Index

abortion, right to, 67–70
  surveys of opinion on, 80–1, 85–7, 148–9
and principled reasoning, 83–5
and test of “mental health,” 87–8
popular referenda, before Roe v.
Wade, 148
public funding, 186
as public good, not merely private
choice, 187
constitutional ground for Congress to
legislate on the subject, 213ff.
and informed consent, 224
restoring to conversation and public
argument, 226
and the unmentionable “A-word,”
273
at odds with “natural rights,” 179–84,
234, 289–90
Abraham, (Sen.) Spence, 102n.32
Adkins v. Children’s Hospital (1923), 53,
218n.33
alchemists, 130
Allen, Woody, 287
American Medical Association (AMA),
opposition to partial-birth
abortions, 119, 121, 127, 134
Americans United for Life (AUL),
245
Antijural jurisprudence, 138–46
Aquinas, Thomas, 17, 83
Aristotle, 3, 5, 17, 38, 38n.1, 68, 144,
293–4
Arkes, Hadley, 21n.17, 47n.21, 51n.26,
60n.36, 75n.2, 76n.4, 83n.13,
84n.14, 109n.38; 156, 159n.23,
178n.52, 186n.6, 191–2n.11,
196n.15, 205n.26, 210n.29,
216n.30, 221n.39, 229n.46, 262,
267
and the proposal of the “modest first
step,” 87, 19, 89–94, 96ff., 135,
138n.28
pointing out the trend of cases on
partial-birth abortion in the courts,
243
bringing back the “modest” proposal
in 1998, then 2000, 235
leading the testimony for the Born-
Alive Infants Protection Act of
2000 [H.R.4292], 248, 249–51
exchange with Rep. Watt in hearings
in House, 256–9
leading testimony on the bill in 2001,
Subcommittee on the Constitution,
U.S. House of Representatives,
285
at Duke University law school,
291n.42
Article III, Sec. 2, of the Constitution,
on altering the jurisdiction of the
courts, 215
Association of American Law Schools,
156n.21
Augustine, St., 39
Auschwitz, 159

308
Index

Axioms, in laws and politics, 39ff., 63, 185ff.

Baby Doe cases, 168, 260
Baker, Allison, 248, 251–2, 267
Baker v. Carr (1962)
Barr, (Rep.) Bob, 102n.32
Barry, (Judge) Maryann Trump, and postmodern jurisprudence, 275–7
Barnes v. Glen Theatre (1991), 51–2, 52n.28, 143n.34
Bates, Edward, 220–1, 221n.39, 257
Beck, Lewis White, 12n.4
Becker, Carl, 22–4
Bell, Jeffrey, 280
Bergen County, NJ, 272
Biden, (Sen.) Joseph, 23, 29–30, 72–8, 82, 155
Bilby, (Judge) Richard, 116–25, 136, 140
birth, as limit to abortion, rejected by federal court in Arizona, 126
Black, (Justice) Hugo, 73–4, 77
Blackmun, (Justice) Harry, 48
Blackstone, Sir William, 11, 37
Blake, Judith, 149n.3
Born-Alive Infants Protection Act [on the survivors of abortion], 237, 238
introduced in 2000 as H.R. 4292, 246ff.
definitions in, text, 246, 246n.13 see also “findings” of the bill passes House in September 2000, 268–9
silences of George W. Bush, 270–1 stalled after Senate changes hands, 274
introduced as “rider” to Patients’ Bill of Rights in the Senate, 2001, 284 hearings on new version [H.R. 2175], 284–6 reflecting changes in the political class, 288, 289ff.
Bork, (Judge) Robert, 29, 50n.24, 73, 75, 77, 150, 154, 155, 215
Bowen v. Superior Court (1986), 169n.42, 170n.45
Bowen v. American Hospital Association (1986), 168
Bowers v. Hardwick (1986), 154
Bowes, Watson, 284
Boxer, (Sen.) Barbara, in debate with Rick Santorum, 280–1
Boxx, T. William, 195n.15
Bradley, Gerard, 248, 253–4
Braestrup, Peter, 90
Breyer, (Justice) Stephen, 242, 250, 254
Brennan, (Justice) William, 58
Brittell, Maureen, 129
Brookline, MA, 179
Brown, John, 45
Brown v. Board of Education (1954), 80, 149
Bucks County, PA, 272
Burke, Edmund, 152
Burlamaqui, Jean-Jacques, 38–9
burning crosses, 59–60
burning flags, 58
Burthell, James Tunstead, 186n.6
Bush, George Herbert Walker (Vice-President, and 41st President), 78, 80, 89, 90–1 (reaction to Webster case), 92–5, 96, 97, 185, 200, 291
Bush, George W., (43rd President), 237, 238, 239, 263, 269, 273, 287
Bush v. Gore (2000), 236
Butler, Judith, 18n, 181n.53
Canady, (Rep.) Charles, 187, 237, 244–7, 262, 265–6, 267, 278, 279
Carhart, Dr. Leroy, 240, 242
Carhart v. Stenberg (1998), 121–3, 238–43
Center for Gender Equality, 81
Chaffee, (Sen.) Lincoln, 274
Cheney, Dick, 238
Cheserton, G.K., 233
Chisholm v. Georgia (1793), 4, 42, 46, 66n.42, 201n.21
Christ Hospital, Oak Lawn Illinois (see “live birth abortions”), 243, 250, 251–2
Cincinnati, Ohio, and controversy over gay rights, 34ff.
Civil Rights Act of 1866, 13n.5
Civil Rights Act of 1964, 27, 48, 75, 191, 193, 195, 225
Civil Rights Act of 1972, 27
310 ■ Index

Civil Rights Restoration Act (1988), 197
Civil War Amendments, to the Constitution, 209, 211
Clanton, Bradley, 244–5, 262–3
Clark v. Community for Creative Non-Violence (1984), 143
Clay, (Sen.) Henry, 164
Clinton, Bill, 74–5, 84, 106n.34, 185–8, 231, 244, 247, 265, 274, 275
vetoes bill on partial-birth abortion, 105–6, 126, 128, 131–2
Clinton, Robert, 216n.30
Colin, Chuck, 150
Commentary, Symposium on the Symposium in First Things, 152–3
Commerce Clause, of the Constitution, offered as the ground for the bill on partial-birth abortion, 190–6
offered by L. Tribe as the ground for the Freedom of Choice Act, 192–5
Committee on Education and Labor, U.S. Senate, 72
Committee on the Judiciary, U.S. Senate, 72
Committee on Labor and Human Resources, U.S. Congress, 194n.12
Community for Creative Non-Violence v. (1983), 143n.33,36
Compassion in Dying v. Washington (1996), 169n.42, 170
Conservative jurisprudence, 289
Conyers, (Rep.) John, 129–30
Cook, Dr. Curtis, 129–30
Coolidge, Calvin, 24–5, 25n.22, 26
Cooper Union (Address by Lincoln), 44–5, 160n.25
Courter, (Rep.) Jim, 91–2, 94
Cruzan v. Director, Missouri Health Department (1990), 206, 206n.27
D & E abortions (Dilatation and Evacuation), 102, 241–2
D & X abortions (Dilatation and Extraction) [see also, partial-birth abortions], 102–5, 114ff., 240–2
defining features, 119
Dalton Shield, 30
Dartmouth College v. Woodward (1819), 61–3
Daschle, (Sen.) Tom, 274
Davis, John W., 79
Davis, (Rep.) Thomas, III [Amherst ’71], 261n.32, 272
Declaration of Independence, 21–6, 44, 177–8
defamation of racial groups, 60
Defense of Marriage Act (DOMA) [1996], 155, as model for the bill on survivors of abortion, 245
DeLaura, (Rep.) Rosa, 100n.30
Doe v. Bolton (1973), 80, 81, 130
Douglas, (Sen.) Stephen, 14–15, 49–50, 151, 160n.26, 162–4
Dred Scott case [Scott v. Sandford (1857)], 1, 174, 174n.47, 218–21, 225; Congress countering, with ordinary legislation, 220; early tests of the doctrine under the Lincoln Administration, 220–1, 257
Dukakis, Michael, 89
Dworkin, Ronald, 62–3
Easterbrook, (Judge) Frank, 109n.38
Eisenhower, Dwight David, 188, 238
Equality Foundation of Greater Cincinnati v. City of Cincinnati, 35n.2
Exceptions for “health,” controversy over, in bills on partial-birth abortion, 125, 130, 132
“mental health, 125
facial challenges, to legislation (and to the bills on partial-birth abortion), 116–17
federal courts, as focus of legislation on abortion, 198–204, 214ff.
Federalist Papers, 37 [#78 and #81], 40–1 [#81], 203n.23 [#84], 204, 205n.24 [#80], 219 [#78]
Feldman, Marty, in Young Dr. Frankenstein, 153
fetal tissue, use in research, 221
Index

Fifth Amendment, its possible relevance on abortion, 214
Filburn, Roscoe, 195
“findings,” to make explicit the purposes and premises of the Born-Alive Infants Protection Act, 237 brought forth, 262–3
igniting controversy, 264–6
text in 2000, 263
state of the findings after September 11th, 286–7
newer, more systematic findings for the bill in 2001 [H.R. 2175], 275ff., esp. 277–8
First Amendment, 144, 203
First principles, 36ff., 52
First Things [the journal], Symposium on Judicial Usurrpation [“The End of Democracy?”] (November 1996), 147ff.
Florida, and Tennessee, in the election of 2000, 271
Floyd v. Anderson, 95, 124, 126, 169n.40, 250, 276, 293
Forte, David, 205n.26
Foucault, Michele, 12
Forseythe, Clark, 97, 245, 247
Fourteenth Amendment, 76, 191, 192, 196–7, 211–12
question of Congressional power under the Amendment, 211–12
“liberty interest,” under the Amendment, 213
Frankfurter, Felix, 79, 109, 226, 247
Freedom of Choice Act, 97–8, 101–2, 187–8, 190, 192–4, 196, 250
Frist, (Sen.) Bill, 102n.32
Gallup surveys, 80–1, 85
Gay rights, trumping privacy, 29;
controversy in Cincinnati, 34ff.; Amendment II in Colorado, 156–7; inclination to use the law and impose moral judgments, 228–9
George, Robert P., 50nn.24, 25; 87, 89, 97, 106, 150, 248, 254–5, 272
Germany, in 1932, 165
Gettysburg, 6
Gibbons v. Ogden (1824), 39, 39n.10, 190
Ginsburg, (Justice) Ruth Bader, 283
Glendon, Mary Ann, 153–4
Gore, Albert, 238, 268, 273
Graham, (Rep.) Lindsey, 99–101, 255
Greenberg, Alan, 1
Greenfield, Meg, 76n.4
Griswold v. Connecticut (1965), 26, 74, 147
Gun-Free School Zones Act, struck down in U.S. v. Lopes, 196
Gunther, Gerald, 53
Hamilton, Alexander, 10, 36–7, 40–1, 47, 49, 203, 204–5, 233
Hammett, Dashiel, 66
Hand, (Judge) Learned, 52–3, 54
Harlan, John Marshall (the elder, 1833–1911), 54
Harlan, John Marshall (the younger, 1899–1971), 53–6, 60
Harris v. McRae, 225n.43
Hart, (Sen.) Gary, 222–4
Hart, (Rep.) Melissa, 285
Haskell, Dr. Martin, 102–3, 104, 115
Hay, John, 6, 7n.6
Hayesworth, (Judge) Clement, 95, 124, 169n.40, 250, 263, 276, 293
Hearings, on partial-birth abortion, 128, 169n.41
Heidegger, Martin, 2, 18
Hile, Matthew, 252–3
Hitler, Adolf, 23, 165–6
Hittinger, Russell, 69n.43, 148n.2, 150, 167–8, 218
Hobbesian man (after Thomas Hobbes), 65–6
Holocaust Museum (Washington, DC), 1, 174
Holmes, (Justice) Oliver Wendell, and the modern project in law, 50–1, 54, 67
Hope Clinic v. Ryan, 119n.19, 135
Huckleberry Finn, and Bill Clinton, 126–7
Human Life Bill, 189
Human Rights Ordinance, Cincinnati, 34ff.
Hunter, James Davison, 149n.1
Hyde Amendment, 186
Hyde, (Rep.) Henry, 187, 197, 265–7, 279
312 ■ Index

Infanticide, losing its significance, 141
In re Guardianship of [Barbara] Grant (1987), 169n.44
In re Jobes, 170n.45
Internal Revenue Service (IRS), 197
Issue 3, Cincinnati, 34ff.

Jackson, Andrew, 215, 218
Jackson, (Justice) Robert, 195
Jaffa, Harry, 15, 17, 24n.20, 21, 32, 45n.17, 70, 70n.44, 151, 163–4, 175–6
James, Henry, 17, 61, 72, 112, 294
James, William, 52
Jefferson, Thomas 4, 215, 218
Jeffords, (Sen.) James, 238, 274, 279, 292
Jessen, Gianna, 248–9
John Paul II, 148
Johnson, Douglas, 243–4, 259, 267
Johnson, Lyndon Baines, 90
Johnson, (Rep.) Nancy, 98, 267, 279
Judiciary Committee, U.S. House of Representatives, 187–8
Judges, federal, blocking the bills on partial-birth abortion, 107–9

Kant, Immanuel, 12n.4, 38
Katz enhach v. McClung (1965), 193, 195
Kennedy, (Judge) Barbara, 115, 117–18
Kennedy, (Sen.) Edward, 72, 155
Kevorkian, Jack, 170
Knopf, Alfred, 23
Kocoras, (Judge) Charles, 126n.19
Kopf, (Judge) Richard, 122–5, 140, 239
Kuykendall, (Rep.) Steven, 266, 279

Lauf v. E.G. Shinner & Co. (1938), 198n.18

“Laws of reason,” as the ground of the natural law, 36ff.
“Legislating by indirection,” 197–8, 197n.16
legislative veto, 221–3
Lincoln, Abraham, 3, 6–7, 14–17, 32, 44–5, 49–50, 70, 75, 76, 82–3, 151, 152, 158–9, 257

fragment on conversation with an owner of slaves, 83
on preserving the forms of democracy while the substance is removed, 151–3, 160–5, 167–8, 171
on the limits to the courts, 183, 215–16, 218–21, 223–5, 233
“live birth abortions,” 242–3
Locke, John, 36, 46, 201–2
Lofgren, (Rep.) Zoe, 100
Lowey, (Rep.) Nita, 100
Loyola University Law School (New Orleans), 87

MacDonald, Forrest, 41n.11
McGovern, (Sen.) George, 199–200
McLean, (Justice) John, 1, 2, 174, 174n.47
McReynolds, (Justice) James, 191
Madison, James, 36, 43
Madsen v. Women’s Health Center (1994), 58n.34
Madzisi, John, 147
Malden, Massachusetts, resolutions, 45
Marbury v. Madison (1803), 35, 216–17
Marshall, (Chief Justice) John, 35, 39–40, 47, 190, 216–17, 250
Marshall, (Justice) Thurgood, 64–5, 66–7, 75, 168
Marx, Chico, 106
Marx, Karl, 183
Mason, George, 36
May offensive (Vietnam, 1972), 90
Meade, (Gen.) George, 6
Mexico City policy, 97, 186
Michelman, Kate, 169
Mill, John Stuart, 162
Monroe v. Pape, 226n.44
Montesquieu, 84n.14
Munsey, Mitchell, 152
Myrick, (Rep.) Sue, 278

Nadler, (Rep.) Jerrold, 100n.30, 260–2, 284, 291
Index  313

Nadler, (Rep.) Jerrold (cont.), exchange with H. Arkes in hearings, 260
denounces bill in House, votes for it, 268
Nassau County, NY 272
Nathanson, Bernard, 149
National Abortion Rights Action League (NARAL), 149, 231, 237, 259–60, 292
National Institutes of Health, 200, 221
National Labor Relations Board v. Jones & Laughlin Steel Corporation (1937), 191n.10
National Organization of Women (NOW), 128
National Review, 87, 96
National Right to Life Committee (NLRC), 97, 98, 102n.32, 104, 132, 133, 230, 237, 243–4, 259, 280
Natural law, and Sen. Biden, 77–8; natural law reasoning, 83–4
Natural rights, 11ff., 139–40, 288ff., adversarial relation to the orthodoxies on the American campuses, 17–18 and radical feminism, 18, 49–50, 60–1, 62–4, 66, 68, 82
at odds with the right to abortion, 179–84, 234, 289–90
Nazi Party (Germany), 165–6
Nebraska case on partial-birth abortion, see *Carhart v. Stenberg* and *Stenberg v. Carhart*
Neuhaus, Richard, 150, 166n.36
Niccolay, John 7
Nietzsche, Friedrich, 1, 18
Nikas, Nick, 135–8
Ninth Amendment, 213
Nixon, Richard M., 90
Noonan, John T., Jr., 88n.22, 149
Norris-LaGuardia Act (1932), 198n.18
North American Man-Boy Love Association (NAMBLA), 228
Oliphant, Lincoln, 97
Olmstead, Frederick Law, 161
“open-texture,” questions in constitutional law, 224–5
Orwell, George, 182
Partial-birth abortion (Dilatation and Extraction (D & X)), 80, 102ff., 112ff., 168–9, 189
trend of cases, striking down laws in the states on partial-birth abortion, 235
Patients’ Bill of Rights, 281
Payne, (Judge) Robert, 119, 120, 140
Peoria Speech (Lincoln), 82
Pettit, (Sen.) John, 160–61
Pitts, (Rep.) Joe, 278
Planned Parenthood, 113, 291–2n.42
Planned Parenthood v. Ashcroft, 95, 168n.40
Planned Parenthood v. Casey (1992), 42–3, 78–80, 82, 108, 117, 118, 125, 137n.27, 189, 224n.42,
239–40
Planned Parenthood v. Doyle (1998), 134
Planned Parenthood v. Woods, 116n.3
Plato, 148, 159, 289
Plessy v. Ferguson (1896), 54, 79
political class, 288, 289ff.
positivism, legal, 13–16, 38, 49–50, 62
Posner, (Judge) Richard, 109n.38, 133–5
Powell, (Justice) Lewis, 95, 168n.40
preambles, in legislation, 247
presidential campaign of 2000, 270
Princeton Research Associates, 81
Privileges and Immunities Clause, Lincoln’s understanding, 257
Quinlivan, Gary M., 196n.15
Raines, Claude, in *Casablanca*, and Justice Kennedy, 239
Randall, J.G., 220
Rawls, John, 48
Reagan, Ronald [and Reagan Administration], 78, 80, 97, 185, 222–3, 239, 253, 273, 274, 275
receding confidence in reason, 290–4
314 Index

Red and Blue counties, and the “culture wars,” 272
Rehnquist, (Chief Justice) William H., 90–1, 118, 175–6
Reid, Thomas 9, 42, 66
Reinhardt, (Judge) Stephen, 169n.42
Republican Party, sweep of congressional elections in 1994, 102, 188
Rhode Island v. Innis (1980), 64–5
Rights that extinguish themselves, 143–4
Right to abortion, 67–70, 81–2, 101–2, 107, 110, 171ff.
right to an “effective abortion,” 168 at odds finally with “natural rights,” 173ff., 179–84, 234
“right to die,” 169–71
Romer v. Evans (1996), 35n.1, 156–7
Rosenblatt, Roger, 86
Royce, Josiah, 52
Russell, Mark, 59
“same-sex marriage,” 155
Santorum, (Sen.) Rick, 102n.32, 275; “pulls the trigger,” 280–4; introduces Born-Alive Act as “rider” to Patients’ Bill of Rights, 281
Saulsbury, (Sen.) Willard, 13n.5
“scepticism” in morality, rejected by the American Founders, 43ff.
Scopes v. United States (1925), 226n.44
Self-refuting propositions, 47–8, 65–6
Sensenbrenner, (Rep.) James, succeeds
Henry Hyde, deletes “findings” in the Born-Alive Act, 279
separation of powers, and the “universalizability” principle, 202–4, 210–11, 213–14
September 11th, halting momentum for the bill on infants born alive, 286
Singer, Peter, 254–5
Snowc, (Sen.) Olympia, 274
“standing to sue,” 150
Stevens, (Justice) John, 283
Sodomy, laws on, 154
Speed, Joshua, 159
Spiegel, (Judge) Arthur, 34–5
Stabenow, (Sen.) Deborah, 282
Stanek, Jill, 248, 251–2, 267, 277, 284
Story, (Justice) Joseph, 211
Strauss, Leo, 19, 151n.9, 157
Stubbsfield, Dr. Philip, 121
Sullivan, Edie, 128–30
Sumner, (Sen.) Charles, 220
Sutherland, (Justice) George, 53, 205, 218n.33
Tet Offensive (Vietnam, 1968), 90
Texas v. Johnson (1989), 58n.34
Thomas, (Justice) Clarence, 60–1, 75, 76, 118, 154, 240–1
Tribe, Laurence, 62–3
Trumbull, (Sen.) Lyman, 13n.5
Tushnet, Mark, 176–8
Uhlmann, Michael M., 97, 170
Unalienable rights, and their logic, 44
United States v. Belmont (1937), 205
United States v. Chadha (1983), 221–2
United States v. Lopez (1995), 196
United States v. Robbins, 100
United States v. Salerno (1987), 117
United States v. Williams, 226n.44
vagueness, in the argument against the legislation on partial-birth abortion, 112ff
Versailles Treaty, 165

Wade, Richard, 161n.27
Wall Street Journal, 96n.27
War Powers Act (1973), 222
Washington, George, 12
Washington v. Glucksberg (1997), 169n.42
Watt, (Rep.) Melvin (“Mel”), 255–9, 262, 267–8, 285–6
Weber, Max, 19
Webster, Daniel, 61–2
Webster v. Reproductive Health Services (1989), 90–1, 227n.45
Wechsler, Herbert, 217–18

Wickard v. Filburn (1942), 193, 195, 195n.14
Weightman, Roger, 4n.4
White, (Justice) Byron, 57, 225n.43
Whitman, Christine Todd, 231, 264
Wilder, Gene, 153
Wilson, (Rep.) Heather, 99–109
Widmar v. Vincent (1982), 57–8
Wilson, James, 4, 5, 9, 11, 16, 20–1, 31, 38, 46, 47, 62, 64, 66, 139–40, 233
Wilson, Woodrow, 19–20, 21–2
Women’s Medical Professional Corp. v. Vohskey, 115, 118
World Health Organization (WHO), 88
World Trade Center, and September 11th, 236