

Index

- abortion 35–36, 37, 72–74, 87, 88, 95–101, 160–164, 186–188
 acceptance 33–34, 151
 Ackerman, Bruce 9, 42–47, 48, 53, 54, 61, 79, 116, 130 (*see also* neutrality)
 affirmative action 3, 123, 169–171, 176–177
 Alito, Justice Samuel 3
 Amish 136–138
 apartheid 45
 Archard, David 80
 Aristotle 3
 asymmetric legislation 49
- Barry, Brian 115
 Benhabib, Seyla 22, 24–25, 27, 95, 115, 117
 Berlin, Isaiah 15, 118
 Bickel, Alexander 185
 Bill of Rights, United States 2, 118
 Black Codes 49
 Blackmun, Justice Harry 160, 163
 Bork, Robert 76–78, 152
 breach, contract 80
 Burt, Robert 186
- Calabresi, Guido 86
 Catholic Church 82–83, 142, 143, 144
 Chemerinsky, Erwin 176
 civil association 55–59
 Cohen, Jean 28–29
 Colker, Ruth 166
 “color-blind” 168
 common good 21, 22, 58
 common law 26
 communitarian thought, 21
 competence 78–79
 conceptions of the good 43, 44, 55, 57, 69, 70, 116
 conscription 81, 97, 98, 163
 consensual killing 79
- consent condition
 in constitutional law 124
 in general 75, 78–83
 feminist critique 81–83
 constitutional law
 comparison to political theory 122
 purpose of 2–3
 relationship to public reason 54
 contraception 32, 146, 151
 contract, right to (*see* rights)
 contractualism 105–106
 Cover, Robert 24
 cruel and unusual punishment 102–103
- Dahl, Robert 85
 death penalty 103
 democracy
 connection to liberty 15, 16–17, 19, 20, 22, 23, 25, 30, 48–49, 52, 53, 58, 60, 92, 124, 187
 connection to neutrality 46
 deliberative 47–48, 117
 democratic debate 35–37, 93–103 (*see also* justification, tyranny of the majority, democratic deficit)
 democratic deficit 8, 15, 17, 19, 20, 22, 23, 24–25, 28, 45, 53, 93, 185
 Devlin, Lord Patrick 70–71
 difference principle 19–20, 53
 discourse theory
 in general 9, 23, 25, 47–53
 justificatory constraints
 ideal speech conditions 48–49
 principle of universalization 49–51
 reflexive regime of rights 51–53
 disparate impact 63, 179
 Dorf, Michael 150

- Douglas, Justice William 137
- due process
 procedural 86, 126
 substantive 125, 126, 146, 162
- drug use 79, 106
- Dworkin, Ronald 20–21, 66, 67, 185
- Eighth Amendment 103
- Ely, James W. 129
- Ely, John 126, 180, 181, 185–186
- eminent domain 128, 129
- equal protection
 heightened scrutiny 122, 165–166, 167, 175
 suspect class/classification 10, 100, 122, 166–177, 178, 183
- equality
 anti-subordination 10, 35, 167, 168–169, 171–174, 177–181, 186
 formal 10, 35, 166–167, 168–174, 177–181
 right to, 2, 4, 52–53, 100, 108, 158
 equality, right to (*see* equality)
- establishment clause 135–136
- facially neutral laws 131, 132, 133, 137, 140, 141, 150, 179
- false consciousness 81
- Feinberg, Joel 78
- Fifth Amendment (*see* public use requirement)
- First Amendment 126, 132, 143, 146
- forced organ transplant 91–92
- Fourteenth Amendment 75, 125, 126, 146, 160, 165, 168
- Fourth Amendment 146
- Fraser, Nancy 31, 113–114, 180
- free exercise clause 132, 142–144
- free speech, right to 28, 93–95
- Gaus, Gerald 41
- genetic disadvantage (*see* harm)
- Ginsburg, Douglas 130
- Ginsburg, Justice Ruth Bader 73, 74, 87, 88, 156, 163, 186–187
- Glendon, Mary Ann 36
- Goldberg, Suzanne 159
- Gutmann, Amy 22
- Habermas, Jürgen 9, 23, 25, 47–53, 54, 55, 61, 84, 85, 94, 116, 185–186 (*see also* discourse theory)
- hair color (*see* segregation)
- Hamilton, Alexander 117–118, 121
- Harlan, Justice John Marshall 168–169
- harm
 cultural “monopoly” 67
 demonstrable/demonstrability 68–72 (*see also* neutrality)
 economic 88, 104, 105
 emotional 76–78, 152
 genetic 42, 43, 46, 66, 77–78, 102
 inefficiency 87
 invoked by theories of justice 66
 misrecognition 31, 113
 moral 76, 108
 physical 65, 86
 prevention/minimization of, 6, 44, 63–64
 social 66, 105
 unemployed, of being 108–109
 wide understanding of 65–66
- health and safety 124, 127, 128, 147–148, 149 (*see also* rational review)
- Holmes, Justice Oliver Wendell 129, 130
- hybrid claim, 138
- immigration 72
- immutability 172–173, 179, 180–181
- international standards 103
- jaywalking 103
- judicial review 184–188
- jurisgenerative politics 22, 23, 24–25, 30
- justification
 courts as enforcer 55, 122
 harm prevention, as a particular theory of justification 7–8, 9, 60–78 (*see also* harm)
 “how” component 6, 41, 42–43, 48–53, 54, 56–57, 60
 in general 5, 6, 41
 in practice 121, 187
 in theory 41, 118
 neutral constraints 43
 relationship to democracy 45–46, 71, 84–92, 102
 “what” component 6, 41, 42, 45, 47–48, 54, 56, 60, 61, 108
- Kennedy, Justice Anthony 153, 156, 160, 162
- Larmore, Charles 62
- libel 94
- libertarianism 17, 46, 87, 104, 125–126, 130
- Locke, John 3, 9, 16–17, 19, 26, 46, 102, 118, 125, 151

204 Index

- MacKinnon, Catharine 27, 81
 marriage
 regulation of 107
 same-sex 3, 50–51, 70, 89–90, 155–156,
 182–184
 marry, right to (*see* rights)
 Marx, Karl 26–27
 McClain, Linda 26
 McConnell, Michael W. 166
 Michelman, Frank 21–22, 24, 33
 Mill, John Stuart 6, 23, 25, 26, 64–66, 72,
 79, 80, 85–86, 91
 minimal prudence 44
 minimum wage laws 105–106
 monarchy 16, 17, 117, 118
 morally irrelevant factors 79, 166, 167, 169,
 171–172, 173–174, 180
 morals legislation 10, 43, 72, 145, 146–160
 multiculturalism 26, 51, 112–113, 143
 murder
 prohibiting/punishing 7, 8, 43–44, 49, 51,
 52, 71, 77, 102, 178–179
 Murray, John 31
 museums (*see* public goods)

 natural law 70
 nature/nurture debate 180–181
 negative liberty 15
 neutrality
 Ackerman's neutrality thesis 42–47
 criticism of 44–45, 57, 116, 158
 in general 43, 145
 Larmore, Charles 62
 Rawls' public reason 55
 relationship to demonstrability 68–70,
 145 (*see also* harm)
 New Deal 26, 47, 109, 125, 127,
 129, 130
 non-discrimination legislation 108–109,
 143, 158
 Nozick, Robert 17–19, 26, 46, 104, 125

 Oakeshott, Michael 9, 55–59, 70, 85, 116
 obscenity 157, 158, 159
 Occam's razor 189
 Okin, Susan 26
 “one step at a time” measure 88–89
 “only” requirement 72–74
 organ transplant, Forced 91–92
 original position (*see* veil of ignorance)
 overlapping consensus 53

 parks (*see* public goods)
 Partial Birth Abortion Act of 2003 72, 97
 Pateman, Carole 81, 82

 paternalism 83, 106, 108 (*see also* consent
 condition)
 patriarchy 82–83, 108
 pedophiles 178–179, 180
 Pettit, Philip 51
 polygamy 134, 157, 158, 159
 pornography 94–95, 113
 Posner, Richard 70
 power
 definition of 42
 justification of 42–43, 47
 prenuptial agreement 107
 privacy, right to
 decisional 2, 4, 10, 26, 28–29, 31–33,
 109–112, 116–117, 146–164, 182, 186
 informational 110–111
 private sphere 1, 10, 18, 25–27, 47, 85, 93,
 103–115
 property, right to (*see* rights)
 prostitution 81–83, 107, 158
 public versus private 14, 27, 28, 30, 34–35,
 57, 81, 97, 108, 109–110, 111, 116,
 117, 156
 public goods 66–67
 public reason 9, 53–55
 public use requirement (of Fifth
 Amendment) 128–129

 rape 81, 101, 110
 rational review 123–124, 128, 129,
 146–152, 154–155, 156, 183–184
 Rawls, John 9, 19–20, 22, 24, 53–55, 61, 62,
 86, 116, 169 (*see also* public reason)
 religion, right to (*see* rights)
 religious exemption 114–115, 132–138
 Religious Freedom Restoration Act (RFRA)
 of 1993 134
 republicanism 3, 33
 Restatement (second) of torts 97
 right not to be harmed (*see* rights)
 rights
 affirmative 46
 as side constraints 18–19
 as “trumps” 3, 20–21, 118, 185
 bodily integrity 86, 91, 92, 101, 102, 161
 classic (pre-political) conception 15–21,
 27, 45
 contract 125–131
 general features 14
 heightened scrutiny 122, 128, 148, 149
 historical rise of 117–118
 levels of generality 150
 marriage 29, 30
 not to be harmed 7–8
 philosophical foundations 13

- privacy (*see* privacy, right to)
 property 3, 10, 17, 18, 26, 46, 104–109,
 125–131, 146
 province of the law 36–37
 reflexive Conception 4, 24–37, 150
 religion 10, 112–115, 131–142
 stamp of legitimacy 30
 Roberts, Chief Justice John 3, 161
 Rubinfeld, Jed 32–33, 157–159
 rule of recognition 47, 62
 Samaritanism
 relationship to abortion 97–101, 162, 163
 Vermont statute 99
 same-sex marriage 29, 34–35, 111–112, 160
 Sandel, Michael 21–22, 24, 30–34, 116–117
 Satanism 71
 Scalia, Justice Antonin 37, 100, 103, 134,
 141, 150, 155, 156–157, 158,
 159, 186
 Schneiders, Sandra 83
 scientific racism 74–75
 Second Amendment 126
 segregation
 on basis of hair color 7, 8, 75, 174, 176
 on basis of race 2, 4, 7, 8, 52, 74, 75, 113,
 175–176, 177
 symmetric 50, 52
 separate but equal 22, 28
 sex
 gay (homosexual) 31–32, 33, 34, 43, 50,
 51, 68, 70, 74, 76, 89–90, 111,
 148–150, 151, 155, 156, 158, 159
 inter-racial 50, 51, 52, 70, 71, 75
 straight (heterosexual) 31–32, 111
 sexual contract (*see* prostitution)
 sexual freedom 1–2, 3, 111–112,
 146–160, 181
 sexually transmitted disease
 HIV/AIDS 89–90
 consensual transmission 110–111
 Shapiro, Ian 109, 163, 186–187
 Sikh(ism) 114–115, 131
 Sixth Amendment 126
 slavery contract 80–81
 social contract/compact 14
 sodomy law 5, 71–72, 76, 111–112, 113,
 150, 153–154, 155, 159, 179
 South African 71
 “special rights” 181, 182
 stakeholding 106
 state action/power 42, 61–64
 stereotypes 107, 113
 Stevens, Justice John Paul 154, 175
 Sunday Closing Laws 132
 Sunstein, Cass 143
 suspect class/classification (*see* equal
 protection)
 Third Amendment 146
 Thomas, Justice Clarence 130, 157
 Thompson, Judith 96, 100
 Tocqueville, Alexis de 23, 24–25, 115
 tolerance 30–33, 148, 151
 tragedy of the commons 67
 Tribe, Laurence 150
 Tushnet, Mark 142, 143
 tyranny of the majority 13, 22–23, 28, 29,
 30, 48–49, 52, 58, 75–76, 84
 Unger, Roberto 5–6, 28
 universal basic income 108
 Urbinati, Nadia 66
 utilitarianism
 Mill, J. S. 64–65, 91
 relationship to democracy 91–92
 relationship to liberalism 65
 veil of ignorance
 criticism 22, 24, 69
 in general 19, 86
 relationship to public reason 53
 similarity to neutrality 45
 vote, right to 49, 71, 84
 Waldron, Jeremy 18, 105
 welfare legislation 17, 46, 87, 104
 white supremacy 169
 Wolfenden Report 153
 Wollheim, Richard 64
 Young, Iris Marion 112