

Index

- Aarsleff, Hans, 47, 50, 56
 Abraham, 37
 Ackerman, Bruce, 120–3, 127, 131, 186, 209, 320
 Article V amendment process, 123
 dual constitutionalism, 120
 informal amendment, 123, 138
 “people,” 120
 popular sovereignty, 120
 Adam, 53, 77, 205, 206
 adjudication, 6
 Adler, Matthew D., 190
 Aeschylus, 79
Alden v. Maine, 199
 Alexy, Robert, 268, 270, 274, 300, 324
 argument from injustice, 268
 Kelsen, critique of, 235
 Nazis, case of, 268
 altruism, 5
 Amar, Akhil Reed, 89
 amendment, by government, 123
 amendment, popular, 123
 Article V, 123
 entrenchment, unavoidable, 155
 limitations on unjustifiable amendment, 155
 majoritarian principles, 123
 presidential succession, 149
 Ames, William, 30
 Anderson, Elizabeth, 190
 anthropomorphic metaphor, 10, 21, 106, 107, 117, 125, 131, 134, 168–71, 180, 186, 191, 192, 226, 320
 in Bodin, 23
 in Dicey, 93
 in Elster, 135, 171
 in Hobbes, 36, 41
 in Kelsen, 233
 in Locke, 45, 76–7, 80
 in Venter, 136
 in Wilson, 86, 88, 90, 87
 Aquinas, St. Thomas, 18, 22
 Aristotle, 8, 16, 20, 21, 22, 36, 40, 44
 army, 5, 6
 “as if” commitment, consent, 44, 114, 115, 122, 130, 144, 191, 193, 227, 335
 in Harris, 129
 in Michelman, 159
 see also constitutional language, commitment to
 Ascraft, Richard, 46
 Ashworth, E. J., 59
 Augustine, St., 16, 35, 176
 Austin, John, 27, 249, 232
 Austria, constitution of, 246
 author/authorship, 120, 125, 127, 321
 self-authorship, 121, 125, 130, 131–2, 136, 327
 in Harris, 127–8, 136
 in Hobbes, 36, 41–2
 in Michelman, 113, 116, 118–19, 125, 136
 in Norton, 143
 see also sovereignty
 autonomy, 7

- autonomy (*cont.*)
 in Cohen, 280
 of constitutional language, 273,
 306, 317
 in McCormick, 252
 in Postema, 252, 271
 Ayoub, M., 195
 Bacon, Francis, 34
 Balkin, Jack, 157, 162, 203, 321
 constitutional evils, 157, 200
 constitutional fidelity, 157,
 199–200, 255
 relation to completeness, 200
 relation to exclusivity, 200
 relation to substance, 200
 constitutional practice, 157
 “interpretive cooptation,” 199
 justice, 199, 200
 Barber, Sotirios A.
 constitutional amendment,
 limitations on, 137
 constitutional maintenance, 286
 Barnett, Thomas, 60
 Barnett, Randy, 101–2, 108, 320
 consent rejected as basis for
 legitimacy, 101, 102
 morality as basis for legitimacy,
 101–2, 111
 rights in, 102
 Barthes, Roland, 142
 Bellamy, Richard, 97, 187, 188
 common welfare, 98, 187
 constitutional politics, theory of,
 98
 rights in, 98
 society, view of, 97
 Benhabib, Seyla, 275–7, 279, 324
 background norms, 275
 Coleman, compared with, 275
 constitutional language, tensions
 with, 275
 democratic legitimacy, conditions
 of, 275–77
 “discourse ethics,” 276
 efficacy, 282
 “hermeneutic validation,” 276
 horizons, 283, 293
 public deliberation, norms of,
 275, 276
 Berbeyrac, Jean, 47
 Berlin, Isaiah, 107
 negative and positive liberty
 distinguished, 154
 Berman, Harold, 211
 Bible, scripture, 8, 19
 Bickel, Alexander, 166
 Bierce, Ambrose, 328
 Blackstone, William, 89, 211
 Bobbitt, Phillip, 133, 143, 149
 constitutional grammar, 133, 143,
 145
 legitimacy of decisions, 143
 modalities of constitutional
 argument, 133, 143
 text, written, significance of, 133
 Bodin, Jean, 9, 17, 18–29, 30, 37,
 39, 41, 42, 44, 66, 75, 76, 104,
 179, 180, 193, 300, 305, 319
 anthropomorphic metaphor in,
 23
 body, metaphor of, 23, 21
 citizens, citizenry, 22, 24
 civil war, fear of, 22
 commonwealth, 20, 26
 family in, 20–1, 22
 fathers, authority of, 21, 22, 26
 God, references to, 21, 24, 25, 27,
 30
 household, role of, 21–2
 king, 23
 law, implies sovereign, 24–5
 lawmaking/lawmaker, 18, 19, 24
Methodus, 24
 natural laws, 25, 26–7
 oaths, oath-making, 24
 order, importance of, 22, 23
 people, collective, 23–4
 property, common, 20, 26
 property, private, 25–6, 27
 providence, 23
 public/private divide, 26, 27

- rebellion, no right of, 28, 29
 “Reply to the Paradoxes of Malestroit,” 74
 rights, 22
 secular emphasis, 18, 19
 sovereign, authority of, 21, 23, 25, 26, 27, 29
 source of authority, 23–4, 27
 sovereign, limitations on, 25–8
 sovereignty, theory of, 17, 21, 23, 23–4, 27–9
The Six Books of the Republic, 9, 18, 27
 state, theory of, 21, 22, 23
 Bolingbroke, Henry St. John, 46
 Bork, Robert, 137, 265
 constitutional amendment, 137
 Ninth Amendment, dismissal of, 334, 334
 Ninth Amendment, “empty vessel” interpretation of, 334
 stability, preference for, 137
 The Tempting of America, 137
 Boyle, Robert, 35
 Bracton, Henry de, 46
 Brand-Ballard, Jeffrey, 237
 Brandon, Mark
 failure of constitutional discourse, 202, 209, 271
 Brewer, David, 152
 Browne, Thomas, 30
 Byrne, James, 61

 Calvinism, 20, 30, 37, 51, 57, 87
 Carroll, Lewis, 206, 206
 Cardozo, Benjamin, 314
 Catholicism, 20, 37
Cato’s Letters, 84
 chess/chess tournament, analogies to, 180, 184
 agreement to rules, required, 184
 arguments over rules, form of, 184
 implied discursive norms, 184
 purpose of association, 184
 rules, necessity of, 185

 children’s play, analogy to, 184–5
Chisholm v. Georgia, 84 n. 1, 95 n. 16
 Christianity, 16, 19, 35, 51, 57
 Church of the Holy Sepulcher, 174
 citizen/citizenship, 20, 96, 203
 coercion, 2–14, 160
 relation to legitimacy, 209
 justifications for,
 see also violence, justifications for; violence, in Derrida
 Cohen, Barak, 211
 Cohen, Joshua, 74, 80, 279–81, 283, 324
 “associative democracy,” 281, 282
 autonomy, 280
 constitutional language, parallels to, 279
 deliberative democracy, 279
 deliberative inclusion principle, 280
 disagreement, not liquidated by deliberation, 279
 efficacy, 281
 “liberties of the moderns,” 280
 reasons, focus on, 280
 religion, problem of, 281, 282
 thick norms, necessity of, 279
 value pluralism, 280
 Coleman, Jules, 211, 272–3
 convergent social practices, 273, 282
 inclusive positivism, 263, 273
 indeterminacy, 211
 officials, focus on, 273
 “modest objectivity,” 211
 collective action, 1, 3, 5–6, 8, 10, 12, 15, 161
 commitment/precommitment, 3, 2, 10, 134, 135, 136, 139, 150, 272, 321
 to language, 3, 11, 135
 to laws, 4
 argument for, 163
 based on appeal to morality, 152
 based on continuous sovereignty, 152

- commitment/precommitment
 (*cont.*)
 challenges to possibility of, 151;
see also Waldron, Jeremy
 to constitutional language, 142,
 144, 149, 193
 democratic creation of, 151
 democratic challenge to, 150, 179,
 186–7
 desirability of, 179
 present consent not sufficient for,
 151
 necessity of, 142, 160, 177
 for democratic self-rule, 185,
 188
 response to democratic
 challenge, 185
 requirement for, identity, 150
 requirement for, justification,
 150
 rhetorical effects of, 149
 time, problem of, 149–50
 utility of, 150–1
 common law, 82, 87, 89, 96, 146,
 211
 Common Sense, philosophy of, 87
 commonwealth, 19, 22
 communities, 5, 9, 19, 104
 compact, model of, 7
 competition, 4
 completeness, 13–14, 197–8, 218,
 245, 254–7, 322, 323
 arguments for, 224
 constitutional evil and, 202
 excessive, problems of, 222
 exclusionary effects of, 220
 incompleteness, arguments for,
 218–28, 258, 261, 299, 300
 incompleteness, and problem of
 indeterminacy, 219, 244
 necessity of, 220, 242, 330
 norm of integrity, implications
 for, 291
 total, impossibility of, 220, 239
 translation, relation to, 195
 consensus; *see* consent, unanimous
- consent, 2–3, 10, 81, 164
 basis for, 98
 challenges to idea of, 98, 203
 consent to consent, 139
 in Locke, 71
 constitution; *see* constitution/
 constitutional
 creation of People by, 78–9
 grounding norm of, 194
 language, 11, 12, 115, 130, 194,
 283
 legitimation by, 108, 113, 185
 of majority, 112
 multiple moments of, 144, 161
 in Raz, 292–3, 293–4
 subjective, individual, 114–15, 161
 unanimous, 98, 122, 127, 130,
 165, 193, 227;
see also “as if,” commitment,
 consent
 “Consent How?” 2, 10, 81, 82, 83,
 114–15, 120, 130–1, 133, 136,
 193–4, 197, 247, 262, 319,
 321–2
 “Consent to What?” 2, 11, 12, 133,
 193, 195, 197, 255, 258, 262,
 319, 322
 constitution/constitutional
 consent, constitutional, 81, 110,
 112, 193, 198, 274, 318
 creation of, 3, 4, 10, 11, 65, 88,
 107, 110, 160, 317
 contrasted with maintenance,
 115, 119, 120, 127,
 299–300, 326
 critical function of; *see*
 constitution, transformative
 culture, constitutional 188
 in Michelman, 116
 definition of, 1, 239–41, 262
 evils, constitutional, 157, 262–3
 in Balkin, 155–6, 200
 completeness and, 202
 exclusivity and, 202
 failure to prevent, 265, 268
 in Graber, 200–1

- pluralism of values and, 265
 - failure of, 6, 271
 - interpretation of, 198, 214–15, 217, 331–2
 - language of; *see* constitutional language
 - law, relation to, 239, 312
 - maintenance, 3, 88, 286, 335
 - norms; *see* norms, constitutional
 - practice, constitutional, 8, 11, 14
 - preservative
 - of norms, 241
 - of practices, 240
 - regime, constitutional, 1, 2, 3, 6, 11
 - text of, 6–7, 10
 - transformative, 239, 241
 - see also* completeness; consent, constitutional; constitutional grammar; constitutional language; substance, question of
- constitutional amendment
 - in Ackerman, 123, 197
 - in Amar, 123, *n.* 47
 - in Bork, 137
 - possibility of, 167, 167
 - problems of, 123, 136–40, *de facto* by interpretation, 137, 143
 - de facto* by law, 138
 - in Griffin, when required, 156
 - in Harris, 126
 - implications for legitimacy, 139
 - in Kramer, 121
 - in Levinson, 137, 138
 - limitations on, 138–9, 137
 - in Barber, 137
 - in Murphy, 138
 - occurrence of, defined, 137
 - procedural requirements for, generally, 168
 - supermajority requirements for, 137, 169
 - in Whittington, 123
- constitutional grammar, 78, 133–4, 136, 149, 177, 210, 212–14, 228
 - exclusivity, first principle of, 212–13, 323
 - validity of arguments determined by, 212, 213
 - validity of arguments, relation to legitimacy, 212
 - violation of rules of, 213, 331
- constitutional language, 8, 10, 14, 226, 228, 130, 136
 - artificial quality of, 141
 - autonomy of, 273, 306, 317
 - commitment to
 - “as if,” 129, 215, 217, 226, 280, 316, 321–4, 327
 - condition of legitimate constitution, 148, 215, 266
 - failure of, 192
 - sufficient basis for legitimate constitution-making, 191–2
 - conservative nature of, 144
 - consent to, 11, 198, 283, 320, 327
 - content of; *see* substance, question of
 - defined, 132–4
 - different from law, morality, 270–1
 - effect of adoption of, 82, 124, 132
 - exclusionary effects of, 214–16; exclusivity of; *see* exclusivity
 - grammar of; *see* constitutional grammar
 - integrity, requirement of, 290, 327
 - extra-constitutional discourse, threat to, 332
 - justice as element of, 261
 - langue* of, 140, 142, 143–4, 147, 186, 194, 198, 246, 258, 321, 338
 - legal language, relation to, 210, 228, 246, 313, 326, 329–31
 - literature, different from, 141, 143
 - multiple languages impossible, 338–9

- constitutional language (*cont.*)
 norms of, thin, 301, 302
 ordinary language, relation to,
 141, 143, 210, 216, 326
 political language, relation to, 217
parole of, 140–1, 142, 143–4, 147,
 186, 194, 198, 246, 258, 321,
 338
 preservation, duty of; *see* juridical
 officials, 122–3
 signs, system of, 133, 136,
 210–12, 213, 226, 228
 substance, role of, 306, 326
 theory of, 2–3, 10, 75, 255, 285,
 312–13, 319–28, 340–1
 violence of;
see constitutional language,
 exclusionary effects of
 Young, challenge to, 282
see also language, extra-
 constitutional: translation;
 commitment/precommitment
- constitutionalism, 12, 15, 132
 eighteenth century, 88
 liberal, 2, 5, 8, 9, 10, 13, 16, 17,
 18, 20
 Lockean, 9, 10, 75–80, 81, 94, 98,
 102, 103, 113, 135, 141, 198,
 230, 320
 medieval, 9, 25
 modern, 8, 17, 48, 78
 possibility, not necessity of,
 148
- conventions, 327
 Cotton, John, 335
 courts, role of, 151, 194, 240
 judicial review, 245
see also juridical institutions
- covenants; *see* Hobbes, Thomas
- Cover, Robert, 207–8
Dred Scott, 200
 jurisprudence, 207
 literary analogy inapposite, 141
 nomos, 207–8
 violence, 207–8
- Croly, Stephen, 165
- Culler, Jonathan, 141, 191
 culture, cultural development, 3, 13
 Curry, Thomas, 335
 Custom/customary practice, 9, 20,
 28, 97, 104, 112, 89
 customary law; *see* law, customary law
- Dawson, Hannah, 58, n. 57
 decisions, decision-making, 5, 12
 Declaration of (American)
 Independence, 190
- deliberation/deliberative
 democracy, 43, 274, 282–3
 benefits of, 153
 in Benhabib, 275, 276
 in Cohen, 279, 280
 conditions of, 226
 in Dorf, 211
 efficacy and, 284
 justifications for preference,
 required, 168
 procedures to ensure, 167
 public deliberation, 145
 question of substance,
 consequences for, 284
 in Sunstein, 223–5
 value pluralism, response to,
 284
 in Young, 277–8
- democracy/democratic theory, 2, 3,
 7, 107, 134, 180, 316, 340
 in Benhabib, 275–7
 in Cohen, 281, 282
 conditions necessary for, 188
 in Dicey, 92–3
 in Eisgruber, 180–3
 in Ferrajoli, 104
 in George, 264
 purposive nature of, 185
 democratic challenge; *see*
 commitment/precommitment
 in Young, 278
- Denning, Brandon, 204
 departmentalism, challenge to, 340
 Derrida, Jacques, 204–5, 323
 arche-violence, 206

- difference, violence of, 205
 discursive violence, 204, 207
 inescapability of, 209, 207-208
 just and unjust, distinguished,
 209-10
 force, element of law, 207
 “*Gewalt*,” meaning of, 204
 Hobbes, compared with, 205
 justice, deconstruction concerned
 with, 210
 law, discourse of, 207
 Descartes, René, 33, 51
 de Seyssel, Claude, 25
 dialogue/dialogic models, 46, 78,
 124-5,
 between people and People, 192
 in Harris, 129
 of popular sovereignty, 124-5,
 129
 Dicey, A. B., 83, 90-4, 95, 108, 121,
 127
 anthropomorphic metaphor, 93
 Bodin, compared with, 92
 consent, 93, 94
 constitution, English, 92
 constitution, subject to
 reformation, 94
 conventions, 91, 93, 124, 174
 courts, 91-2
 no power of judicial review,
 91
 no power of law making in,
 91
 democratic theory of, 92-3
 George III, dissolution of
 Parliament, 93-4
 “law,” defined, 91
 maxims,
 Parliament, 90-2, 93
 people, 91, 92-3
 as electors, 92
 as Parliament, 93
 politics, distinct from law, 91
 positivist arguments of, 93, 94
 psychological arguments of, 93
 representation, 93
 sovereign
 lawmaking authority of, 90, 92
 law not a limitation on, 91
 sovereignty, 90
 legal, 91, 92, 93
 political, 91-2, 93
 limitations on, 93
 popular, 93
 transfer of irrevocable, 90
 Treaty of Unity, discussion of, 90
 Wilson, compared with, 94
 disagreement, persistence of, 5, 8,
 100, 193, 245
 in Cohen, 279
 in Griffin, 156
 in Michelman, 116, 159, 160
 in Sunstein, 226
 in Waldron, 155-6, 170
 see also morality; pluralism
 discourse, theories of; *see*
 deliberation/deliberative
 democracy
 DiStefano, Christine, 203
 Dorf, Michael, 100
 deliberation, democratic, 211
 procedural norms inadequate, 166
 problem of indeterminacy, 103,
 166, 211
 rejection of “right answer”
 theories, 103
 Dow, David, 137
 appeal to moral principles, 139
 Dunn, John, 73
 Durkheim, Emile, 310
 Dworkin, Ronald, 211, 284, 285-90,
 303, 324, 325
 “chain novel,” metaphor of, 289,
 290
 “checkerboard” model, 288
 Fourteenth Amendment, 289
 grounding norm, need for, 286
 Hart, compared with, 286
 integrity, norm of, 284, 285, 287-8,
 288-9, 290, 317, 292
 basis for political community,
 288

- Dworkin, Ronald (*cont.*)
 effect on lawmaking, 289
 “law working itself pure,” 289
 interpretation, 286
 law, discursive nature of, 287
 rights as trumps, 317
 positivism, critique of, 285–6
 “semantic sting,” 286
 substance, question of, 290, 306
Taking Rights Seriously, 317
- Early Modern period, 9, 16
- efficacy, effectiveness, 12, 241,
 247–8, 299, 324
 in Benhabib, 282
 in Cohen, 282
 completeness, relation to, 255
 deliberative democracy, relation
 to, 284
 in Kelsen, 237
 law, distinguished from
 constitution, 239, 242, 243,
 261
 legitimacy, relation to, 215
 necessity of, for constitution, 239,
- Eisgruber, Christopher, 180–3, 184,
 185, 187–8, 188–9, 192, 193,
 321
- coordination, benefits of, 181
 courts, 181
 decision whether to debate, 183,
 185–6
 democratic principles, 180–3
 dialogic theory of self-rule, 183
 elections, 182
 impartiality, norm of, 181, 182
 institutions, necessity of, 181, 183
 legal discourse, harms of, 228
 legislatures, 181
 morals,
 dimension of constitutional
 discourse, 182
 institutions required for
 expression of, 182
 subject of collective expression,
 182
- “moral reasons,” requirement of,
 187, 188
 “people” distinguished from
 majority, 181
 popular sovereignty,
 requirements of, 181
- Eleftheriadis, Pavlos, 112
- Elster, Jon, 153, 171–3, 173–4, 175,
 181, 192, 321
 anthropomorphic metaphor,
 employed by, 135
 anthropomorphic metaphor,
 abandonment of, 171
 authority to bind, problem of, 171
 “constraint theory” of, 153
 conventions, contrasted with
 constraints, 174
 critique of Waldron, 154
 enlistment, 173–5
 international institutions, 172
 precommitment, criteria for, 150
 self-binding, possibility of, 172
 by prior unanimous agreement,
 172
 by individuals, 173
 by continuity of principle, 173
 mutual, 174–5
 Ulysses, example of, 173
 upstream authority,
- emergencies, 8, 14, 341–5
 abdication of commitment to
 constitutional language,
 342–4, 344
 judicial emergency, “absurdity”
 of, 346
 question of substance, relation to,
 342
 threat to constitutional language,
 342
 usurpation of sovereignty and,
 344–5
- Emerson, Ralph Waldo, 152
- employment, law of, 96
 “empty vessel” theory of
 interpretation, 242–3, 330,
 331, 334

- enclave deliberation, 226;
see also Sunstein, Cass
- enforcement, enforcers, 4
- Erikson, Erik Oddvar, 104
- European Constitution, 104–6
 Article I, duty of good faith in, 189, 190
 Article I, duty of loyalty, 191
- European Court of Justice, 190
- European Union, 104, 113
 democracy deficit and, 104
 federalist system of, 134
- exclusivity, 13–14, 195, 197–8, 203–18, 217, 245, 254–5, 322–3, 324, 329
 analogy to amendment procedures, 204
 arguments for, 222–3, 224
 constitutional evil and, 202
 exclusionary effects of, 203–204
see also translation, burden of; violence, discursive
 institutional authority, relation to, 215
 limited, not absolute, 217
 necessity of, for constitutional language, 216, 330
 necessity of, for ordinary language, 204
 not required for ordinary lawmaking, 256
 partial, argument for, 220
 “public reason,” relation to, 216
 relation to incompletely theorized agreements, 227
 relation to completeness, 242
 relation to substance, 203
 source of authority, 216
 sovereignty, relation to, 216
 threat to, legal language, 329
 writing distinguished from reading, speaking, 217
see also constitutional grammar
 expressivist jurisprudence, 190
- family; *see* Bodin, family in
- federalism, federal systems, 134
- Federalists, 83, 88
- Ferrajoli, Luigi, 104–5, 108, 320
 argument from democracy, 104
 challenge to sovereignty, 104
 challenge to citizenship, 105
 “global constitution” in, 105
 optimistic outlook for Europe, 105
- Filmer, Robert, 46, 66
- Fineman, Martha, 206
- Finn, John
 civic constitutionalism, 228
 juridic constitutionalism, 228
- Finnis, John, 103, 269–70, 272, 274, 324
 “central cases,” 269
 critique of positivism, 248, 269
 functionalist definition of law, 269
 justice, definitional element of “law,” 270
 Leiter, critique of, 269
 morality, definitional element of “law,” 103, 269
 positivism, critique of, 269
 reciprocity, 269
- Fish, Stanley, 155
- Fisher, Louis, 99
- Fortescue, John, 25, 46
- Fossum, Jon, 104
- Franklin, Julian, 24, 25, 26
- Freeman, Samuel, 100, 223, 323
 completeness in, 219, 223
 exclusivity in, 219
 liberal justice, 122
 public reason, 218–19
 overdetermined, 218
 political argument, distinguished, 219
 rejection, danger of, 219, 220
 translation, required, 219
- Rawls, critique of, 122, 216, 217
- Fuller, Lon, 96
- Gadamer, Hans-Georg, 314
- Galileo, 31
- games, 5
- Gauthier, David, 30, 39, 42

- George, Robert, 96, 263–4, 270, 316
 abortion, discussion of, 264
 allegiance, conditions of, 265, 271
 democracy, moral commitments
 of, 264
 duty to obey laws, 265
 Fourteenth Amendment,
 discussion of, 264
 moral view of law, 263
 officials, authority of, 264
 Pope John Paul II, appeals to,
 264
 Germany, Constitution of, 111, 214
 Goldberg, Arthur, 333
 good faith, 188, 199
 contract law doctrine,
 distinguished, 190
 in European Constitution, 189,
 190
 insufficiency of, 188
 declaration in constitutional text,
 189–90
 declared by sovereign, 190
 declared by self-sovereignty,
 problem of infinite regress,
 190
 necessity of, questioned, 191, 192
 in Waldron, 187
 Gorbachev, Mikhail, 131
 Gordon, Thomas, 84
 government, 6
 Graber, Mark, 200, 215
 constitutional evil, 200–1
 Cover, critique of, 200
Dred Scott, discussed, 200–1
 “right answer thesis,” 201
 Gramsci, Antonio, 167
 Grant, Ruth, 45, 70, 71
 Great Britain, 7
 Green, Leslie, 295, 297, 300
 Greenawalt, Kent, 218
 Establishment Clause,
 “intermediate position,” 219
 positivism, defense of, 249
 Griffin, Stephen, 204
 amendment, required, 156
 disagreement, unliquidated, 156
 “rule of law constitutionalism,”
 156
 Grimm, Dieter, 111
Griswold v. Connecticut, 333
*Gulf, Colorado and Santa Fe Railway
 Co. v. Ellis*, 214
 grounding/groundedness, 13
 Grotius, Hugo, 46, 47
 Guttman, Amy, 218
 Habermas, Jürgen, 100, 145–6, 284,
 285, 307–13, 308, 324, 326–7,
 337
 bargaining, 145
 citizens, 316–17
 constitutional language,
 implications for, 314
 ethos, 310
 hermeneutic approach of, 285
 horizons, 285, 310, 327
 identity formation related to
 institutions, 112
 internal perspective of, 308
 Kelsen, compared with, 310
 law, 309–10
 morality, distinguished, 309
 relation to ordinary language,
 310
 relation to other institutions, 310
 secondary rules of,
 specialized language, required,
 310
 lifeworld, 308
 ordinary language, 308
 positivism of, 311
 rationalization, necessity of, 312
 Rawls, critique of, 311
 Raz, compared with, 310
 self-control, 310
 systems theory, critique of, 308,
 315
 will to reasonableness, 100
 Hamilton, Alexander, 83, 121
 independent judiciary, defense of,
 152

- justification for precommitment, 152
- Harris, Will, 125–30, 135, 186, 210, 224, 320
- “as if” commitment, 129
- authorship, 127–8, 136
- consent, requirement of, 126
- constitution/Constitution, 125–6
- constitutional amendment, 126
- constitutional thinking, 129
- Constitutional People, 126, 127, 127, 183, 186
- dialogic model, 129
- intelligibility, norm of, 129
- popular sovereignty, 126
- sovereign as reader, 128
- Sovereign People, 126–7, 126, 186
- text, significance of, 127–9
- Hart, H. L. A., 247–54, 257, 249, 260, 311, 269, 323
- completeness, 251
- constitutionalism of, 250
- customary law, 253
- Dworkin, critique of, 248
- internalist perspective, 249, 308
- grounding norms, 253–4
- law, as normative system, 248
- midlevel rules, 250
- obligation, 249–50, 272
 - conditions of, 250
 - consent, relation to, 250
- positivism of, 249
- “Postscript to *The Concept of Law*,” 232
- primary and secondary rules, distinguished, 251–3
- Raz, critique of, 248
- rule of recognition, 252, 254, 283
- Hayek, Friedrich, 152, 153
- Herder, Johann, 111
- hermeneutics, theory of; *see*
 - horizons, hermeneutic
- Hirschman, Albert, 35
- Hirschmann, Nancy, 203
- Hirschl, Ran, 247
- historical jurisprudence, 211
- history/historiography, 3, 4, 9, 130, 131, 167
 - New Soviet History, 132
 - revisionist, challenge of, 131
- Hobbes, Thomas, 9, 17, 18, 19, 29–45, 48, 51, 58, 61, 63, 73, 75, 76, 77, 132, 145, 207, 210, 319
- absurdity, 34–5, 36, 39, 41, 42–3, 55
- anthropomorphic metaphor in, 36, 41
- authorship, metaphor of, 36, 41–2
- authorization, 42
- civil war, 29
- cogito*, Cartesian, 32
- commonwealth, 36, 41
- consent, 17, 39–40
- covenants, 36
- De Homine*, 34
- equality, 44, 29
- error, 33, 34–5
- family, 29
- glory/vainglory, 35–6
- God and theology, role of, 29, 30, 31
- human nature, 30, 35, 44, 165, 166
- justice, 43
 - constitutional justice, defined by sovereign, 37
 - relation to legitimacy, 210
- knowledge, theory of, 30, 32–3
 - desires, interests, 32–3
 - perceptions, 32
 - sensations, sense impressions, 32
 - “train of thoughts,” 32, 33, 34–35
- language, 17, 30, 31–4
 - communicative function of, 33
 - names, 33, 37
 - organizing function of, signs, 33, 43, 50
 - source of error, 34

- Hobbes, Thomas (*cont.*)
 “train of words,” 33, 34, 35
see also Hobbes, sovereign
 law, 30, 39
 good laws, meaning of, 36,
 39–40, 40–1
 interpretation, 40
 unjust laws, impossibility of, 36,
 43
 laws of nature, 17–18, 30–1, 40,
 30, 32, 38, 44
Leviathan, 31–4, 41, 44
 method of investigation, 31, 44
 moral conventionalism of, 44
 moral terms, defined by
 sovereign, 37
 Nature, 34–5
Objections to Descartes’ Mediations,
Philosophical Writings, 32
On the Citizen, 30, 34–6
 peace, 36, 39
 people, the, 42–3, 45
 psychological theory, 17, 32, 36
 reason, 39, 43
 rebellion, caused by bad
 government, 38
 rebellion, no right of, 42, 43
 religion, source of error, 29, 40
 religious doctrine, sovereign’s
 authority over, 37
 representation, 42
 right reason, 38
 rights, 38, 41
 social contract, 41, 43
 sovereign
 authority of, 42
 authority over language, 37, 38
 authority to define moral rules,
 duty to educate populace, 39, 40
 limitations on, 29, 41, 44
 source of authority of, 29, 45
 sovereignty, theory of, 17, 43
 state of nature, 34
 universities, role of, 41
 Holmes, Stephen, 28, 169–70,
 176–9, 180, 181, 192, 193,
 221, 224, 321
- Bodin, discussed by, 176–7
 judiciary, utility of for
 sovereign, 176
 stability, goal of, 176
 chess, analogy to rules of, 169
 constitutive rules, 169
 constraints
 constitutional, 178
 inescapability of, 178
 benefits of, 176
 inheritance, model of, 177–8
 linguistic rules constitutive,
 169–70, 179
 “people,” conditions for existence
 of, 170, 179
 precommitment justified, 177–8
 argument from utility,
 reconsidered, 179
 argument from inescapability,
 reconsidered, 179
 regulative rules, 169
 tacit consent, 177
 Hooker, Richard, 51
 horizons, hermeneutic, 307, 309,
 314–15, 315–16
 in Benhabib, 283, 314
 in Habermas, 285
 and substance, question of, 315,
 316, 327
 human nature, 8, 9, 17
 Hume, David, 17
 Humpty Dumpty, story of, 206
 indeterminacy, problem of, 202,
 211, 221, 244
 in Coleman, 211
 completeness, relation to, 219,
 244
 in Dorf, 103, 166, 211
 in Klarman, 202
 in Leiter, 211
 in Whittington, 222
 infinite regress, problem of, 11,
 115, 139
 inscription, self-inscription, 132, 134,
 136, 144, 150, 180, 211, 320
 institutionalization, 5, 6, 12

- integrity, norm of, 2,
 in Dworkin, 284, 285, 287–8,
 288–9, 290
 as constitutional grounding norm,
 284
 constitutional language, applied
 to, 290
 question of substance,
 implications for, 291
 as thin constitutional norm, 284
 intellectualism, 60; *see also*
 voluntarism/nominalism
 Iraq, draft constitution of
 September 2005, 335–6
 Israel, 7, 211, 335
 Jackson, Robert, 342
 Jefferson, Thomas, 83, 178
 John of Salisbury, 17, 21
 Judaism, Judeo-Christian, 20, 80
 judges; *see* officials
 judicial review; *see* courts, role of
 juridical
 practices, 3, 7, 12
 acts, 7
 officials; *see* officials, 3, 5, 12, 82
 justice, just, 7, 8, 102–3; *see also*
 morality/moral principle
 Kahn, Paul, 88
 Kant, Emmanuel, 112, 235
 Katz, Elai, 137
 Kafka, Gregory, 30, 37, 40, 42
 Keller, Evelyn, 206
 Kelsen, Hans, 232–9, 241, 245,
 246–7, 254, 258, 260, 323
 anthropomorphic metaphor, 233
 completeness, implications for, 238
 constitution, constitutionalism,
 232, 234
 creator, authority of, 237
 critical function of, 234
 “first constitution,” 236
 custom, customary law, 233, 234,
 253
 duality of law and state rejected
 by, 233
 efficacy, norm of, 237
 exclusivity, implications for,
 238–9
 infinite regress, problem of, 236
 law, general theory of, 232–3,
 235–6
 critical function of, 237
 defined by basic norm, 237
 “dynamic” system of, 238,
 245
 natural law, 233
 norm, 235
 basic, grounding, *grundnorm*,
 235, 236
 ordinary, 235
 relation to institutions, 235
 positivism of, 232, 236, 242,
 248
Pure Theory of Law, 249
 sovereignty, 233, 236
 state, normative theory of, 231,
 232
 validity, 237
 Kennedy, Duncan, 140, 142
 fashion, language of, 142
 naturalness, illusion of, 206
 Kerber, Linda, 96
 King, Brett, 155
 king; *see* monarch/monarchy
 Klarman, Michael, 203
 anti-entrenchment, norm of, 152
 Balkin, critique of, 202
 indeterminacy, problem of, 202
 judicial review, 152
 Knowles (Knolles), Richard, 18
 Kokott, Juliane, 134
 Kramer, Larry, 99, 157
 amendment, discussion of, 121
 critique of Ackerman, 121
 antimajoritarian problem, 99
 mistrust, 157
 “popular constitutionalism,” 151
 popular sovereignty, 99, 121
 precommitment, challenge to,
 321
 Kramnick, Isaac, 46

- Lamprecht, Sterling, 51
 language, 10–11
 accounting, as example of, 309
 architecture, as example of, 142, 142
 authority over, 9, 10, 11, 16, 81, 82, 131, 210, 330
 exclusionary effect of exercise, 210
 officials, exercise of, 214
 violence of, 210
 commitment to, 3; *see also*
 commitment, precommitment
 constitutional; *see* constitutional language
 differentiation and construction of meaning in, 141
 extra-constitutional, 8, 14
 gendered, in science, 206
 juridical, 81
 failure of, 82
 relationship to other language, 81
 “language-within-a-language,” 142, 143
langue, 133, 140, 141; *see also* constitutional language, *langue* of
 Laslett, Peter, 46, 47
 laws of nature,
 law/lawmaking, 3, 8, 9, 12, 20
 customary law, 25, 71, 95, 97
 international, 134
 language of, 194, 254, 259
 ordinary, relation to
 constitutional, 10, 14, 95, 97, 274, 279, 328
 relation to political system, 83
 relation to social practice, 239
 social functions of, 211
 source of extra-constitutional language
 source of norms, 96
 theories of, relation to
 constitutionalism, 254, 255, 260
 see also legitimacy, of law;
 morality, relation to law
 Legal Realism, 308
 legislature, lawmaker, 9
 legitimacy/legitimation, 3–5, 6
 claim of, 108
 common language required for, 145, 146
 of constitutions, constitutional regimes, 1, 3, 10, 12, 36, 44, 95–6, 102, 322, 328, 343, 347
 of law, generally, 4, 6, 9, 82, 203
 based on agreement with moral principle, 103
 based on consent, 114–15
 relation to constitutional legitimacy, 203, 231
 loss of, 124
 normative or descriptive term, 109–10
 political, 7, 8, 20, 113
 of regimes, 9, 10, 11, 113, 185
 efficacy, an element of, 215
 stability, an element of, 215
 sovereignty and precommitment requirements for, 197
see also consent; language, commitment to; constitutional language
 Leiter, Brian, 103, 211, 231, 248
 Finnis, critique of, 103, 269
 indeterminacy, 211
 “modest objectivity,” 211
 morality, relevance of for soft positivism, 109
 rule of recognition discussed, 109
 Raz, positivism of, 291
 “soft” and “hard” positivism, distinguished, 109
 Lessig, Lawrence
 preservative constitutionalism, 238
 transformative constitutionalism, 238

- Levinson, Sanford, 204
 constitutional amendment
 distinguished from
 interpretation, 137
 constitutional amendment,
 informal, 138
 constitutional practice,
 legitimation by, 89
 critique of Bork, 137
- Leyh, Gregory, 315
- Li, Andrew
 architecture, language of, 142
 “shape grammar,” 142
- liberalism, 12, 100, 107, 203, 211;
 see also constitutionalism,
 liberal
- Lieber, Francis, 314
- Lincoln, Abraham, 215
- Locke, 9–10, 17, 18, 82–3, 84, 90,
 106, 115, 117, 122, 126, 131,
 161, 206, 251, 319, 330
 anthropomorphic metaphor in,
 45, 76–7, 80
 archetypes, 53–4
 citizens
 commonwealth, 10, 48, 64, 77
 consent to, 71, 75, 76
 creation of, 78, 74
 external relations, 76
 juridical language in, 53,
 71–2
 juridical, relation to ordinary
 language, 71–2, 73, 74–5, 80
 laws in, 77
 limitations on, 77
 constitutionalism in, *see also*
 constitutionalism, Lockean
 complex ideas, 58, 69, 77, 107
 as example of mixed modes,
 52–53
 as purely conventional, abstract,
 53, 54, 55, 70
 consent, tacit consent, 9, 18, 65,
 71, 76, 79–80
 “consent to be ruled by consent,”
 71
 constitutionalism in; *see*
 constitutionalism, Lockean,
 213
 epistemological theory of, 48, 50,
 51, 54–5, 47
 knowledge, conditions of, 58
 reflection, 49
 sense perceptions, 48–9, 51, 62,
 65, 75, 66
 error, 54, 59
Essay Concerning Human
 Understanding, 47, 48–59, 60,
 61, 62, 64, 69, 76–7
Essays On the Law of Nature, 47, 48,
 60, 61, 64
 fathers, authority of, 76
 God, theology, roles of, 51, 55–6,
 57, 60, 61, 62, 63, 65, 66
 happiness, 55–6
 hedonistic theory of right/wrong,
 55
 Hobbes, comparisons with, 46, 47,
 50, 66
 human nature, 51, 56, 60
 analogy to geometry, 61, 54
 inheritance, 74, 77
 language, 18, 47, 51, 61
 authority over, 59, 70, 76
 development of, 50, 53, 57–9,
 75
 purposes of, 58
 subject of consent, 59, 74
 law, theory of, 47, 63, 73, 262
 lawmaker/lawmaking; *see*
 legislature, legislation, 65, 69
 equality, 66, 80
 not to harm others, 66
 legislature, legislation, 71, 74,
 76–7, 79
 as “soul” of commonwealth,
 76–7, 168
 legitimacy, question of, 46, 65
 microscopes, 48
 mixed modes, 52–3, 70,
 71, 50
 money, 70, 114, 320

- Locke (*cont.*)
- creation of by tacit consent in society, 69, 75
 - displacing natural law against waste, 69
 - displacing natural law of equality, 69, 74
 - source of insecurity, 69
 - moral questions, 54, 55
 - names, naming, 49, 50, 52–3, 59, 70
 - natural law, 47, 54, 56, 60
 - divine, 55–6, 57, 75
 - human, 51, 57, 66–7
 - knowledge of existence of/
 - discovery, 56, 57, 62, 63, 64
 - knowledge of content of/
 - interpretation, 56–7, 62, 63, 64, 66
 - physical, 61
 - nominal essences, 50
 - prerogative power, 146
 - property, in common wealth, 72–3
 - authority over definition of, common, 72
 - conventional, 73
 - “determined,” 72
 - enclosure, 73
 - “life, liberty, and estate,” 73
 - relation to existing practice, security of, 73–4
 - property, in society
 - conventional, 68, 71, 74
 - insecurity of, 74
 - relation to state of nature; *see* money
 - property, in state of nature, 66–7, 75
 - appropriation by addition of labor, 66, 67
 - “beginning of,” 67–8
 - common, 66, 72
 - law against waste, 67, 75
 - public/private distinction in, 58–9
 - public good, appeal to, 146–7
 - reason, 57, 61–2, 63–4
 - revelation second to reason, 57
 - rights, 75
 - rule over others, 46
 - Second Treatise on Government*, 47, 48, 60, 61, 64–75, 80, 117
 - self-rule, 18, 46, 76
 - simple ideas, 47, 48–9, 50, 51, 52, 53, 75
 - skepticism in, 48, 50, 55, 56, 62, 65, 66
 - social contract, 46
 - society, 48, 75, 71
 - creation by tacit consent, 70–1, 75, 79
 - intermediate political stage, 64, 68–71
 - language, stage of development, 80
 - law, conventional, 69, 71
 - creation of money; *see also* money; property/property rights
 - sovereignty, theory of, 18, 45, 46, 65, 76
 - state of nature, 64
 - analogy of ocean to, 67
 - conditions of, 74
 - Two Treatises on Government*; *see* Locke, *Second Treatise on Government*
 - value of coinage, 80
 - virtue, 46
 - Logical Positivism, 59
 - Luhman, Gerald, 307–8
 - Luxembourg v. European Parliament*, 190
 - Lysias, 143
 - Maastricht Urteil* case, 111
 - MacCormick, Neil, 104
 - autonomy, 252
 - “commonwealth,” defined, 104
 - constitution, function of, 252
 - heteronomy, 252

- morality, distinguished from law, 252
 sovereignty, rejected by, 104
 Machiavelli, Niccolo, 16, 19, 35, 176
 Madigan, James
 public reason, 217
 Madison, James, 83, 177, 178
 Magarian, Gregory, 149
 precommitment, utility of, 151
 Mancini, G. F., 111
 “Volk” theory, 139
 European values, 111
 Mara, Gerald, 41
Marbury v. Madison, 297, 331
 Marshall, John, 246, 331
 McCloskey, Robert G., 83, n. 1
 McIlwain, Charles, 152, 153
 McRae, Kenneth, 18, 27, 28
 metaphysics, 9
 Medvedev, Roy, 132
 metaphor, background/foreground, 12
 Michelman, Frank, 110, 116–20, 122, 127, 157, 161, 173, 179, 276, 321
 “as if” commitments in, 159
 author/authority, authorship, 116, 117, 125
 as abstract conception, 118–19
 basis for legitimacy of constitution, 136
 necessity, for sovereignty, 118–19
 commitment, possibility of, consent, necessity of, 116
 “Constitutional Authorship,” 116
 constitutional culture, 116, 118, 186, 293
 disagreement, problem of, 116, 159, 160
 government totality, focus on, 158, 159–60
 “Ida,” “Ida’s way,” 158–9, 160, 161, 173, 179, 311
 value pluralism among Idas, 159
 identity formation, 118
 legitimacy, of constitution, 116
 legitimacy, of laws, 116
 agreement with pre-legal standards, 118
 norm, basic norm, 116, 117, 118
 People, 118, 119
 Rawls, critique of, 158–9
 “respect-worthiness,” test of, 158
 sovereignty/self-sovereignty, 116–17, 118
 “Thirteen Easy Pieces,” 118
 unity, preference for, 158
 minimalism/minimalist approach, 3, 7, 11, 162, 186,
 Mitchell, Joshua, 29, 32
 money, 82
 monarch/monarchy, 5, 9, 25
 divine right of kings, 29
 morality/moral principle, 2, 3, 7, 8, 14, 20, 328
 in Alexy, 268
 appeals to as violation of constitutional grammar, 213
 appeals to as extra-constitutional authority, 266–7, 332–3
 agreement on, basis for consent, 112
 agreement with, basis for legitimacy,
 in Barnett, 101–2, 111
 critical standpoint, required, 161
 disagreements over, unresolved, 162; *see also* disagreement, persistence of
 in Dow, 139
 in Eisgruber, 182
 enforcement by law, 157
 in Finnis, definitional element of “law,” 101, 269
 in George, agreement with as basis for legitimacy, 263, 264
 language of, 259
 in Leiter, as element of soft positivism, 109
 in Locke, questions of, 54, 55–6

- morality/moral principle (*cont.*)
 in Postema, 252
 in Raz, 110, 293
 relation to constitutional
 argument, 191
 relation to law, 103
see also norms; legitimacy;
 substance, question of
- Mulligan, Lotte, 59
- Murphy, Walter
 constitutional amendment,
 limitations on, 138
 German Constitution, 137
- naming, effects of, 205
- nature, 8, 20, 22
 appeals to, effects of, 206–7
see also human nature
- natural law, 8, 18, 19, 22, 31, 162,
 261
- Noonan, John T., 199
- norms, 4, 9, 13, 195, 97
 authority over, of sovereign, 25
 concentric circles model of, 96
 conflicting, problem of, 338
 constitutional, 12, 96, 120–3
 cultural, 189
 discursive, 145, 146, 184, 185
 excluded, 216
 of fairness, 154
 grounding norms, *grundnorm*,
 242, 296
 implied, 146
 practice, relation to, 248
 primary and secondary, 245
 societal, 96
 thick, 186, 195, 275, 277, 301,
 302
 in Cohen, 279
 constitutional language, in, 299
 in Raz, 302
 thin, 279, 285, 301
 constitutional language, 301,
 302
 in Raz, “non-parochial,” 301
 unanimous, assumption of, 97
 unanimous, claim of necessity for,
 98
 underdeterminative, 112
- Norton, Ann, 119, 161–2
 inscription, 132
 sovereign as author, 143
 sovereign people, 119
 text, relation to people, 162
 writing, privileged position of,
 162
- Novak, William, 82, 147
- Oakeshott, Michael, 30, 37
- Oakley, Francis, 60
- Odegard, Douglas, 49
- officials
 appeals to comprehensive views
 by, 218
 authority of, 251, 296–8, 300,
 302, 307, 325–6, 334
 in Coleman, 273
 delegation of authority to, 337, 338
 duties of, 194, 265–6
 abdication of duties by, 333,
 338, 342–4
 expertise of, 297, 303, 305, 306,
 307, 316, 330
 Green, questioned by, 297
 Waldron, questioned by,
 297–8
 in George, 264
 judges, 345
 multiple levels of, 245
 in Raz, 284, 291, 295, 298
 role of, 194, 299, 327
 rules, changing, 154
 usurpation of sovereignty by,
 1–331, 267, 344–5, 346
see also courts, role of
- oligarchy, 5
- ontology, 8, 18
- order, goal of,
- Orren, Karen, 266
- parole*, 133, 140, 141; *see also*
 constitutional language,
parole of

- Parsons, Talcott, 308
 Pateman, Carol, 203
Paul v. Davis, 215, 242
 Penner, James, 302, 303, 312
 perestroika, 131
 Pildes, Richard, 190, 317
 people, People, 121, 122
 in Ackerman, 120
 in Bodin, 23–4
 consent, creation by, 78–9
 constitutional language, relation
 to, 132
 in Dicey, 91, 92–3
 in Eisgruber, 181
 in Harris, 126–7, 183, 186
 in Hobbes, 42–3, 45
 in Holmes, 170, 179
 in Michelman, 118, 119
 in Preuss, 106
 sovereign, 180, 192–3, 193, 185
 in Whittington, 125, 120
 in Wilson, 85, 89, 90
 People drunk/People sober, 152
 in Hayek, 152
 in McIlwain, 152
 Waldron, metaphor rejected by,
 153
 Phillip drunk/Phillip sober, 152,
 171, 152; *see also* Emerson,
 Ralph Waldo
 Pitkin, Hannah, 42
 pluralism, 2, 95, 324
 completeness, limit to, 220
 limits of, 115, 262, 316
 of interests, 5, 19, 223
 of values, 5, 14, 20, 97, 98, 103,
 107–8, 146, 216, 257, 339
 problem of constitutional evils
 and, 265
 rejection of by appeal to moral
 correctness, 265
 see also norms
 Plutarch, 22
 Pocock, J. G. A., 25, 46
 politics, political authority 5;
 see also legitimacy, political
 Polybius, 16
 positivism/legal positivism, 109,
 229, 257–8, 259, 283
 challenges to, 261, 263
 in Coleman, 273, 299
 completeness, implications for,
 230, 231
 “Consent How?” applied to, 230
 “Consent to What?” applied to,
 230
 constitutionalism, applied to,
 230
 Dworkin, critique of, 285–6
 constitutional language,
 implications for, 230–1
 exclusivity, implications for, 230,
 231
 Finnis, critique of, 248, 269
 in Greenawalt, 249
 “hard” positivism, 231–2
 in Hart, 249
 in Kelsen, 232, 236, 242, 248
 in Leiter, 109, 211
 legitimacy, of law, 229
 in Raz, 299
 “soft” positivism, 231–2, 232
 Post, Robert
 Cover, critique of, 216
 Postema, Gerald, 252, 271–2, 274
 autonomy “autonomy thesis,”
 252, 271
 constitutional and legal discourse
 distinguished, 271
 courts, 272
 integrated model of legal
 discourse, 272
 morality, integration into law, 252
 preemption thesis, 271, 272
 subject scope, of laws 252
 substance scope, of laws, 252
 Powell, H. Jefferson, 133
 power, limitations on, 7
 precommitment; *see* commitment
 predictions/predictability, 5, 4
 proceduralism, 88, 282
 Prohibition, 169

- Preuss, Ulrich, 105–6, 108
 American constitutional practice, 105
 constitutionalism in, 104
 “constitution-creativity,” 105
 custom in, 105
 horizontal versus vertical
 authority, 104
 France, French constitutionalism, 105, 106
 “People” contrasted with
 “nation,” 106
 social contract, appeal to, 106
 Priestly, Joseph, 46
 privacy, public/private divide, 22;
see also property/property rights
 property/property rights, 22
 Protestantism, 29; *see also* Calvinism
 Pufendorf, Samuel, 17, 46, 47
 Qur’an, untranslatability of, 195
 Ramus, Petrus, 20, 30
 rationalization, 5
Raven v. Deukmajian, 138
 Rawls, John, 98–101, 102, 107, 108, 122, 147–8, 219, 320, 323
 comprehensive doctrines, 100, 107
 consent in, 101
 constitutional consensus, 99
 constitutional essentials, 100, 102, 147, 148
 “difference principle,” 148
 equality of opportunity, 148
 justice, 100
Justice As Fairness: A Restatement, 148
 legitimacy, principles of, 99
 overlapping consensus, 99, 100, 107, 111, 147
Political Liberalism, 98, 99
 public reason, 100, 147, 226
 paradox of public reason, 147
 resolved by overlapping
 consensus, 147
 reasonableness, 148
 sovereignty, absent from, 107
 substantive commitments in, 99
Theory of Justice
 “well ordered society,” 216
 Raz, Joseph, 110, 112, 122, 284, 302, 324, 325
 authority, 294–5
 consent, 292–3, 293–4
 constitutions self-validating if old, 110, 299
 coordination, 295–6
 dependence thesis, 294
 division of labor, 304–5
 Hart, critique of, 292, 293
 law as comprehensive system of
 norms, 300
 moral principles, role of, 110, 293, 299
 underdeterminative of law, 295, 299
 normal justification thesis, 294, 296, 298, 311
 norms,
 “non-parochial,” thin, 301, 317, 326, 340
 thick, 302
 underdeterminative of political
 practice, 296
 officials, authority of, 284, 291, 295, 298
 positivism of, 291–2, 299
 preemption thesis, 294
 substance, implications for
 question of, 299, 306
 rights, 303–4, 304–5
 old and new constitutions
 different, 107
 reason, 18
 Reformation; *see* Protestantism
 Rehnquist, William, 242
 Religious Freedom Restoration Act, 149
 Reid, Thomas, 87
 religion, religious authority, 8, 14, 16, 19, 99, 259, 328, 335–40
 Cohen, discussion of, 281, 282

- as competing grounding norm, 267
- separate officials, problem of, 336–8
- separate language, problem of, 336
- religious conflict, 9
- Renaissance, 16, 35
- representation, 42, 88, 121
- republicanism, 16, 19, 20, 22, 26, 46, 214
- rights, 7, 6, 13, 27, 99, 303–4, 334
 - in Barnett, 102
 - in Bellamy, 98
 - in Bodin, 22
 - in Dworkin, 317
 - in Hobbes, 38, 41
 - in Locke, 75
 - in Raz, 303–4, 304–5
- Riley, Patrick, 57, 64, 74
- Roe v. Wade*, 265
- Rousseau, Jean-Jacques, 17
- Rubinfeld, Jeb, 131, 320
 - “demo-graphy,” 131
- Rubin, Edward, 21
- salus populi suprema lex est*, 82, 87, 146
- Sager, Lawrence, 111
 - adjudicated constitution, 99
 - judicial review, reliance on, 99
 - justice, constitutional distinguished from political, 111
 - Ninth Amendment, 333
 - underenforcement, 99
- Santa Clara County v. Southern Pacific Railroad Co.*, 214
- Saussure, Ferdinand de, 133, 140, 142, 198, 321; *see also* constitutional language, *langue* of; constitutional language, *parole* of; *langue*; *parole*
- Schauer, Frederick, 166–7, 145
 - constitutional practice, norms of, 174
 - Dworkin, critique of, 229
 - first-order vs. second-order decisions, 167
 - law, limited domain of, 229
 - long-term vs. short-term values, 166
 - “negative Constitution,” 166
 - precommitments, defended by, 166
 - secular authority, secularism, 9
 - self-rule, 2, 9, 107, 139, 168; *see also* sovereignty/self-sovereignty
 - Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995), 199, n. 1
 - Shaftesbury, Anthony, 46
 - Shapin, Stephen, 35
 - Shari’ah, 338, 339; *see also* Iraq, draft constitution of September 2005
 - Shivakumar, Dhananjai, 235
 - Skinner, Quentin, 19, 23, 25, 29, 30, 46
 - slaves, slavery, 21, 96, 202, 205, 265
 - Smith, Steven D., 190
 - social contract, 10, 130
 - society, 4, 12
 - Society for Secular Humanism, 145
 - sociolegal, 6
 - Soles, David E., 61
 - Soviet Union, 7, 131
 - sovereignty, 9, 16, 36, 134, 175, 180, 191
 - as conditions of discourse, 180, 186, 192, 226, 245, 253, 320
 - authority required for, 145
 - challenges to idea of, 103–6, 106–7
 - conditions of discourse, 131
 - creation of by consent, 115, 135–6 *see also* consent, constitutional
 - dual, theory of, 339
 - language, relation to, 133, 144; *see also* language, authority over
 - mode of political practice, as, 191
 - necessity of, 106, 108, 112–13, 113–14, 131, 139, 176,
 - secular roots of, 17

- sovereignty (*cont.*)
 self-sovereignty/popular
 sovereignty, 9, 10, 45, 106,
 121, 150, 168, 283
 in Ackerman, 120
 assumption of, 339
 dialogic model of, 124–5, 129
 in Dicey, 93
 in Eisgruber, 181
 in Harris, 126
 in Kramer, 99, 121
 obligations of, 179–80
 in Wilson, 84, 85, 89–90
 sovereign as author, 122, 124, 134
 sovereign as reader, 125, 129, 134
 sovereignty-in-action, 169, 191,
 192, 320, 321
 sovereignty over others, 9, 28, 42,
 45, 76, 160, 168
 unitary nature of, 336, 339
 sovereign immunity, 199
 Spooner, Lysander, 101
 stability, necessity of, 6
 state, 10
 as “artificial person”; *see*
 anthropomorphic metaphor
 Stevenson, Drury, 244
 Stewart, Dugald, 87
 Stewart, Iain, 233, 235, 243–4, 246
 Kelsen, critique of, 243, 248
 law-creation, 239
 norms, higher and lower, 239
 norm of exclusion, 244
 officials, 243–4
 Stoner, James, 83 N. 1, 96, 147
 Straus, Leo, 51
 Strauss, David, 211
 subjects (political), 5
 substance, question of, 3, 13–14,
 112, 196, 197–8, 228, 257,
 258–9, 260–2, 314, 316, 318,
 324–6, 327
 absence of, consequences, 203,
 203, 305
 constitutional language and, 274
 Dworkin, implications for, 290, 306
 horizons, relation to, 315, 316, 327
 implicit in nature of constitution,
 262
 integrity and, 291, 307
 minimum required for legitimacy,
 202
 Raz, response to, 299, 306
 self-sovereignty, relation to, 262
 Waldron’s arguments, applied,
 298
 Sunstein, Cass, 124, 223–7, 224,
 240, 254, 257, 258, 261, 323
 cascade effects, 225
 civility, 226
 constitutional interpretation, 224
 courts, role of, 224
 criminal sentencing, 225
 deliberative democracy, theory of,
 223, 224–5
 disagreement, persistence of, 226
 enclave deliberation, 124
 dangers of, 225
 benefits of, 225
 incompletely theorized
 agreements, 160, 223, 225–6,
 226, 255, 204
 justification, requirement of,
 223–4
 midlevel principles, 226
 “republic of reasons,” 223
 rhetorical asymmetry, 225, 226
 semantic principles, 224, 227
 substantive principles, 224
 Taliban, 145, 146
 Theology; *see* religion
 time, problem of continuity over,
 12, 122; *see also* commitment/
 precommitment
 Tomlins, Christopher, 96
 translation, 193, 194–5, 300, 311,
 326, 327, 340, 343
 burden of, 258, 315
 implication of precommitment,
 183
 impossibility of, consequences, 255

- necessity of, 14, 149, 213
 untranslatable propositions, 339
see also White, James Boyd
 transparency, 5
 treaties, treaty obligations, 113
 Trenchard, John, 84
 Tuck, Richard, 32, 34, 37, 38, 42
 Tully, James, 47, 54, 72, 79
 Tur, Richard, 235
 Tushnet, Mark, 96, 99, 157
 Twining, William, 235
- Ulysses, 153, 154, 164, 167, 184
 basis of authority as ship's captain,
 185
 reconsidered, 164–5, 168–71
see also Waldron, Jeremy
 Urdang, Elliott W., 60
 U. S. Constitution, 211, 246
 Article III, 199
 Article V; *see* Ackerman, Bruce;
 Amar, Akhil Reed;
 Whittington, Keith
 Eighteenth Amendment, 169
 Fifth Amendment, 204
 First Amendment, 219
 Fourteenth Amendment, 209,
 261, 265
 definition of citizenship in, 214
 Dworkin, discussion of, 289
 exclusionary effect of, 214
 Due Process Clause of, 213, 214
 Equal Protection Clause of,
 214
 Ninth Amendment, 333–5
 Bork, dismissal of, 334
 Goldberg, Arthur,
 interpretation of, 333
 Sager, discussion of, 333
 Thirteenth Amendment, 201
 Twenty-First Amendment, 169
- Venter, Francois, 106, 110
 anthropomorphic metaphor, 136
 practice as source for legitimacy,
 110
 Verhoeven, Amaryllis, 104, 134, 190
- violence
 discursive, 207, 216, 322
 justifications for, 209
 in Cover, 208
 in Derrida, 204, 205, 206, 207,
 208, 209–10
see also naming, effects of;
 exclusivity; language,
 authority over
 virtue, 17, 19, 20
 voluntarism/nominalism, 60, 66
 von Leyden, William, 47
- Waite, Morrison, 214
 Waldron, Jeremy, 80, 108, 153–7,
 159, 162, 164–6, 168, 170,
 175, 179, 187, 188, 192, 193,
 276, 321
 “Bridget,” 154, 156, 163–4, 167,
 184
 reconsidered, 165, 168–71, 175
 “cosmopolitan” moral principles,
 163
 disagreement, persistence of,
 155–6, 170
 Dworkin, reading of, 317
 force, necessity of for
 precommitment, 155–6
 “good faith,” 187
 legislation, language of, 187
 legitimacy not possible for, 163
 minorities, security of, 165
 officials, claims to expertise
 questioned, 297–8
 “People drunk” metaphor
 rejected by, 153
 precommitments rejected, 108,
 135, 157
 Raz, critique of 297
 Ulysses metaphor rejected by,
 153, 156
- Walsh, Kathy, 124, 225
Ware v. Hylton, 339
 Weber, Max, 129, 167, 235, 249
 West, Robin, 203
 Weiler, Joseph, 172

- Whigs, 46
- White, James Boyd,
 law, language of, 195
 lawyer, role of, 141
 literary view of language, 141
 translation, 144, 207
- Whittington, Keith, 120–5, 127, 131,
 186, 220–3, 254, 320, 323
 amendment, Article V, 123
 construction, 220, 221
 implications for constitutional
 language, 221
 public reason and, 221
 gap-filling, necessity of, 120
 incompleteness, value of, 221
 impoundment, discussion of, 222
 indeterminacy, 222
 interpretation, 220
 People, 125, 120
 partial sovereignty, 120
 political behavior, norms of, 221
 political principles, relation to
 constitution, 221
 potential sovereignty, 120
 sovereignty in action, 120, 180
 written text, significance of,
 123–4
- Wilson, James, 83–90, 95, 96, 106,
 108, 117, 121, 126, 251, 253,
 331
 American Constitution,
 significance of, 90
 anthropomorphic metaphor, 86,
 87, 88, 90
 commitment, binding, 89
 common law, role of, 89
 consent, legitimation by, 84, 85,
 86, 88, 89
 constitutional consent, 88
 constitutional theory of, 84, 90
 covenants, multiple, 85
 custom, evidence of consent, 89,
 114, 174, 293
 equality, 85
 human nature, 86, 87
 language, public, 88, 89–90
 laws of human nature, 85, 86
 lectures at the College of
 Philadelphia, 83
 legislature, legislation, 85
 Locke, comparison with, 83–4,
 87–8
 method of investigation
 experience not reason, 86
 natural law, 86
 norms, source of, 86
 Pennsylvania Constitution, 83
 People, 85, 89, 90
 Providence,
 reason, 86
 representation, representatives, 89
 revolt, justified, 84–5
 self-defense, right of, 86
 society, relation to state, 84, 85,
 86, 89, 87
 sovereignty/popular sovereignty,
 84, 85, 89–90
 state, 86
 state of nature, 85
- wives, 21
- Wood, Gordon, 88
- Yolton, John, 47, 65
- Young, Iris Marion, 277–8, 279, 324
 Benhabib, critique of, 278
 “communicative democracy,” 278
 constitutional language, challenge
 to,
 deliberative theory, exclusionary
 effects of, 277–8
 equality, 277
 pluralism, 282
 thin norms, benefits of, 278
 unity, goal of, 278
 value pluralism, possibility of, 278
Youngstown Sheet & Tube Co. v.
Sawyer, 342
- Zuckert, Michael, 49, 51, 59, 69