Index

abortion, 103
administrative actions, 64–65, 72, 98–99, 120
Afghanistan, 118
Alexander the Great, 8
Allan, T. R. S., 110–11
apartheid, 120
Aquinas, Thomas, 18–19, 25, 48, 115
arbitration, 121, 135
Aristotle, 7, 8–10, 12, 18–19, 87, 122, 125
Asian countries, 92–93, 135, 139
Augustus, 12
Austin, John, 57
authoritarian regimes, 85, 93, 95–96, 97, 115, 120, 139
autonomy of law, 83
Bentham, Jeremy, 45, 57, 59, 79, 107
Berlin, Isaiah, 32, 37, 38
bills of rights, 55, 71, 104, 118–19, 138–39
bishops, 21, 30
bourgeois, 28–31, 43–44, 51, 53, 61
Bracton, Henry of, 26
Burger Court, 74
Bush, George W, 1, 108, 130
Byzantium, 12, 17–18
Cambridge University, 18
capitalism
19th century England, 60–62
and formal legality, 119, 121–22
and liberalism, 43–45, 73
Radical Left, 73
rules, 97
Central American Court of Justice, 128
certainty, legal certainty, 66, 83, 97, 119, 122
Charlemagne, 17, 20, 21
Charles the Bold, 22
Chicago, 2, 73
children, 7, 36
China, 2, 3, 92–93, 112, 120
Church, 19–23, 30, 39
Cicero, 11–12
civil disobedience, 74
civil liberties. See human rights
clarity of rules, 93, 97
clergy, Middle Ages, 17
Coke, Edward, 25, 29, 57
colonization, 138
colonized subjects, 36
commerce, 28–31, 43–44, 53, 119, 121, 130
common law, 27, 56, 57, 59, 64, 69–70
communism, 1
comunitarianism, 42–43, 73, 84–86, 121
Conference on Security and Cooperation in Europe 1990, 111
conservatives. See Dicey; Hayek
Constant, Benjamin, 37
Constantine, Emperor, 12, 15, 19, 20–21
Constantinople, 12, 15, 18
constitutions, 36, 55, 56–57, 64, 104
contractual rights, 44, 103
Corpus Iuris Civilis, 12, 13–14, 18
criminal punishment, 98, 109, 120, 139
Critias, 10
Critical Legal Studies Movement, 74, 77
cruel punishment, 35
Crusaders, 18
customary law
England, 26
German customary law, 23–25, 116, 117
international law, 128, 129
meaning, 23–24
Middle Ages, 22, 115
Dark Ages, 15–17
death penalty, 103, 125
Declaration of Delhi, 112
democracy
Cicero, 11
eyear liberalism, 38
© Cambridge University Press  www.cambridge.org
Index

democracy (cont.)
eligible electorate, 62–63
Greek thought, 10
Hayek, 71
and individual rights, 104–08
Locke, 50
mob rule, 10
Montesquieu, 52
and morality, 101
and personal liberty, 38
property holding, 50, 54
subversion, 100
with formal legality, 99–01
with formal legality and human rights, 110–12
development, 2, 119
Dicey, A. V.
common law, 69
decline of rule of law, 4, 47
definition of rule of law, 63–64, 82
discretionary powers, 63–64, 67
government restraint, 58, 117
social welfare, 63, 72, 82
dignity, right to, 108–10
discretionary powers, 63–64, 65, 67, 98–99, 120
distributive justice, 67–68, 120–21
Donation of Constantine, 20–21
Dostum, Abdul Rashid, 2
Dworkin, Ronald, 80–81, 82, 85, 102–04, 107, 138
Eastern Europe, 110
economic development, 2, 119
electoral franchise, extension, 62–63
emperors. See sovereigns
employment law, 136
Engels, Friedrich, 51, 62
England
19th century, 47, 56–58, 60–62
administrative law, 72
common law, 56, 57
Germanic tribes, 23
Magna Carta, 25–27, 57, 116
and Montesquieu, 53–54
rise of lawyers, 29
social welfare, 72
Star Chamber, 63
unwritten constitution, 26, 56–57
Enlightenment, 32, 39–41
environmental protection, 45, 72, 136
equality
ambiguity, 76–77
conservatives, 76
and formal legality, 120–21
Hayek, 67–68, 94
liberalism, 32–33
and liberty, 38
Locke, 50
Radical Left, 74–77
equality before the law
Dicey, 64
formal legality, 94, 119
Greece, 10
Hayek, 66
Unger, 83
European Court of Human Rights, 128, 134
European Court of Justice, 128
European Union, 56, 127, 129, 133
excommunication, 117
executive. See sovereigns
fair hearings, 109, 119
fairness, 83, 98
Federalist Papers, 47, 54–56
feminists, 85
feudal system, 16, 24, 31, 43, 116
Field, David Dudley, 79
formal legality
and authoritarianism, 93, 94, 95–96, 97
and commerce, 119, 121
and communitarianism, 121
and elites, 137
emptiness, 93–94, 96
evaluation, 119–22, 139
international law, 131–33
morality, 95–96
neutrality, 94, 95
procedural requirements, 94, 95
and social welfare states, 96–99, 120–21
with democracy, 99–101
with democracy and individual rights, 110–12
formal theories, 91
formalism
critical formalism, 77–78
legal formalism, 77–78
rule formalism, 78
France, 15, 21, 23, 125
freedom of association, 80, 105
freedom of expression, 35, 64, 103, 105, 112
freedom of religion, 35
Fuller, Lon, 94, 95
GATT, 132
Gelasian doctrine, 19
generality of rules, 86, 83, 93, 97, 119
judges (cont.)
  independence, 50, 52–53, 107, 117–18, 124
  interpretation of individual rights, 105–08
  judicialization of politics, 108–10
  requirements, 123
  rule by judges, 122–24, 125, 126, 133–35, 140–41
  selection, 125
  socio-economic background, 89
  judicial review, 50, 55, 56, 57
  Justinian Code, 12, 13–14, 18
  Justinian, Emperor, 13, 19
  Kant, Immanuel, 38, 99, 100, 108
  Kennedy, Duncan, 84
  Kern, Frits, 23–24
  kings. See sovereigns
  Krygier, Martin, 99
  laissez-faire, 45, 78
  Latin America, 125
  left. See Radical Left
  legal certainty, 66, 83, 97, 119, 122
  legal formalism, 77–78
  legal generality, 66, 83, 93, 97, 119
  legal positivism, 57, 109
  legal pragmatists, 85
  See also judges
  legal realism
    and conceptual formalism, 77–78
    instrumental approach, 79–80, 81
    and rule formalism, 78
  United States, 77–80
  legalism, 59
  legislation
    and common law, 57, 69–70
    Hayek, 69–70
    judicial review, 55, 56, 57
    Locke, 50
    social welfare, 70
  Leo III, Pope, 20, 21
  Lex Regia, 12, 13
  liberalism
    19th century England, 56–58, 60–62
    bourgeois theory, 43–44, 51
    and capitalism, 43–45, 73
    and communitarianism, 42–43, 73
    and democracy, 38, 104
    emergence, 29, 31, 32
    Enlightenment, 39–41
    equality, 32–33
    liberty. See liberty
    Locke, 49
    mainstream US theorists, 80–82
    moral pluralism, 41
    neutrality, 42
    proceduralism, 41
    Radical Left, 73, 74–77
    social contract, 32, 34, 47
    v socialism, 60–63
    socio-cultural context, 39–42
  libertarianism, 45
  liberty
    ambiguity, 77
    categories, 33–36
    constitutions, 36
    and equality, 38
    Greek conception, 33, 34
    legal liberty, 34–35, 36, 52, 53, 66, 90, 94, 95
    limits, 36
    Locke, 49
    Montesquieu, 52–53
    natural liberty, 44, 48
    personal liberty, 32, 35, 36, 37–38, 104
    political liberty, 34, 36, 99, 104
    Radical Left, 74–77
    and separation of powers, 35–36
    tensions between liberties, 36–38
    Locke, John
      democracy, 100
      individual rights, 104
      liberalism, 32, 43
      property rights, 50–51
      Second Treatise of Government, 47, 48–51
      social contract, 32, 47
  MacIntyre, Alastair, 103
  Madison, James, 47, 54–56
  Magna Carta, 25–27, 57, 116
  Maitland, Frederic, 67
  Marshall, John, Chief Justice, 56, 57, 64, 87
  Marx, Karl, 51, 62
  mediation, 121
  merchants, 28–31, 43–44, 121
  Middle Ages
    Byzantium, 17–18
    customary law, 22, 115
    Dark Ages, 15–17
    feudal system, 16, 24, 31, 43, 116
    Germanic customary law, 23–25, 116, 117
    moral certainty, 39–40
    natural law, 22, 27–28, 70, 109, 115, 116
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Index 179</td>
<td></td>
</tr>
<tr>
<td>popes v kings, 19–23</td>
<td></td>
</tr>
<tr>
<td>prevention of tyranny, 139</td>
<td></td>
</tr>
<tr>
<td>rise of the bourgeois, 28–31</td>
<td></td>
</tr>
<tr>
<td>sovereign powers, 118, 119</td>
<td></td>
</tr>
<tr>
<td>universities, 18</td>
<td></td>
</tr>
<tr>
<td>Middle East, 15, 17</td>
<td></td>
</tr>
<tr>
<td>Mill, John Stuart, 32, 35, 61, 62, 76</td>
<td></td>
</tr>
<tr>
<td>minority rights, 104</td>
<td></td>
</tr>
<tr>
<td>Montesquieu</td>
<td></td>
</tr>
<tr>
<td>and England, 53, 57</td>
<td></td>
</tr>
<tr>
<td>liberty, 54, 57, 51, 94</td>
<td></td>
</tr>
<tr>
<td>separation of powers, 52–54</td>
<td></td>
</tr>
<tr>
<td>Spirit of Laws, 47, 52–54</td>
<td></td>
</tr>
<tr>
<td>moral certainty, 39–40</td>
<td></td>
</tr>
<tr>
<td>moral pluralism, 41, 81, 85, 99</td>
<td></td>
</tr>
<tr>
<td>moral principles, 81, 103</td>
<td></td>
</tr>
<tr>
<td>NAFTA, 127</td>
<td></td>
</tr>
<tr>
<td>natural law</td>
<td></td>
</tr>
<tr>
<td>Aquinas, 18–19</td>
<td></td>
</tr>
<tr>
<td>Cicero, 11–12</td>
<td></td>
</tr>
<tr>
<td>classical world, 56</td>
<td></td>
</tr>
<tr>
<td>Enlightenment, 39, 40</td>
<td></td>
</tr>
<tr>
<td>human rights, 107, 109</td>
<td></td>
</tr>
<tr>
<td>v instrumental approach, 79</td>
<td></td>
</tr>
<tr>
<td>limits on sovereigns, 118</td>
<td></td>
</tr>
<tr>
<td>Locke, 48</td>
<td></td>
</tr>
<tr>
<td>loss of faith in, 99</td>
<td></td>
</tr>
<tr>
<td>Middle Ages, 22, 27–28, 70, 109, 115, 116</td>
<td></td>
</tr>
<tr>
<td>nihilism, 86</td>
<td></td>
</tr>
<tr>
<td>nobility, 25–27, 30, 31</td>
<td></td>
</tr>
<tr>
<td>non-citizens, 7</td>
<td></td>
</tr>
<tr>
<td>Noet, Philippe, 81–82, 86, 120</td>
<td></td>
</tr>
<tr>
<td>Nozick, Robert, 32</td>
<td></td>
</tr>
<tr>
<td>Nuremberg trials, 131</td>
<td></td>
</tr>
<tr>
<td>Orthodox Church, 18</td>
<td></td>
</tr>
<tr>
<td>Oxford University, 18</td>
<td></td>
</tr>
<tr>
<td>papacy, v kings, 19–23</td>
<td></td>
</tr>
<tr>
<td>Paris University, 18</td>
<td></td>
</tr>
<tr>
<td>parliamentary sovereignty, 26, 57</td>
<td></td>
</tr>
<tr>
<td>Pépin the Short, 21, 22</td>
<td></td>
</tr>
<tr>
<td>Plato, 7, 8–10, 12</td>
<td></td>
</tr>
<tr>
<td>pluralism, 41, 81, 85, 99</td>
<td></td>
</tr>
<tr>
<td>polis, 7, 8</td>
<td></td>
</tr>
<tr>
<td>poverty, 61–62, 68, 75, 76</td>
<td></td>
</tr>
<tr>
<td>privacy, 33</td>
<td></td>
</tr>
<tr>
<td>private law, v public law, 64</td>
<td></td>
</tr>
<tr>
<td>property rights, 43, 44, 49, 50–51, 54, 103, 104, 105, 122</td>
<td></td>
</tr>
<tr>
<td>Protestantism, 39</td>
<td></td>
</tr>
<tr>
<td>public interest, 72</td>
<td></td>
</tr>
<tr>
<td>race theorists, 86</td>
<td></td>
</tr>
<tr>
<td>racial segregation, 80, 103, 120</td>
<td></td>
</tr>
<tr>
<td>Radical Left</td>
<td></td>
</tr>
<tr>
<td>breakdown of rule of law, 82–84</td>
<td></td>
</tr>
<tr>
<td>communitarianism, 84–86</td>
<td></td>
</tr>
<tr>
<td>indeterminacy thesis, 86–90</td>
<td></td>
</tr>
<tr>
<td>legal realism, 77–80</td>
<td></td>
</tr>
<tr>
<td>liberty and equality, 74–77</td>
<td></td>
</tr>
<tr>
<td>railways, 60–61</td>
<td></td>
</tr>
<tr>
<td>Rawls, John, 32</td>
<td></td>
</tr>
<tr>
<td>Raz, Joseph, 93–94, 95, 113</td>
<td></td>
</tr>
<tr>
<td>reason, 9, 19, 27, 39, 40, 48, 50</td>
<td></td>
</tr>
<tr>
<td>reasonableness, 83, 98</td>
<td></td>
</tr>
<tr>
<td>Rechtsstaat, 92, 108, 113</td>
<td></td>
</tr>
<tr>
<td>Reformation, 27, 39</td>
<td></td>
</tr>
<tr>
<td>Rehnquist Supreme Court, 87, 125</td>
<td></td>
</tr>
<tr>
<td>relativism, 79</td>
<td></td>
</tr>
<tr>
<td>religious law, 16, 19–23, 118</td>
<td></td>
</tr>
<tr>
<td>religious schools, 103</td>
<td></td>
</tr>
<tr>
<td>religious societies, 138</td>
<td></td>
</tr>
<tr>
<td>responsive law, 81–82</td>
<td></td>
</tr>
<tr>
<td>retroactive rules, 97, 109</td>
<td></td>
</tr>
<tr>
<td>right to fair hearing, 109, 119</td>
<td></td>
</tr>
<tr>
<td>right to work for wages, 43</td>
<td></td>
</tr>
<tr>
<td>Roman law, 11–14, 15, 16, 18, 20, 23, 56</td>
<td></td>
</tr>
<tr>
<td>Romantics, 40</td>
<td></td>
</tr>
<tr>
<td>Roosevelt, F. D., 111</td>
<td></td>
</tr>
<tr>
<td>Rousseau, Jean-Jacques, 34, 66, 99</td>
<td></td>
</tr>
<tr>
<td>rule by law, 92–93, 96, 108</td>
<td></td>
</tr>
<tr>
<td>rule formalism, 78</td>
<td></td>
</tr>
<tr>
<td>rule of law</td>
<td></td>
</tr>
<tr>
<td>decline, 60, 64–65, 73, 81</td>
<td></td>
</tr>
<tr>
<td>and democracy, 1–2, 37</td>
<td></td>
</tr>
<tr>
<td>developing, 4</td>
<td></td>
</tr>
<tr>
<td>elusiveness, 3</td>
<td></td>
</tr>
<tr>
<td>formal legality. See formal legality</td>
<td></td>
</tr>
<tr>
<td>global endorsement, 3</td>
<td></td>
</tr>
<tr>
<td>government limited by law, 114</td>
<td></td>
</tr>
<tr>
<td>history. See specific authors; specific</td>
<td></td>
</tr>
<tr>
<td>periods and liberalism, 33</td>
<td></td>
</tr>
<tr>
<td>requirements, 66–67, 83, 93, 97, 119</td>
<td></td>
</tr>
<tr>
<td>rhetoric, 1–3, 141</td>
<td></td>
</tr>
<tr>
<td>rule by judges, 122–24, 125, 126, 133–35, 140–41</td>
<td></td>
</tr>
<tr>
<td>rule by law, 92–93, 96</td>
<td></td>
</tr>
<tr>
<td>substantive theories. See substantive</td>
<td></td>
</tr>
<tr>
<td>theories universal good, 137–41</td>
<td></td>
</tr>
<tr>
<td>rulers. See sovereigns</td>
<td></td>
</tr>
<tr>
<td>Selznick, Philip, 81–82, 86, 120</td>
<td></td>
</tr>
<tr>
<td>separation of powers, 35–36, 49, 52–55, 66, 124</td>
<td></td>
</tr>
</tbody>
</table>
Index

serfs, 16, 17, 30, 31
shared principles, 81, 85
Shari’a law, 118
Shklar, Judith, 59
Shugang, Li, 3
Singapore, 120
slavery, 93, 95, 120
slaves, 7, 36
Smith, Adam, 44, 51
social contract, 32, 34, 47
social justice, 67
social science, 79, 83
social welfare
administrative actions, 64–65
emergence, 63
enduring idea, 72
and formal legality, 120–21
Hayek, 45, 68, 72, 82, 98, 99
legislation, 70
rights, 112–13
and rule of law, 4–5, 97–99
Unger, 82–83
socialism, 60–63, 97
socio-economic rights, 112–13
Socrates, 8, 10
Solon, 8
sources of law
Dicey, 64
international law, 128
South Africa, 120
sovereigns
17th century, 28–29
Aquinas, 19
discretionary powers, 63–64
divine right, 28–29
Germanic customary law, 23–25, 116, 117
Hobbes, 47–48
law-making limits, 92, 118–19
legal remedies against, 117
limited by law, 50, 114, 129–31, 139
Locke, 49
Magna Carta, 25–27, 57, 116
and medieval merchants, 30
v medieval papacy, 19–23
Middle Ages, 28, 118, 119
Roman law, 12, 13–14, 23
Spain, 15, 23
Strauss, Leo, 50
substantive theories
formal legality with democracy and
human rights, 110–12
generally, 91–92, 102
individual rights, 102–04
individual rights v democracy, 104–08
right to dignity, 108–10
thickest versions, 112–13
Sylvestre, Pope, 20
taxation, 94
Thompson, E. P., 137–38, 141
Tocqueville, Alexis de, 58
torture, 35, 139
towns, 17, 29–30, 60
trade, 28–31, 43–44, 53, 119, 121, 130
Ullmann, Walter, 23
unconscionability, 83
Unger, Roberto, 74, 82–84, 85, 94, 98
United States
administrative law, 72
attacks on rule of law, 73–74
Burger Court, 74
Commerce Clause, 77
Constitution, 26, 94, 78
Declaration of Independence, 107, 117
democracy, 58
due process, 26
Equal Protection Clause, 80
instrumental approach, 79–80, 81
and international law, 130
judiciary, 89, 108
legal realism, 77–80
mainstream legal theorists, 80–82
moral divisions, 103
racial segregation, 80, 120
Radical Left, 82–84
Rehnquist Court, 87, 125
slavery, 93, 120
social upheavals, 73
social welfare, 72, 111
Warren Court, 74, 80–82
universalism, 40–41
utilitarianism, 41, 79
Vietnam War, 73
violence, 121
Waldron, Jeremy, 96
war crimes tribunals, 128, 131
Warren Court, 74, 80–82
Watergate, 73
Weber, Max, 59, 97
World Bank, 2, 94, 136, 137
World Court, 127, 128, 130, 133, 134
WTO, 128, 130, 132, 134, 136
Yugoslavia, 128, 131