Index

abandonment 125–9
adverse possession, and 142–3
costs of abandonment 127–8
demonstrating abandonment 135
destruction of property compared with 135–7
informational intervention in law of abandonment 137–8
negative externalities, controlling 138
law of abandonment 128–9
permission regimes 128, 137, 138
prohibition regimes 128, 137
real property 128–9, 142–3
transaction costs 136–7
why people abandon property 126–7
Adler, Barry 4
Administrative Procedure Act (1946) (United States) 83
adverse possession 142–3
airspace 79
Alexander, Gregory 315, 354
alienation and alienability
asset identification and alienability 201
clogs on alienability 300
inalienability 78–9, 85
meshing of property rights 159
restraints on alienation
numerus clausus and 151
servitudes, and 298
Almeida, Ana L.O. 25
Alston, Lee 1, 26, 28
American Law Institute 296
Andorra 241
anticommons see under commons, anticommons and semicommons
Aristotle 57
Arrow, Kenneth J. 106, 112
Arrufada, Benito 5, 248
assembly of rights 42–3, 67, 93–4, 97–9
transaction costs 94, 95, 98
see also commons, anticommons and semicommons
asset portioning 117–18
auctions 361–2, 364
‘SP’ auction mechanism 361
Vickrey-Clarke Groves auction 361, 364
Australia
frontier settlement see under property rights, land settlement and conflict on frontiers
hybrid regime managing fish resource 65
registration of rights 166, 240
RS system of land demarcation 260, 268–9
Ayotte, Kenneth 4, 177–8, 181, 201, 214
Ayres, Ian 303
Baigent, Elizabeth 283
Baines v. Baker (1752) 335
Baird, Douglas 209, 247
bankruptcy as property law 4–5, 206–17
bankruptcy governing mutually insupportable obligations 206
insolvency as part of broader doctrine 213–16
contract law doctrine of substantial performance/material breach 215–16
ownership/transfer of land and public filings 213–14
property law, meaning of 214–15
restitution doctrine and constructive trusts 214
process versus property 206–13
absolute priority and reorganization 209
Butner principle 207–12
Butner principle, application of 208
Butner rationale 210–12
continuation bias 209, 211
forum-shopping, avoidance of 210–11, 216–17
non-consensual claims 212–13, 216–17
proceduralist arguments 209–11, 213
substantive entitlement left to state law 207–8, 209, 212, 216
United States Bankruptcy Code’s process-centric approach 206–7
use of capital structure to externalise risk 212–13
Bankruptcy Code, United States 206–7
Barzel, Yoram 258
Bentham, Jeremy 375, 379
Berle, Adolf  190
Bernstein, David  311
BFP v. Resolution Trust Corp. (1979)  208
bilateral monopolies  92, 93, 95
eminent domain, and see under eminent domain and takings law
see also monopolies
Bill of Rights (1789) (United States)  84
Blackstone, William  62, 84, 296, 374
Blume, Lawrence  376
Bolton, Patrick  4, 177–8, 181, 214
Borenstein, Severin  228
Bourke, Richard  16
Brandeis, Justice Louis D.  75
Brazil
abandonment and rain forest management  129
frontier settlement see under property rights, land settlement and conflict on frontiers
land demarcation  269, 290
Breyer, Stephen  96
Brinig, Margaret F.  233–4
Brooks, Richard  311
Buchanan, James  41, 66
bundle of rights/bundle of sticks’ view of property see under property
Burk, Dan  68
Burnham, Daniel  132
Butner v. United States (1979)  207–11
Calebresi, Guido  78, 351, 373, 376
Canada, RS system of land demarcation in  260, 267–8
Carter, John  262
Centre of European Law and Politics (University of Bremen)  249
changed circumstances, doctrine of  303, 304–5
common interest communities, and  135
racial covenants, and  310, 311
see also servitudes
Che, Yeon-Koo  216
Civil Rights Act (1964) (United States)  83, 84
Coase, Ronald  5, 10, 87, 89, 93, 111, 192, 326, 373
Coase Theorem  227, 230–31
Cohen, Lloyd R.  357
Cohen, Morris  75
Commentaries (Blackstone)  296
common interest communities  296, 297, 311–16
declaration of servitudes  312
governance mechanisms  313–15
objections to  312
positive obligations  305
public policy constraints  312
reasonableness review  314–15
‘touch and concern’ covenants  304, 313
see also servitudes
commons, anticommons and semicommons  1, 35–50
anticommons  2, 41–6, 57–9
assembly of rights problem  42–3, 67, 93–4, 97–9
commons, and  42–3
commons, and semicommons, and  48–9
conservation easements, and  70
content of property rights mattering as much as clarity  58
continuum of ownership, and  64–5
economics of  67–8
‘game of chicken’  43–5, 67
group property, importance of  66, 70
linked tragedies and solutions  45–6
moving resources to private or common ownership  39
overuse, possibility of  69–70
problems requiring the assembly of permissions/entitlements  41–2
psychology of  68
public use takings  97
servitudes and vertical privity  302
taxation costs of assembly of rights see under transaction costs
true anticommons  93
veto or exclusion rights  2, 41, 43, 48
when is an anticommons tragic  41–2, 43
commons  2, 35–41
advantages of  70
‘comedy of the commons’  70
commons without the tragedy  35–6
‘creative commons’  91
distinction between open-access resource and limited-access commons  36
group access  62, 63, 65, 66
lessons from  65–6
group property, importance of  66
misaligned incentives generate inefficient results, conditions when  36, 48
open access see open access
Prisoner’s Dilemma  2, 37, 43, 45, 46
problem of scale  37–40
property, nature of  62–3
property rights evolving from  2, 3
commons and anticommons  42–3, 57–9
linked tragedies and solutions  44, 45–6
rejection of symmetry in  68
symmetry in  66–7
Index 385

commons, anticommons and semicommons 47–8
group property 62, 63, 65
exponentially more important than extremes of open access/full exclusion 66
hybrid schemes managing 65
optimal level of use 63–4
ordinary use 61–2, 63, 64
overuse 42, 57–8, 59–60
meaning 61, 63–4
possible in anticommons 69–70
ownership of property 62–3, 64
problem of scale 37–40
delinking right from individual to single or collective ownership 38–40
mix of individual and common ownership producing the dilemma 37–8
parcelization 38–9, 45, 48
rescaling to reduce the risk of mismatch 38, 39
transaction costs of shifts of ownership 39
unitization addressing overextraction 38
reversibility in property arrangements 48, 50
semicommons 2, 46–9, 114
commons and anticommons, and 48–9
commons tragedy growing out of 38
historically in farming 47, 49
information 114
interacting mixtures of private and common property 46–7
seeing the semicommons 47–8
strategy-proof solutions 49
temporal semicommons 48–9, 50
‘true semicommons property’ 47
spillovers 36, 48, 50
tragedy of the anticommons 41, 44, 45–6, 57–9, 60–61, 64–5, 66
expropriation of fragmented rights, addressing problems by 65
fragmentation and wasteful underuse 58, 60, 64, 65, 68, 69
full exclusion, addressing problems by 65
group exclusion 65–6, 70
hybrid systems, addressing problems by 65
individualistic behaviour, increase in 68
invisibility of underuse 65
lack of knowledge about 61
linked tragedies and solutions 45–6
monopolies, and 69
multiplicity of players blocking use of resource 60
privatization going too far 59, 60–61, 64
self-regulation 66
technological development, and 67–8
underuse 2, 42, 57–8, 60–61, 65, 68–70
unitization 68
vetoes, advantages of 70
tragedy of the commons 1, 2, 10, 35–6, 66
dilemma driven by two or more activities on different scales 38, 48
examples of overuse tragedies 59, 70
overuse 42, 57–8, 59–60, 62
use privileges 43
tragedy of the commons, addressing 40–41, 45, 57–9
anticommons dynamic, and 46, 50
cooperative engagement 59, 60, 62, 65, 66, 70
‘grandfathering’ provisions curtailing draws on common resources 46
hybrid systems 65
‘mutual coercion, mutually agreed upon’ 40, 45
privatization, markets and private property 57–8, 59–60, 61, 62–3, 66, 70
‘propertized’ solution may create tragedy of the anticommons 45–6
regulation and political advocacy 57–8, 59, 60, 62, 65, 66, 70
repricing, forms of 40, 45
requirement to give up untrammelled access to resource 46
use rights constrained by customs or rules 2
underuse 2, 42, 57–8, 60–62, 65, 68–70
continuum of resource use, and 64
design, by 70
invisibility of 65, 70
justifiability of 70
meaning 63
monopolies, and 69, 70
rarely the optimum 70
compensation see under eminent domain and takings law
compulsory purchase see eminent domain and takings law
conservation servitudes 70, 296, 297, 305, 316–18
criticisms of 317–18
easements 70, 317, 374
no requirement for benefitted land 317
renegotiability and termination 318, 319
contracts
contract rights, rights on assets as 237

Kenneth Ayotte and Henry E. Smith - 9781849808972
Downloaded from Elgar Online at 02/16/2019 04:07:00AM via free access
doctrine of substantial performance/material breach 215–16
economic theories of property in information 111–12
standardization and numerus clausus principle 151
see also financial contracts, covenant lite lending, liquidity and standardization of transaction costs of contracting 111–12, 191, 198–9
conveyancing see property titling and conveyancing
copyright 77
commercialization theory 107
creative commons license 119
exclusion, and 116–17
fair use doctrine 76, 113
see also intellectual property
Courant, Paul 228
Cournot, Antoine-Augustin 67
covenants easements, and 300–301, 302
financial contracts, in see under financial contracts, covenant lite lending, liquidity and standardization of fragmentation 302–3
horizontal privity 301, 302, 307
information requirements 301
not to compete 305, 310, 311
obsolete covenants and doctrine of changed circumstances 303, 304–5
positive 301, 305
rural see racial covenants
running with the land 299, 301, 302 ‘touch and concern’ covenants 304, 313
see also ‘touch and concern’ doctrine vertical privity 302, 304, 307
zoning, alternatives to 6
see also servitudes
Crafton, Steven M. 233–4
Craswell, Dick 215
‘creative commons’ license 119
open source software 91
protecting against enclosure 78
public domain, and 91
Cuba 279, 290–91

Dee, Thomas S. 233–4
delineation and enforcement see under information
Demsetz, Harold 3, 60, 116, 248, 296
Dennen, R.T. 19, 20, 21
destruction of property 129–35
abandonment compared with 135–7
costs 136–7
courts’ hostility to destruction plans 129–30, 131, 133–4, 140
destruction via wills 133–5, 139
lack of rational judgment 133–4
negative externalities 133
ex ante perspective on destruction 130–33
demolition of buildings 131
historic preservation of buildings 130–31
landmark designation 131–3
Presidential papers 130
informational intervention in law of destruction 139–42
destruction by living owner 140
surreptitious destruction 140
when destructive will provisions should be permitted 140–41
Dukeminier, Jesse 258
easements 70, 299
appurtenant 299
conservation 317, 374
covenants, and 300–301, 302
implied 92
in gross 299–300, 301–2, 304, 307
information, and 299–300
necessity, by 349
negative 299
positive 299
see also servitudes
economic theory of property in information 104–20
applications 116–20
comparative statics 116–17
intellectual property compatibility 118–20
modular intellectual property and asset partitioning 117–18
modularity theory 109–10, 113, 114–16, 188
modular intellectual property and asset partitioning 117–18
property in New Institutional Economics and Law 108–16
contracting 111–12
modularity theory 109–10, 113, 114–16
property in information and rights to things 113–16
‘quantitative’ thin property rights 108, 113, 118, 120
tracing and restitution 112–13, 118
theories of intellectual property see under intellectual property
Eisenberg, Rebecca 67
Elgueta, Giacomo Rojas 202
Ellet, Charles 67
Ellickson, Robert 298
eminent domain and takings law 7–8, 344–64
administrative costs
eminent domain 355–6, 360
land assembly districts 360
alternatives to 356–62
auction mechanisms 361–2, 364
land assembly districts 358–9, 364
secret purchases 357–8, 363
bilateral monopolies 344, 345, 348–9, 353
land assembly districts, and 360
compensation 79, 80, 82, 85, 99, 344
costs of dispersed 354–5
‘fair market value’ as objective measure of damages 351–2, 353, 354
‘just compensation’ law see Michelman 1967
consensual transactions 344, 345
holdout problem 345–8, 362
idiosyncratic owners 348, 351
large number of owners 346–7
strategic owners 345–6
justifications for eminent domain 344, 345–8, 362–3
bilateral monopoly problem 344, 345, 348–9, 353
externalities 350
holdout problem 345–8
other transaction costs 349–50, 353
limitations of eminent domain 344, 351–6, 363
administrative costs 355–6
secondary rent seeking 354–5, 362, 363
valuation difficulties 351–3
Michelman’s views see Michelman 1967
nature of eminent domain 344
private commercial development, and 94, 97–8, 350, 354–5
‘private’ eminent domain 349
public use justifying compulsory transfer, nature of 80, 373
public use takings, private property and 79–80, 82, 85, 94, 97
regulatory takings doctrine 82, 86
risk of erroneous transfer 357
secondary rent seeking 354–5, 362, 363
concentrated benefits, diffuse costs 355
lobbying for and against condemnation 354–5
subsidarity principle 99
transaction costs of eminent domain 98, 344, 349–50, 353, 355–6, 362–3, 373
valuation difficulties 351–3
assessment costs 353, 360, 363
risk of undesirable transfers 351–2
zoning regulations, and 7, 82, 358
England
abandonment 126–7, 128–9
Corn Laws abolition 373
covenants running with the land 298
historic land demarcation in 259
Gunter’s chain 262, 263
open-field village model 263
non-possessor interest 150
public nuisance 81
registration of rights and title records 165–6, 240
licensed conveyancers 244
servitudes see under servitudes
Ensign v. Walls (1948) 338
Environmental Protection Act (1970) (United States) 381
Epstein, Richard A. 168, 304, 305, 313, 372
European Mortgage Federation 248
Eyerman v. Mercantile Trust Co. (1975) 133–4, 139–40
‘fancies’ 119, 152, 165
disallowing from registration 307
Farber, Daniel A. 373
Federal Land Law (1785) (United States) 285
Fennell, Lee Anne 2
financial contracts, covenant lite lending, liquidity and standardization of 4, 174–88
collateralized loan obligations 174
covenant lite lending 175
expansion of securitization to corporate loans 174–5
liquidity benefits of standardized contracts 174–6
related literature 176–7
summary of Ayotte and Bolton 177
model 177–81
contracting assumptions 179–80
liquidity preferences and loan sales 180–81
parameter assumptions 178–9
technological assumptions 177–8
open-ended standardization 174–5
optimal contracting 181–8
closed-ended standardization 187
contracting and trading game with no standardization 182–3
law and standardization 187–8
optimal contracting with open-ended standardization 183–6
sales of junior loans 186–7
optimal contracting with no information costs 181–2
first-best contract 181
Fischel, William 7, 131, 311, 376, 377
France
land demarcation by long lots 263
recording of deeds in 166, 239, 242, 243–4, 246, 250
Franzese, Paula 314
free riding
collective action, and 13, 373
covenants not to compete 305
development, and 69, 355
eminent domain 355
collective action, and 13, 373
frontier settlement 30
public goods, and 13, 373
Freedom of Information Act (1966) (United States) 83
frontier property rights see property rights, land settlement and conflict on frontiers
Gale, D. 176
Garoupa, Nuno 248
Gasques, José G. 26
Germany
historic land demarcation in 259
registration of rights in 166, 240, 246, 247
Gibson, Robert 262
gifts 3, 125, 127, 137–8, 142
transaction costs 136
Goldstein, Paul 258
governance structure see under information; personification and property of legal entities
Governor the Commons (Ostrom) 60
Gray, Jeffrey S. 234–5
Grayson, William 285
Grossman, Sanford J. 192
Grotius, Hugo 345
Hadacheck v. Los Angeles (1915) 372, 374, 380
Hamilton, Alexander 286
Hansmann, Henry 195, 201, 214
Hardin, Garrett 1, 35–6, 38, 40, 42, 57, 59
Harris, Edwyne 1
Hart, Oliver D. 192
Hazlett, Thomas 68
Heller, Michael 2, 41, 42, 43, 358–60, 361
Hicks, John R. 372, 373
Kaldor/Hicks criterion 372–3, 374, 375, 380
high-value users 137, 303, 345, 349, 353
Hills, Rick 358–60, 361
Hirsch, Adam 139
Hobhouse, Leonard 372, 376
holdouts
addressing holdout problem auction mechanisms 361–2
endomain domain see eminent domain
land assembly districts 358–60
liability rules 49, 351, 353
secret purchases 357, 358
‘honest holdout’ 347, 348
idiosyncratic owners 348, 351, 362
large number of owners 346–7, 358, 362
strategic owners and holdouts 345–6, 348, 362
compared with ‘honest holdouts’ 347
land assembly districts, and 360
secret purchases, and 357, 358
transaction costs 353
Holmes, Oliver Wendell 372, 376
horizontal privity 301, 302, 307
racial covenants, and 309–10
see also servitudes
Houweling, Molly Van 119, 120, 318
hunting
general privilege to hunt on unenclosed rural land 76
land demarcation 257
Hylton, Keith 7
Iacobucci, Edward 199
idiosyncratic rights 7, 119, 149, 152, 157–60, 165, 169
inalienability see under alienation and alienability
India, land demarcation in 271–3, 274
information 2–3
abandonment, controlling negative externalities of 138, 142, 143–4
Arrow’s paradox of information 106, 112
asymmetries and hidden property rights 238–9
costs see information costs
economy 69
exclusion-governance regimes 2–3
fancies, and 119, 152
imperfect information and eminent domain 346–7, 352, 353, 360, 362–3
nonexcludability 105, 106
nonrivalrous 105–6
problems, legal entities and adverse selection 190
Index 389

complete contracting impeded 191

disrupting renegotiation 192

external and internal capital 199–200

imperfect information and financial contracting 194

moral hazard 190

property, in see economic theory of property in information

servitudes, and see under servitudes

special publicness, effect of 2

unbiased, obtaining 49

veiled or blurred 49

information costs 3

abandonment and destruction 143–4

contract rights, and 151

custom into law 168–9

delineation and enforcement 2–3

economic theory of property in information 108, 119, 120

meaning 157

numerus clausus, and see under numerus clausus principle

optimal contracting with no information costs 181–2

information-cost theory
economic theory of property in information 115–16

standardization in property law 150, 152, 157, 160, 165, 167, 169

see also standardization in property law

insolvency see bankruptcy as property law

intellectual goods

nonrivalrous 88

protecting the 'creative commons' against enclosure 78

public domain, and 77, 91

intellectual property

Arrow's paradox of information 106, 112

assembly of licenses 94

copyright see copyright

intangibles excludable by law, making 88

intellectual goods protected by 77

judicial innovation 156

licenses 94

compulsory licensing 94

patents see patents

property rights see economic theory of property in information 104–20

public and private rights 114

rights, scepticism towards 78

servitudes see under servitudes theories of 105–8

commercialization theory 107–8

prospect theory 107

reward theory 106

trademarks see trademarks

United States' system 106

International Association for the Study of the Commons 59

International News Service v. The Associated Press (1918) 156, 168

Italy, historic land demarcation in 259

Jackson, Thomas 209, 247

Janczyk, Joseph T. 246


Jefferson, Thomas 285, 286

Johnson v. Whiton (1893) 155

'just compensation' law see Michelman 1967

Kain, Roger J.P. 283

Kaldor, Nicholas 372, 373

Kaldor/Hicks criterion 372–3, 374, 375, 380

Kelly, Daniel B. 7, 349, 357, 361

Kelleher v. Schoene (1926) 378


Kappell v. Bailey (1834) 151–2

Kitch, Edmund 107

Kominers, Scott Duke 361

Kraakman, Reinier 195, 214

Krier, James 40, 258, 304, 351–2, 353

land assembly districts 358–60, 364

land demarcation systems 6, 257–92

Australia 260, 268–9

Brazil 269, 290

Canada 260, 267–8

Cuba 279, 290–91

economic framework for understanding land demarcation 273–9

coordination and collective action in a land demarcation system 277–8

land demarcation in a decentralized system 273–7

land demarcation in a rectangular system 278–9

economic implications and economic history 279–91

Cuban circular system 279, 290–91

demarcation in urban areas 289–90

demarcation under metes and bounds 280–84

demarcation under United States rectangular system 285–7

land markets 287–8

England 259

Geographic Information Systems 279, 284

Germany 259

Gunter's chain 262, 263
historically 257, 258
Roman system of centuriation 259, 260
India 271–3, 274
Italy 259
land markets in United States 287–8
market transactions, land values and infrastructure investment 288
property disputes 287–8
long lots 263
metes and bounds (MB) system 257–8, 285
alignment of parcels 282
boundary conflicts 282–3, 286–7, 287–8
complexity 283–4
coordination and collective action 277
costs 279, 283–4
decentralized system in 276, 280–81, 282
demarcation under 280–84
economic disadvantages 259
individual surveys required 278
limiting market trades 259
market transactions, land values and infrastructure investment 288
size and shape of parcels 280–81, 286–7
unsystematic 261
when effective 258
New Zealand 260
rectangular system (RS) 257–8
advantages 278–9, 287
Australia 260, 268–9
Barcelona 269, 271, 272, 290
Brasilia 269, 290
Canada 260, 267–8
Chandigarh, India 271–3, 274
cities 269–73, 289–90
costs 258–9, 279, 285–6, 287
decentralized system in 276–7
features of major historical and contemporary RS systems 261
land demarcation in 278–9
market transactions, land values and infrastructure investment 288
metes and bounds systems surrounding 269–71
New York City 269, 270–71, 290
New Zealand 260
Philadelphia 269, 270, 290
South Africa 260
Washington 289
when chosen over MB system 250, 278–9
South Africa 260
Spain 259, 269, 271, 272, 290
survey of land demarcation systems 258–73
Tunisia 259
transaction costs 259, 278
adoption of the rectangular system 285–6
cities 269–71
frontier regions 261–2, 287
gains from coordination 286–7
land markets 287–8
metes and bounds 260–63, 264, 265, 285, 286
New York City 269, 270–71, 290
other systematic land demarcation systems 263–5
Philadelphia 269–70, 290
rectangular survey 265–7
urban land demarcation patterns 269–71
Washington 289
urban areas 269–73, 289–90
Land Ordinance (1785) (United States) 6, 265, 286, 291
land settlement see property rights, land settlement and conflict on frontiers
Landes, Elisabeth M. 226–7, 230
Latin America 241
Legal Realist movement 75
Lehavi, Amnon 361
Lemley, Mark 68
liability rules 108
eminent domain 318
holdout problem avoiding 49, 351
imperfect information 353
transaction costs 353
nuisance 327, 340
servitudes
changed circumstances 303
extinguishing 318
undermining stability of property rights 303
Libecap, Gary 6, 26, 28, 279, 287–8
licensing 118–19
Licht, Amir N. 361
limited commons see common property owned by groups
Linklater, Andro 282, 287
Llewellyn, Karl 214
Lochner v. New York (1905) 81–2, 86
Locke, John 106, 296, 374
Lucas v. South Carolina Coastal Council (1992) 381
Lueck, Dean 6, 279, 287–8
Madison, James 373
Mahoney, Julia 317–18
marital property, law and economics of 5, 221–35
consumption within marriage, nature of 231–4
definition of marital property
formal/legal marital property 221, 230
functional/practical marital property 221, 230–31
degrees and professional licenses 228
domestic violence 233–4
female labor supply 234–5
modelling marriage, divorce and marital property 221–6
role of the law 226–35
changes in the size of divorce settlements 226–8
expanding scope of marital property 228–30
switch to no-fault divorce 230–34
transferability 221
Marx, Karl 374
matching principle 96–8
Means, Gardiner 190
Melamed, A. Douglas 78, 351
Merges, Robert 41
Michelman, Frank 41
Michelman 1967 7–8, 372–81
compensation 373–4
demoralization costs 375–9
institutional arrangements for securing just compensation 380
Michelman’s tests for 375–9
settlement costs 375–6, 377, 379
triple-negative rule 379
judicial rules 379–81
diminution of value 379
fairness discipline 380
investment backed expectations 379
philosophical conundrum of citizen versus society 372
purposes of collective action 372–3
Kaldor/Hicks criterion 372–3, 374
Pareto superiority 373
public goods and free riders 373
social efficiency 373
theories of government 372–4
fairness machine 380
theories of property 374–5
desert theory 374
personality theory 374–5
social functionary theory 374–5, 376
utilitarianism 375–6, 377, 378, 379
Miller v. Schoene (1928) 374, 377, 381
misappropriation 156–7, 168
modularity see under economic theory of property in information; standardization in property law
monopolies
anticommons, and 69
bilateral monopolies 92, 93, 95
eminent domain, and see under eminent domain and takings law
holdouts as 346
limiting property rights, and 91–2
natural monopolies 91, 99
public rights, and 91–2
limiting abuses of monopoly power 95
situational or locational monopolies 92, 93, 95
transaction costs 91, 95
monopsonies 92
Moore, John 192
Mueller, Bernardo 1, 26, 28
Munch, Patricia 357
Nash equilibrium 37, 45, 225
Nash v. Atherton (1840) 287–8
navigable waterways see under waterways
Neponsit Property Owners’ Association v. Enigrant Industrial Savings Bank (1938) 313, 315, 316, 319
network effects 90–91, 97
application of network theory 113
property used in consumption with 159
transaction costs 90, 95
New Institutional Economics 2, 104
property in see under economic theory of property in information
New Zealand, RS system of land demarcation in 260
Nixon v. United States (1992) 130
nuisance and the economics of nuisance law 7, 326–40
definition of a nuisance 333
economics of nuisance 326–33
activity levels, care levels and externalities 327
economics of activity level choices 327–31
externality model and regulatory function of nuisance law 326–7, 340
law 331–3
transaction cost model, nuisance and trespass and 326–7, 340

economics of activity level choices 327–31

cost and benefit externalization: single activity model 328–9

cross externalization of costs and benefits: dual activity model 329–31, 334

injunctions 339–40

intentional, meaning of 333, 334

law 331–3

coming to the nuisance 338–9

dual activity case 332–3

extra-sensitive plaintiff 337

intention 333, 334

negligence 331–3

proximate cause 336–8

reasonableness 334–5

single activity case 331–2

strict liability 331–3, 334, 336–7, 339

theory of nuisance law 333–40

non-trespassory, meaning of 333

private nuisance 81

injunctions, and 339–40

private property rights qualified by 76, 80–81

public nuisance

assembly of rights 97

concept of 80–81

enforced by public officials 89–90

injunctions, and 340

negative spillovers 93, 97

networks effects 97

police power, and 82, 85–6

private rights, and 80–81, 85–6

remedies for 82

public rights regulating 95

theory of nuisance law 333–40

coming to the nuisance 338–9

extra-sensitive plaintiff 337

intentional invasions 334

non-trespassory invasions 333–4

proximate cause 336–7

Rylands v. Fletcher 334–5

scope of liability 336–9

shut downs 339–40

unreasonable invasions 334–6

transaction costs 326, 340

numerus clausus principle 3–4, 6, 112

custom, and 168–9

explanations and understandings of 148–9, 152

feudalism, and 148

implications for institutional choice 155

in rem character of property, and 149

information and courts of equity, and 306–7

information costs 148, 149, 150, 152, 156, 169

custom, and 168–9

model where numeros clausus solution to communication tradeoff 160–65

registries, and 165–7

standardization and third-party information costs 157–65

third-party information costs 158–60

judicial approaches, and 155–7

meaning of mandatory standardization 148, 150

property forms in building blocks as 152, 155

recursive 152

registries, and 165–7, 245

standardization through 150–52

O’Brien v. O’Brien (1985) 228

oceans

fishing quotas and licences 60, 65

non-excludable nature 87

open access 62

see also water

open access 1–2

direct command resource addressing problems 65

frontier settlement, and see property rights, land settlement and conflict on frontiers

group access, and 65–6

group norms not effective in extreme open access 65

hybrid rights addressing problems 65

intellectual goods, and 77

land demarcation system creating 257, 273–5

meaning 1–2, 62

navigable waterways 78–8

property rights evolving from de jure or de facto as open access 10

public domain in United States, and 77–8

public streets, highways and navigable airspace 79, 87–8

public trust, and 78

ruined if full users bear only fractional cost 1–2

solutions to commons property dilemmas 65

see also common, anticommons and semicommons

Ostrom, Elinor 60
overuse see under commons, anticommons and semicommons

Pareto superiority 373
Patent Crisis, The (Burk/Lemley) 68
patents and innovation 67–8, 77, 106
commercialization theory 107
exclusion, and 113, 116–17
exhaustion doctrine 120
experimental use, privilege of 76
incentives to disclose information 107
monopoly effects of 69
patent protection theories 106–7 see also intellectual property
Penn Central v. New York (1978) 379
Penn, William 269, 285
Pennsylvania Coal v. Mahon (1922) 372, 374
Pennsylvania Coal Co. v. Sanderson (1886) 335–6
People ex rel. Marbro Corp. v. Ramsey (1960) personification and property of legal entities 4, 190–202
asset identification and alienability 201
capital structure tailoring 193–8
definition of persons to include entities 190
economic boundaries of control 191–3
control over critical physical assets 192
incomplete contracts 191–2, 193
opportunistic hold-up 191–2
third party financing 193
why firm activity rather than individual contracts 191–2
internal capital markets tradeoff 199–200
informational obstacles raising cost of external capital 199–200
legal boundaries of a firm 193–9
advantages of contracting through firms 193
assets and debts 193–4, 195
governance or control rights in firms, tailoring of 197–8
hostile takeover bids 198
minority shareholder or creditor protection 194
optimal capital structure varying with asset type or venture 194–7
private debt more easily renegotiated 196
legal separation and economic integration, tension between 198–9
Peters, William 282
Pincus, Jonathan 361
Plassmann, Florenz 361
Plato 77

Plotkin, Wendy 309
police power 81–2
negative spillovers, and 93
Polinsky, A. Mitchell 353
Polsby, Daniel D. 28
Popov v Hayashi (2002) 126, 127, 138
Portugal, historic land demarcation in 259
Posner, Richard A. 258, 357
Powell, John Wesley 22
Presidential Records Act (1978) (United States) 130
Prisoner’s Dilemma 2, 37, 42, 45, 46
private property 1
definition 62
land as an excludable good 87
more valuable because of public rights 95–6
owned by no-one 1
overburdening with obligations, danger of 95–6
public rights, and see private property and public rights
rights qualified 76
private property and public rights 2, 75–99
legal doctrines on property and public rights 76–86
police power 81–2, 85–6
private property rights qualified by jus publicum 76
public accommodations 84–6
public domain 77–8, 85, 86
public enforcement 82–4, 85, 86
public nuisance 80–81, 85–6
public rights, nature of 76
public streets, highways and navigable airspace 79, 85–6
public trust 78–9, 85–6
public use takings 79–80, 85–6
public utilities 85, 86
Legal Realism, rights dependent on collective recognition and enforcement, and 75
matching principle 2, 96–8
normative guidelines 95–9
public/private distinction 75
public rights, economic concepts and 86–95
assembly of rights 93–4
externalities 87, 90, 92–3
monopoly 91–2
network effects 90–91
public goods see public goods spillovers 92–3
subsidiarity principle 2, 98–9
transaction costs 87, 89, 90, 91, 94–5
privatization see under commons, anticommons and semicommons
property
bundle of rights or ‘sticks’, as 1
economic theory of property in information, and 104, 105, 109, 115, 120
standardization in property law, and 149
commons see under commons, anticommons and semicommons
definition of 213
entity property 150
see also personification and property of legal entities
frontiers, on see property rights, land settlement and conflict on frontiers
group property see under common, anticommons and semicommons
law see property law
private see private property
records 118
see also land demarcation systems
relinquishing see unilateral relinquishment of property
rights see property rights
standardization see standardization in property law
state property 62–3
property law
bankruptcy, as see bankruptcy as property law
direct co-ownership, forms of 150
marital property see marital property, law and economics of
meaning of 214–15
ownership types 62
standardization see standardization in property law
property rights
catalog of estates 150–51, 155
evolution 1, 3
evolving to meet changing needs for resource management 296
increasing costs 3
institutions forming to prevent externalities 3
naive theory of property rights 12–13
formal and informal 9
frontiers see property rights, land settlement and conflict on frontiers
full set of property rights never exists 10
‘running with the land’ 237
property rights, land settlement and conflict on frontiers 1, 9–30
Australian frontier, settlement of 9, 14–18
claims (runs) enforced against later arrivals 15
collective goods with private benefits, agreed norms as 15
conflict 15, 17–18, 29
de facto rights respected/determined by arbitration 15
de facto rights strengthened as wool production value increased 14, 15–16
de jure rights, demands for 15–17
exhausted gold fields leading to increased land demand 12, 17
land occupation by squatters outside the Nineteen Counties 14–15
land selection before survey and information asymmetries 17–18
leases granted to squatters 16–17
licences granting de jure and de facto rights to squatters 15–16
reform 17–18
rent dissipation when formal rights did not recognise status quo 14
social norms developed to reduce losses from open access 15
sources of change affecting scarcity 12
squatters’ ability to evade redistribution to new small holders 18
Brazilian Amazonian frontier 1, 9, 23–9
‘Brazilian Miracle’ 24
colonization projects 24, 25, 26–7
commons arrangements formed 26–7
conflict 25, 26–8, 29–30
devastation of forests 24
fiscal incentives 25–6, 27, 30
INCRA (National Institute for Colonization and Agrarian Reform) 25, 28–9
integration and occupation of the Amazon, policies for 24
lack of clear property rights leading to rent dissipation 25
land reform of compensated forced expropriation 28, 29
Landless Peasants Movement 28–9
norms established 26–7, 29–30
premature settlement 24, 26, 29
property rights, emergence of 26–7
rent dissipation when formal rights did not recognise status quo 14
road construction increasing competition 24, 25–6
scarcity values increasing, effect of 26–7
social norms developed to reduce losses from open access 15
squatters’ rights and adverse possession 27–8, 30
titles to land 27–8, 29
formal and informal property rights 9
model of land settlement 9–14
asset value in commons arrangement versus open access arrangement 13–14
conflict 12, 13, 14
content of full set of property rights 9–10
de facto property rights 13–14
de jure property rights advantageous 14
demand for more secure property rights as function of scarcity value 10–13
dissipation of rents, incentives leading to 13, 14
‘dummying’ 18
exclusivity agreements and common collective good 11
formal property rights 9, 12–14
informal property rights 10–12, 13
measures of scarcity 10, 12
naive theory of property rights 12–13
open access, effect of expropriating use rights over 10
scarcity values increases leading to formal property rights 12
sources of change affecting scarcity 12
United States Great Plains frontier 1, 9, 19–23
cattle branding and collective action 19–20, 23
cattlemen’s associations 19, 20–22, 23
commons arrangements, emergence of 19–22
conflict 18, 21–2, 23, 29
de facto rights of ranchers and de jure rights of homesteaders 22, 23
dissipation 13
General Land Office 22–3
Great Plains, value of 19, 20, 22
Homestead Act 1862 20, 22
illegal fencing by ranchers 22–3
informal commons arrangements replaced with leases 23
range rights and management 20–21
rent dissipation when formal rights did not recognise status quo 14
social norms developed to reduce losses from open access 15
sources of change affecting scarcity 12
sub-optimal use of land 13
technological change of barbed wire 12, 22
property titling and conveyancing 5–6, 237–52
consent requirement
effects of 237–8
enforcing individual consent as a requirement 240
hidden property rights 238–9
contract rights, rights on assets as 237
empirical arguments for a comparative analysis 245–52
dubious cost advantage of recording 245–6
need for adaptation 248
quantitative comparison 248–52
risk of ineffectual registration 246–8
frontier settlement 14
fiscal advantages only available in Amazon to titled land 25–6
titling costs affected by land distance from market centre 14
notice and information about real property 42, 118, 166, 213–14
numerous clausus and registries 165–7, 245
priority rule 239
privacy of rights 238–9, 241
recording of deeds 239, 241–2, 245–6, 248–52
servitudes, and 299
rights which ‘run with the land’, meaning of 237
enforcement advantages 238
requirement of consent 237–8
role of conveyancing services in each titling system 240–44
conveyancing under privacy 241
conveyancing under recording 241–2
conveyancing under registration 242–4
how to regulate conveyancing 244
servitudes, and 306, 317
title assurance 245, 246, 247, 248
title plants 242, 245–6
title reports 239
titling systems
privacy of rights as a benchmark 238–9
recording of deeds 239
registration of rights 240
transaction costs 241, 244, 250, 251
public accommodations 84–5, 86
locational monopolies, and 92
public domain 77–8, 85–6
network effects, and 91

Kenneth Ayotte and Henry E. Smith - 9781849808972
Downloaded from Elgar Online at 02/16/2019 04:07:00AM
via free access
public enforcement 82–4, 85–6
of private rights constituting state action 83–4
public goods
definition 87
elimination of a public bad, as 88
enforcement of public goods 89–90
excludability as function of technology 87, 88–9
intangible goods as nonrivalrous 88
limiting property rights, and 87–90
Michelman, and 373
nonexcludable 89, 105
nonrivalrous 87, 88, 95, 105
partial 88
rivalrous and nonrivalrous goods 87, 88
tangible goods as rivalrous 88
transaction costs 89, 95
public nuisance see under nuisance
public rights see private property and public rights
public streets, highways and navigable airspace 79, 85, 86
public trust doctrine 78–9, 85, 86, 94
public use takings see eminent domain and takings law
public utilities 85, 86
matching principle, and 96–7
Puerto Rico, registration of rights in 247
Quanta Computer v. LG Electronics, Inc (2008) 120, 168
racial covenants 83, 167, 296, 297, 301, 308–11
changed circumstances, and 310, 311
courts’ approach 309–10
effects of 310–11
history 308–9
neighbourhood agreements 309
racial zoning 308, 311
Rajam, U. 176, 192
Rawls, John 7, 49, 372, 378–9
maximin principle 378, 379
recording see under property titling and conveyancing
registration see under property titling and conveyancing
regulatory takings doctrine see eminent domain and takings law
Reichman, Uriel 304
rent seeking 304
auctions, and 362, 364
costs of 363
secondary 7, 344, 351, 354–5, 356, 360, 361, 363
Researches into the Mathematical Principles of the Theory of Wealth (Cournot) 67
Restatement (Second) of Contracts (United States) 215
Restatement (Second) of Torts (United States) 81, 335
restitution and tracing 112–13, 118
Rich, Judge Giles 107
Roberts, S.H. 15, 18
Roosevelt, President Teddy 23
Rose, Carol 6, 36, 70, 167
Rubinfeld, Daniel L. 376
Rylans v. Fletcher (1868) 334–5
Sax, Joseph 131–2
Scandinavia, registration of rights in 243, 246
Schelling, Thomas 311
Schwab, Stewart J. 351–2, 353
Schwartz, Alan 216
Second Treatise of Government (Locke) 296
secret purchases 357–8, 363
seicommons see under commons, anticommons and seicommons
Seru, A. 176
servitudes 6–7, 159, 296–320
advantages of stability over space and time 297–8
changed circumstances, doctrine of 303, 304–5
common interest communities, and 135
racial covenants, and 310, 311
common interest communities 296, 297, 311–16
declaration of servitudes 312
governance mechanisms 313–15
objections to 312
positive obligations 305
public policy constraints 312
reasonableness review 314–15
‘touch and concern’ covenants 304, 313
conservation servitudes 70, 296, 297, 305, 316–18
criticisms of 317–18
easements 70, 317, 374
no requirement for benefitted land 317
renegotiability and termination 318, 319
covenants
 fragmentation 302–3
horizontal privity 301, 302, 307
information requirements 301
not to compete 305, 310, 311
obsolete covenants and doctrine of changed circumstances 303, 304–5
positive 301, 305
racial see racial covenants

Kenneth Ayotte and Henry E. Smith - 9781849808972
Downloaded from Elgar Online at 02/16/2019 04:07:00AM
via free access
Index 397

running with the land 299, 301, 302
‘touch and concern’ covenants 304, 313
see also ‘touch and concern’ doctrine
vertical privity 302, 304, 307
zoning, alternatives to 6
easements 70, 299
appurtenant 299
conservation 317, 374
covenants, and 300–301, 302
implied 92
in gross 299–300, 301–2, 304, 307
information, and 299–300
necessity, by 349
negative 299
positive 299
England 301, 306–7
equitable servitudes 299
events with differing size effects 298
evolution 296–7
horizontal privity 301, 302, 307
racial covenants, and 309–10
implied easements 92
information or notice concern 118, 298, 299–301
easements versus covenants and the
‘horizontal privity’ puzzle 300–301
general rule 299
horizontal privity 301, 302, 307
information and easements – ‘in gross’
versus ‘appurtenant’ 299–300
intellectual property servitudes 119–20, 168, 296
involuntary servitude, courts’ antipathy to 305
new uses of servitudes 308–18
common interest communities 311–16
conservation servitudes 316–18
racially restrictive covenants 308–11
personal property servitudes 167–8
private governance regime 118
public easements 99
public rights of way 85, 86, 99
racial covenants 83, 167, 296, 297, 301, 308–11
changed circumstances, and 310, 311
courts’ approach 309–10
effects of 310–11
history 308–9
neighbourhood agreements 309
renegotiability concern 298, 301–3, 304–5, 319
fragmentation of interests 302–3
general rule 302
liability rules 303
vertical privity 302, 304, 307
‘running’ to successive interest-holders 297
standardization 150, 167–8
‘touch and concern’ doctrine 167, 303–6, 311
common interest communities, and 304, 313
concept of 303–4
positive obligations 305
value doctrine 304–5
traditional concerns and formalities 298–307
information or notice concern 298, 299–301
numerus clausus, information and courts
of equity 306–7
renegotiability concern 298, 301–3
value concern – ‘touch and concern’ 298, 303–6
transaction costs 298, 301, 302, 305, 319
United States 301, 306–7
racial covenants 83, 167, 296, 297, 301, 308–11
Restatement of servitude law by
American Law Institute 296, 303
vertical privity 302, 304, 307
common interest communities, and 313
Shapiro, Carl 67
Shapiro, Perry 361, 376
Shavell, Steven 258, 347–8
Shelley v. Kraemer (1948) 83, 84, 310, 311, 312, 315
Sherwin, Emily 214
Simon, Herbert 109, 118, 157
Smith, Henry 2, 3, 13, 188, 214, 258, 306
commons, anticommons and semicommons
46–7, 49
eminent domain 349, 353
social functionary theory 374–5, 376
South Africa, RS system of land demarcation
in 260
Spain
historic land demarcation in 259
Barcelona 269, 271, 272, 290
long lots 263
registration of rights in 240
Spencer, Herbert 107
spillovers 2, 3, 99
commons, anticommons and semicommons,
and 36, 48, 50
limiting property rights, and 92–3
nuisance, and see under nuisance
positive or negative 92
transaction costs 93, 95
standardization in property law 3–4, 148–69, 306–7
implications 165–9
complexity externalities 169
custom 168–9
_numerus clausus_ and registries 165–7
servitudes 167–8
_numerus clausus_ see _numerus clausus_
principle
servitudes, and 306–7
standard features in property 149–57
flexibility of standardized modular
building blocks 152–3
intermediate situations 154
judicial and other institutional approaches
to standardization 155–7
standardization through _numerus clausus_
principle 150–52
standardization and third-party information
costs 157–65
model where _numerus clausus_ solution to
communication tradeoff 160–65
third-party information costs 158–60
see also financial contracts, covenant lite
lending, liquidity and standardization of
state action doctrine see public enforcement
state property 62–3
Sterk, Stewart E. 349
Stevenson, Betsey 235
Strahilevitz, Lior 3, 311
subsidarity principle 98–9
Sussman, O, 176
takings law see eminent domain and takings
law
Talley, Eric 303
technology
anticommons, and 67–8
excludability
technological change of barbed wire 12, 22
technology, as function of 87
technology of exclusion too expensive 88–9
technology too expensive 88–90
_Treatise of Practical Surveying_ (Gibson) 262
Triantis, George 4, 199
Tunisia, historic land demarcation in 259
underuse see under commons, anticommons
and semicommons
unilateral relinquishment of property 3, 125–44
abandonment see abandonment
abandonment and destruction compared 135–7
methods of relinquishing property 125
real property 142–3
right to destroy see destruction of property
United States
abandonment see abandonment
Administrative Procedure Act (1946) 83
bankruptcy see bankruptcy as property
law
Bankruptcy Code 206–7
Bill of Rights (1789) 84
Civil Rights Act (1964) 83, 84
Davis-Bacon wage rules 83, 84

Kenneth Ayotte and Henry E. Smith - 9781849808972
Downloaded from Elgar Online at 02/16/2019 04:07:00AM
t via free access
eminent domain 345
  see also eminent domain and taking law
Environmental Protection Act (1970) 381
Federal Land Law (1785) 285
financial tailoring within firms 202
  see also personification and property of legal entities
free land and personal property 125–6
Freedom of Information Act (1966) 83
frontier settlement see under property rights, land settlement and conflict on frontiers
intellectual property system 106, 120
land demarcation see under land demarcation systems
Land Ordinance (1785) 6, 265, 286, 291
marital property see marital property, law and economics of non-possessory interests 150
numerus clausus 155
police power 81–2
Presidential Records Act (1978) 130
Presidents’ destruction of papers 130
property law 2
public accommodations 84–5
public domain 77–8
public enforcement 82–4
Public Land Survey System 6
  see also land demarcation systems
public nuisance 80–81
public streets, highways and navigable airspace 79
public trust doctrine 78–9
public use takings 79–80
public utilities 85
recording of deeds 166, 239, 242, 246, 247
servitudes, and 300, 301, 306–7
title companies 244
title insurers 243
Restatement (Second) of Contracts 215
Restatement (Second) of Torts 81, 335
right to destroy see destruction of property
servitudes see under servitudes
Uniform Commercial Code 187, 212, 214
utilitarianism 375–6, 377, 378, 379
vertical privity 302, 304, 307
  common interest communities, and 313
  see also servitudes
Vig, V. 176
Washington, George 285
water 85
  access to 17
  common ownership 39
  land with water, value of 20
  law 119, 159
  correlative rights 76
  exclusion, difficulties of 117, 119, 159
  governance regime 159
  oceans
    fishing quotas and licences 60, 65
    non-excludable nature 87
    open access 62
  property right, as 21
  public goods aspects 114
  rights 21, 159
  utilities as monopolies 69
  watershed 19
waterways
  common ownership 70
  navigable
    blocking 81
  public trust doctrine, and 78, 86
Weaver, John C. 15
Weyl, E. Glen 361
Widen, William 201
Yengin, Duygu 361
Yokomizo, Clando 26
Yoon, Yong 41, 66
Young Surveyor’s Instructor: or, An Introduction to the Art of Surveying (Carter) 262
Zelder, Martin 5, 228, 230
Ziedonis, Rosemarie Ham 68
Zingales, Luigi 192
zoning 154, 243
  alternatives to 6, 7
  environments 132
  grandfathering non-conforming uses 379
  laws 82, 93, 115, 244, 258, 373, 377, 380
  racial 308, 311