
  
- Waldron, Jeremy
  - generally, 83
  - hypotheticals regarding labor and property acquisition, 99
  - on Locke, 98, 147, 155–56
  - on ownership, 146–47, 151, 155–56
  - property, criticism of, 19, 99, 145
  - on sufficiency proviso, 150
  - on usufructs, 145
  - on utilitarian property theory, 155–56
- waste
  - affirmative waste, 213
  - ameliorative waste, 212–16
  - component rights and, 212–16
  - future interests and, 214–15
  - permissive waste, 213
  - productive use requirement prohibiting, 86
- water rights. *See* riparian water rights
- watersheds, 179
- ways. *See* rights of way
- Westenhaver, David, 268–70
- whaling, capture rules and, 97, 135–36
- Whiting, Jennifer, 52
- Widerquist, Karl, 156
- will-based rights
  - interest-based rights versus, 41, 133–34
  - natural property rights and, 133–34
  - Nozickian natural rights as, 131
  - trespass to land and, 131
- Willett, Don, 196–98
- wills, right to destroy as limited by, 134, 163
- Wolff, Jonathan, 132
  
- zoning. *See* Euclidean zoning
- Zuckert, Michael, 49