

# Index

- absurd intended meanings, 168–70, 188–89.  
     *See also* infelicities
- actual intentionalism, 137. *See also*  
     intentionalism; intentionalism,  
     competitors to
- adjudication
  - analogical methodology/reasoning, 66–67,  
     119–20, 126
  - availability heuristic, 111
  - of controversies, 28–29
  - in disputes/settlement, 117
  - judicial cognition, 113–14
  - judicial decision making, 106–7, 117
  - overruling precedent rules, 61, 63
  - and rule making, 107–8, 125
- algorithmic textualism, 200–4
- analogical reasoning
  - appeal of, 66
  - case-to-case, 66–67
  - distinguishing precedents, 83–87
  - indeterminacy of rules, 19–20
  - judicial craftsmanship, 233–34
  - and legal principles, 2–3, 64–65, 88
  - nonexistence of, 87–88, 234
  - searching for, 65–66
- analogical reasoning, a fortiori constraint
  - comparative judgments, 81–82
  - erroneous precedents, 77, 81
  - factual comparisons, 76–79
  - factual similarities, 76
  - factual weighting/values, 79–81
  - precedent cases, 82–83
- analogical reasoning, constraint by similarity
  - general principles/rules, 71
  - intuition, 75–76
  - and legal principles, 71–72
  - perception of similarity, 72–73
  - and precedents, 68–69, 73–75
  - reflective equilibrium, 70–71
  - supporting generalizations, 69–70
- application understandings, 227–29
- Arizona, Miranda v.*, 154
- Arrow’s theorem, 183
- Ashwander doctrine, 177–78

- attribution error, fundamental, 113
- authoritative rules. *See* rules, authoritative
- authority questions, 213
- Bassham, Gregory
  - framers' intentions, 147
  - levels of generality, 150
  - multiplicity of intentions, 145–50
  - term exemplars, 222–23
- Black Codes, 228–29
- Burton, Steven, 22
- Calabresi, Guido, 181
- canonical legal rules. *See also* intentionalism, competitors to
  - dynamic interpretation of, 213–14
  - normative meanings, 165–66
  - rule promulgator's intended meaning, 220
- canonical legal texts, intended meaning of
  - absurd meanings, 168–70
  - in multimember rule-making bodies, 171–73
  - problematic meanings, 167
- canonical legal texts, interpretation of. *See also* intended meaning
  - authors' intended meaning, 4–5
  - dynamic interpretation, 213–14
  - lawmakers' intended meaning, 165–66
- Cernauskas v. Fletcher*, 168–69, 202
- Church of the Holy Trinity v. United States*, 169
- cognitive bias. *See also* heuristic
  - fact-finding accuracy, 109–10
  - fundamental attribution error, 113
  - in judicial rule making, 109–11, 114
  - psychology of, 47–48, 109–10
- Coke, Sir Edward, 2
- common law
  - Coke's description of, 2
  - judicial decision making, 104, 129–30
- common-law reasoning, natural model
  - coordination, 36, 46–47
  - empirical reasoning, 34, 39
  - equal treatment, 36–39
  - expectations of consistency, 36
  - moral reasoning, 32, 39
  - and past decisions, 34–35
  - vs. rule model, 31–32, 42, 64
  - rule-sensitive particularism, 45–46, 48
  - salient vs. background facts, 47–48
- common-law reasoning, rule model, 36–39.
  - See also* precedent rules; rule making, judicial
  - coordination, 45, 48
  - errors of, 42–43, 48–49
  - and judges, 41–44, 49–50
  - judicial decision making, 106–7
  - vs. natural model, 42, 64
  - and precedent, 41, 48, 105–6
  - promulgation of rules, 50–53
  - rule-based benefits, 40
  - rule-making authority, 104–5
  - rule-sensitive particularism, 40–41
- community membership
  - controversy settlement, 11–12, 15–16, 27–29
  - coordination, lack of, 45
  - and moral controversy, 10
  - rule-making authority designation, 12–15, 53, 75–76
  - “universal context,” 20–21
  - and values, 13, 25
- Constitution
  - intentionalist interpretation, 221
  - as “living constitution,” 225–27
- Constitution, as super statute
  - authorial intention, 222–23
  - intentionalist interpretation, 221–22
  - moral reality, 223–25
  - “true nature” of clauses, 224–25
- constitutional amendment
  - and erroneous judicial interpretations, 229–30, 232
  - Fifth, 154, 224–25
  - Fourteenth, 222, 224–25
  - and “living constitution,” 225–26
  - Seventeenth, 133, 135–38, 169
  - Tenth, 154–55
- constitutional framers. *See* framers, constitutional
- constitutional interpretation
  - change of authorship, 230–32
  - “paradigm case,” 227–29
  - Supreme Court precedents, 229–30
- constraint, a fortiori
  - comparative judgments, 81–82
  - erroneous precedents, 77, 81
  - factual comparisons, 76–79
  - factual similarities, 76
  - factual weighting/values, 79–81
  - precedent cases, 82–83

- constraint, by similarity
  - general principles/rules, 71
  - intuition, 75–76
  - and legal principles, 71–72
  - perception of similarity, 72–73
  - and precedents, 68–69, 73–75
  - reflective equilibrium, 70–71
  - supporting generalizations, 69–70
- constraint, procedural
  - levels of generality, 185–88
  - norms for failed law, 182–85, 189
  - norms of form, 178–82
  - types of, 178
- constraint, substantive
  - absolute/presumptive constraints, 174–75
  - Ashwander doctrine, 177–78
  - contract/document interpretation, 175–76
  - doctrine of lenity, 176–77
  - infelicitous result avoidance, 173–74
- controversy
  - and community membership, 10
  - moral costs of, 12–13
  - settlement, 11–13, 15–16, 27–28
- counterfactual scope belief/intention
  - and framers, 146–47
  - and semantic intention, 148
- courts. *See also* constraint, a fortiori;
  - constraint, by similarity
  - acceptance over time, 57–58
  - and Ashwander doctrine, 177–78
  - binding precedent rules, 53–56
  - and canonical texts, 63
  - common-law reasoning, 31–32, 39
  - coordination benefits, 36, 46
  - distinguishing precedents, 83–87
  - and doctrine of lenity, 176–77
  - moral/empirical reasoning, 32, 34
  - overruling precedent rules, 127
  - past decisions, use of, 34–35
  - reasoning by analogy, 66–67
  - reasoning from legal principles, 64–65
  - role/function of, 25–26, 28–29, 108–9
  - rule model, 43
  - rule treatment, 40, 51, 56–57
  - and serious rules, 115
  - Supreme Court precedents, 229–30
  - craftsmanship, judicial, 233–34
- deductive reasoning
  - in common-law decision making, 40
  - and determinate meaning, 23–24
  - in judicial decision making, 106, 129–30
  - and legal principles, 40
  - and natural reasoning, 104
- determinacy, challenges to
  - facticity of intentions, 162–65
  - “Kripkenstein” critique, 160–62
  - levels of generality, 150
  - multiplicity of intentions, 145–50
  - norm-governed interpretations, 164
  - translation, 152–59
- determinate rules. *See* rules, determinate
- diction. *See* grammar/grammatical context
- distinguishing rules, 122–24
- “do the right thing,” 152, 168, 186–87, 217–18
- doctrine of lenity, 176–77
- Dworkin, Ronald
  - idealized author, 211–12
  - legal principles, reasoning from, 89, 91, 95–97, 101–2
- dynamic statutory interpretation, 213–14
- Easterbrook, Frank H., 208
- emendation, 155
- empirical reasoning, 34, 232
- epistemological questions, 213
- equal protection clause, 224–25, 228–29
- equal treatment
  - competitive disadvantages, 39
  - moral error/imperative, 36–39
  - past decisions, 37–39
- Eskridge, William, 213
- failed law, norms for
  - apparent laws, 184
  - Arrow’s theorem, 183
  - authority of decision-making bodies, 185
  - and majorities, 182–83
  - in multimember rule-making bodies, 182
  - procedural higher order norms, 189
  - “reauthored” laws, 184
- faulty logic. *See* legal principles, faulty logic
- fidelity, in translation. *See* translation, fidelity in
  - Fidelity in Translation* (Lessig), 153–54
  - Fifth Amendment, 154, 224–25
  - Fletcher, Cernauskas v.*, 168–69, 202
  - Fourteenth Amendment, 222, 224–25
- framers, constitutional
  - and counterfactual scope belief/intention, 146–47
  - of Fifth Amendment, 154

- framers, constitutional (*continued*)
  - intentions of, 147
  - and originalists, 197–98
  - substantive constraints, 173–74
  - value presuppositions, 158–59
- Frickey, Philip, 213
- fundamental attribution error, 113
- generality, levels of
  - challenges to determinacy, 150
  - in determinate rules, 151
  - procedural constraints, 185–88
  - of rule maker's intentions, 185–88
- grammar/grammatical context
  - average interpreter, 206–7
  - idealized author, 211–12
  - impure textualism, 203–4
  - infelicities of language, 133
  - interpretive norms, 138–39
  - language identification, 135–138
  - procedural norms, 178–80, 182
  - textualist algorithms, 200–3
  - utterance meanings, 140–41
- heuristic
  - affect, 112
  - anchoring, 112–13
  - availability, 47–48, 111
  - fact-finding accuracy, 109–10
  - fundamental attribution error, 113
- Holy Trinity* case, 169
- humility, in translation, 155–56
- idealized author, 211–12
- idealized reader, 208–11
- impure textualism. *See* textualism, impure
- indeterminacy of rules. *See* rules, indeterminacy of
- infelicities
  - absurd intended meanings, 168–70, 188–89
  - and language/style, 133
  - normative meanings, 165–66
  - opaque intended meanings, 170–71
- intended meaning, challenges to determinacy
  - facticity of intentions, 162–65
  - “Kripkenstein” critique, 160–62
  - levels of generality, 150
  - multiplicity of intentions, 145–50
  - norm-governed interpretations, 164
  - translation, 152–59
- intended meaning, in legal interpretation
  - authoritative settlement, 140–41
  - common understanding, 140
  - interpretive norms, 138–39
  - language identification, 135–40
  - lawmaker's state of mind, 141–45
  - speaker's meaning, 132–33
  - utterance meaning, 134–35
- intended meaning, procedural constraints
  - levels of generality, 185–88
  - norms for failed law, 182–85, 189
  - norms of form, 178–82
  - types of, 178
- intended meaning, substantive constraints
  - absolute/presumptive constraints, 174–75
  - Ashwander doctrine, 177–78
  - contract/document interpretation, 175–76
  - doctrine of lenity, 176–77
  - infelicitous result avoidance, 173–74
- intention-free textualism. *See* textualism, intention-free
- intentionalism
  - hypothetical, 137
  - moderate form, 147
  - rejection of, 171
  - utterance meanings, 137
- intentionalism, competitors to
  - concepts/underlying purposes, 217–18
  - original public meaning, 215–17
- judicial craftsmanship, 233–34
- judicial decision making
  - and adjudication, 117
  - rule model of, 106–7
- judicial decisions. *See also* common-law reasoning, natural model
  - in controversies, 28–29
  - equal treatment, 36–39
  - legitimacy of, 53
- judicial rule making. *See* rule making, judicial
- judicial rule making, correctives to. *See* rule making (judicial), correctives to
- justifications, failure of
  - changeability, 100–1
  - morally incorrect decisions, 100
  - normative arguments, 100
  - past decisions, 101–2
  - retroactivity, 101

- Kahneman, Daniel, 47–48  
 Kress, Ken, 101–2  
 Kripke, Saul, 160–62  
 “Kripkenstein” critique, 160–62
- Lamond, Grant, 82–83  
 Lee, Spike, 152, 168, 217–18  
 legal decision making. *See* legal reasoning  
 legal interpretation. *See* intended meaning  
 legal principles  
   in judicial decision making, 102–3  
   pernicious effects, 98–100  
   reasoning from, 88  
 legal principles, failure of justifications for  
   changeability, 100–1  
   morally incorrect decisions, 100  
   normative arguments, 100  
   past decisions, 101–2  
   retroactivity, 101  
 legal principles, faulty logic  
   function of weight, 95–96  
   and moral principles, 97  
   products of convention, 97–98  
   professional consensus, 98  
   requirement of fit, 96–97  
 legal principles, nature of  
   appeal/allure of, 94  
   constraints of, 94  
   descriptions of, 90–91  
   vs. legal rules, 91–92  
   vs. moral principles, 1–3, 92–93  
   in reasoning process, 89–90  
   and reflective equilibrium, 93–94  
   uses of, 90  
 legal reasoning  
   canonical authoritative rules, 130  
   as craft, 1–3, 233–34  
   by judges, 129–30  
   as ordinary reasoning, 3  
   rejection of, 235  
 legal training, 234–35  
 lenity, doctrine of, 176–77  
 Lessig, Lawrence  
   factual vs. legal presuppositions, 157–59  
   legal presuppositions, 154–57  
   structural humility, 155–56  
   translation of legal texts, 153–54  
   value presuppositions, 158–59  
 levels of generality. *See* generality, levels of  
 “living constitution,” 197, 225–27  
 Locke, *United States v.*, 169  
 Manning, John, 195  
 “mindless” algorithm, 201  
 mindless/meaningless text, 182, 198–99,  
   203  
*Miranda v. Arizona*, 154  
 mistaken expression, 194. *See also* scrivener’s  
   errors  
 moral controversy, 9–15, 50–53, 105–6, 168  
 moral principles  
   in a fortiori decision making, 83–87  
   and analogical methodology, 120–22,  
     234  
   assumptions, 10  
   and common law, rule model of, 107–8  
   consensus on outcomes, 98  
   determinate rules, 151  
   and equal treatment, 36–37, 100–1  
   and faulty logic, 95–97  
   and legal principles, 1–3, 87–88, 92–93, 97,  
     101–2  
   posited by humans, 12  
   and precedents, 122–24  
   and rules, 23–24, 99  
   and settlement, 34
- natural law/positivism divide, 24–26  
 no-application understandings, 227–29
- obsolescence, statutory, 181  
 ontological questions, 213  
 opaque intended meanings, 170–71  
 originalists, 197–98
- “paradigm case,” 227–29  
 particularism, rule-sensitive, 16–17, 40–41,  
   45–46  
 pointless intended meanings, 168–70. *See also*  
   infelicities  
 positivism  
   and natural law, 24–26  
   presumptive, 17  
   settlement function, 25  
 Posner, Richard, 213  
 practical reason interpretation, 213–14  
 precedent rules, identification of  
   acceptance over time, 57–58  
   authoritative rules, 54, 56  
   in common-law reasoning, 105–6  
   deliberation requirement, 56–57  
   legislative rules, 53  
   positing requirement, 54–56

- precedent rules, persistence of
  - adjudication task, 61–62
  - and canonical text, 63
  - erroneous outcomes, 59–61
  - middle-ground standard, 62
  - overruling of precedent, 58–59
- procedural constraint. *See* constraint, procedural
- psychology
  - analogical decisions, 75
  - cognitive bias, 47–48, 109–10
  - judicial, 23, 61, 73
  - justified/unjustified rules, 122–23
  - and moral judgment, 73
  - and reasoning, 10
  - and rule compliance, 17–18
- punctuation. *See* grammar/grammatical context
- Rawls, John, 32
- Raz, Joseph, 85–86
- reasoning, 10, 129–30. *See also* analogical reasoning; common-law reasoning; deductive reasoning; legal reasoning
- reflective equilibrium
  - and analogical methodology, 119
  - judicial decision making, 104
  - and legal principle formation, 93–94
  - and moral reasoning/principles, 70–71, 129–30, 232
  - and particularism, 40–41
  - wide reflective equilibrium, 32
- Rubinfeld, Jed, 227–29
- rule-making authority/power
  - community designation of, 14–15, 53
  - sanction imposition, 17–18
  - and serious rule dilemma, 15–16
- rule making, judicial
  - cognitive bias, 109–14
  - error reduction, 107–8
  - inattention, 108–9
  - overruling problems, 114–17
  - rationality/sustainability, 125–27
- rule making (judicial), correctives to
  - analogical methods, 120
  - distinguishing and overruling, 122–24
  - precedent rule restrictions, 120–22
  - rule quality, 118
  - summary of practices, 125
- rule-sensitive particularism, 16–17, 40–41, 45–46
- rules, authoritative. *See also* rules, serious
  - compliance with, 17–18
  - controversy settlement, 11–13, 27–28
  - and disagreement, 13–14
  - and lawmakers, 130
  - and misbehavior, 13
  - posited by humans, 12
  - rationality of following, 16
  - rule-sensitive particularism, 16–17
  - vs. rules of thumb, 11–12
- rules, determinate
  - deductive reasoning, 23–24
  - levels of generality, 151
  - rule skepticism, 18–19
- rules, indeterminacy of
  - accumulation of rules, 22–23
  - application to cases, 19–20
  - classification of facts, 22
  - dependence on purpose, 21
  - linguistic meaning, 20–21
- rules, serious
  - application determination, 19–20
  - common-law decision making, 43
  - common-law reasoning, 31–32
  - deduction from, 48–49
  - error entrenchment, 59
  - governance by, 217–18
  - judicial rules, 41, 45, 66
  - legal principles, 98–101
  - precedent rules, 51, 61–62, 115, 122–24
  - rule-maker intention, 151
  - rule-sensitive particularism, 47
  - settlement function, 27–28
  - unconstrained natural reasoning, 94
- sanctions, use of, 17–18
- Scalia, Antonin, 193–95, 208
- Schauer, Frederick
  - adjudication, 117
  - concrete facts, 111
  - overlap of rules, 23
  - overruling precedent rules, 115–17
  - rule-sensitive particularism, 16–17
  - semantic autonomy, 20–21
- scope beliefs, 145–48
- scrivener's errors
  - intended meaning, 138, 202, 204
  - mistaken expression, 194
- semantic autonomy
  - common social meanings, 22
  - individual rules, 22–23

- intended meaning, 20–21
- level of generality, 149
- malapropisms, 149
- rich vs. spare intentions, 147
- scope intentions, 148
- and serious rules, 21
- semantic conventions, 140
- semantic intentions, 146–47, 149
- settlement
  - authoritative rules, 11–12
  - by chosen authorities, 27–28
  - by human authority, 10–11
  - and misbehavior, 13
  - of moral controversy, 10
  - and positivism, 25
  - preference for, 12–13
  - rule-making power, 14–15
  - and serious rule dilemma, 15–18
- Seventeenth Amendment, 133, 135–38, 169
- Solum, Larry, 215
- spelling. *See* grammar/grammatical context
- statutory obsolescence, 181
- substantive constraint. *See* constraint, substantive
- Sunstein, Cass, 213
- Supreme Court precedents, 229–30
- syntax. *See* grammar/grammatical context
- Tenth Amendment, 154–55
- texts, translation of legal. *See also* canonical legal texts
  - factual vs. legal presuppositions, 157–59
  - value presuppositions, 158–59
- textualism. *See also* textualism, impure
  - author identification, 198–99
  - “deviant” meanings, 199
  - dynamic interpretation of canonical legal rules, 213–14
  - legislative history, 194
  - legislative intent, 193
  - objectified intent, 193–94
  - primacy of texts, 192
  - relevant language, 195–96
  - texts vs. ink marks, 196–98
- textualism, impure
  - algorithmic, 200–4
  - average interpreter, 206–8
  - idealized author, 211–12
  - idealized reader, 208–11
  - legal reasoning, 212
  - nonalgorithmic textualisms, 204–5
  - rule-of-law restricted intentionalism, 205–6
- textualism, intention-free
  - author identification argument, 198–99
  - “deviant” meaning argument, 199
  - impossibility of, 192–95
  - language argument, 195–96
  - text declaration argument, 196–98
- textualist algorithm, 200–4
- translation, fidelity in
  - emendation, 155
  - presuppositions, 157
  - value determinations, 159
- translation of legal texts
  - factual vs. legal presuppositions, 157–59
  - legal presuppositions, 154–57
  - structural humility, 155–56
  - value presuppositions, 158–59
- Tversky, Amos, 47–48
- United States, Church of the Holy Trinity v.*, 169
- United States v. Locke*, 169
- unjust intended meanings, 168–70. *See also* infelicities
- utterance meanings
  - and hypothetical intentionalism, 137
  - and legal interpretation, 140–41
  - vs. speaker’s meaning, 134–35
  - and textualists, 200–4
- Weinreb, Lloyd, 69–70, 73
- wide reflective equilibrium, 32. *See also* reflective equilibrium
- Wittgenstein, Ludwig, 160–62