

## Index

- Abrams v. United States*, 189
- adversarial reasoning, x, xii
- persuasiveness and, 177–79
    - individual reflection in, 178
    - intellectual honesty as prerequisite in, 179
  - in judicial review, 178–79
    - Marbury v. Madison*, 178–79
    - United States v. Nixon*, 179
- advocacy, legal, of constitutional law, x
- Affordable Care Act, 130–31
- Akerman, Amos T., 145–46
- amendments, to constitution. *See* constitutional amendments
- American political community
- charter of negative liberties in, 136
  - constitutional law as governing law in, 31–36
    - anti-commandeering principle, 35
    - state action requirements, 33–35
  - moral commitments of, 69–70
  - personal judgment in, 177
- Ames, Fisher, 40
- analogical reasoning, for precedents, in
- Constitution-in-practice, 88–89
- analogy
- disanalogy and, 89
  - between precedent and present problem, 89
  - reasoning by, 49–50, 88
- anti-commandeering principle, 35
- in structural arguments, over written Constitution, 67
- anti-originalists, constitutional law and, 14
- arguments, in constitutional law, x. *See also specific arguments*
- arguments from precedents, for Constitution-in-practice. *See* Constitution-in-practice
- Article I, Constitution, 207–12
- dormant commerce clause, 153–55
    - Congressional power under, 155
    - in Constitution-in-practice, 154
  - Quill Corp. v. North Dakota*, 183
  - South Dakota v. Wayfair, Inc.*, 183, 197–98
  - foreign commerce clause, 23–24, 154
  - Indian Commerce Clause, 23–24
  - Interstate Commerce Clause, 23–24
    - Section 1, 207
    - Section 2, 207–8
    - Section 3, 7–8, 208–9
    - Section 4, 209
    - Section 5, 209
    - Section 7, 210
    - Section 8, 20, 25, 26–27, 48, 153–55, 210–11
    - Section 9, 37, 45–46, 211–12
    - Section 10, 19, 45–46, 212
    - slavery in, 37
- Article II, Constitution, 212–14
- enumeration principle in, 155–56
    - Section 1, 212–13
    - Section 2, 23–24, 155–56, 214
    - Section 3, 94, 144, 214
    - Section 4, 214
  - take care clause, 144
  - treaty power under, 28, 155–56
    - domestic law effect, 156
    - Missouri v. Holland*, 155–56
- Article III, Constitution, 92, 214–15
- limitations of, 107–15
    - Section 1, 214–15
    - Section 2, 215
    - Section 3, 215
- Article IV, Constitution, 215–16
- Section 1, 215–16
  - Section 2, 216
  - Section 3, 216
  - Section 4, 216
  - state governance under, 28–29

- Article V, Constitution, 36–37, 216–17  
 amendments to Constitution, 156–59  
 Civil War amendments, 157–58  
*Leser v. Garnett*, 158  
*Plessy v. Ferguson*, 158
- Article VI, Constitution, 217  
 sections in, amendments to, 217–27  
 Supremacy Clause in, 19–20, 28
- Article VII, Constitution, 24
- Ashwander v. Tennessee Valley Authority*, 116
- asymmetry, principle of  
 in executive branch, 108  
 in legislative branch, 108  
 for US Congress, 151
- Attorney General office, creation of, 137–38
- authorization. *See* logic of authorization; questions of authorization
- autonomy, of states. *See also* state authority  
 in presuppositions of constitutional law, 30–31
- balance and balancing, in federal courts, 124–28  
*Kassel v. Consolidated Freightways Corp.*, 126–27  
 Pike balancing, 126–27  
 primary criticism of, 126
- Bank Markazi v. Peterson*, 67–68
- Bereford, Sir William de, 185, 232–33
- Bill of Rights, 8  
 ninth amendment and, 163  
 original meaning arguments for, 56–57, 63  
 tenth amendment and, 164  
 textual arguments for, 52  
 tradition-based arguments for, Constitution-in-practice and, 69, 73
- Black, Hugo (Justice), 94–95, 185–86
- Blackstone, Sir William, 228
- Bobbitt, Philip, 41
- Bond v. United States*, 129
- Boos v. Barry*, 124
- Bradwell v. Illinois*, 193
- Brandeis, Louis D. (Justice), 185–86
- Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assoc.*, 34
- Brown v. Board of Education*, 182, 193–94, 197, 202
- Bush v. Gore*, 86–87
- Calder v. Bull*, 91, 186
- Cardozo, Benjamin N. (Justice), xii, 185–86
- Carpenter v. United States*, 86
- case precedents. *See* Supreme Court
- charter of negative liberties, 135–36  
 in American political community, 136  
*DeShaney v. Winnebago County Dept. of Social Services*, 135
- Chase, Samuel (Justice), 186
- Chisholm v. Georgia*, 137
- Civil War amendments, 157–58
- Cohen v. California*, 183–84
- Coke, Sir Edward, 233–34
- commitments  
 moral, xii, 173  
 of American political community, 69–70  
 political, xii, 12–13, 28–31  
 of American political community, 4, 71, 74–75
- common law reasoning  
 in Constitution, as written, 8, 9, 13  
 in textual arguments, 44
- common law traditions, 228–36  
 Bereford and, 185, 232–33  
 establishment of, 228
- Gibbons v. Ogden*, 231  
 as judicial tradition, 231–34  
 as legal method, 228–31  
 in interpretation of texts, 230–31  
 for precedent, 228–29  
 stare decisis, 228–29
- McCulloch v. Maryland*, 231
- procedural due process in, 159
- Steel Seizure case*, 231
- Swift v. Tyson*, 235–36
- Confederation Congress, 62
- Congress, US  
 dormant commerce clause and, 155  
 Fifth Congress, 49  
 First Congress, 8, 63, 76  
 institutional perspective of, 148–52  
 constitutional reasoning in, 150  
 constitutional views of, 148–49  
 for enactment of legislation, 149–50  
 on enumeration principle, 148  
 on judicial review, 148  
 principle of asymmetry in, 151
- War Powers Resolution, 150
- Constitution, as written. *See also* original meaning arguments; structural arguments; *specific articles*  
 arguments over, 43–68  
 Article III, 92, 214–15  
 limitations of, 107–15  
 Section 1, 214–15  
 Section 2, 215  
 Section 3, 215
- Article V, 36–37, 216–17  
 amendments to Constitution, 156–59  
*Leser v. Garnett*, 158  
*Plessy v. Ferguson*, 158
- Article VI, 217–27  
 sections in, 217–27  
 Supremacy Clause in, 28

- Article VII, 24  
 authority of, 10  
 Bill of Rights, 8  
   textual arguments for, 52  
 common law arguments in, 8, 9, 13  
 definition of, 1–3  
 eighteenth amendment, 34  
 federal government response to, 24–25  
 fifth amendment, 53, 69–70  
 first amendment, 36  
 fourteenth amendment, 53, 59–60, 62, 69–70  
 fourth amendment, 36  
 “high crimes and misdemeanors” in, 6–7  
 judicial review in, 11–12  
 as legal instrument, 13  
*McCulloch* principle, 50, 74, 180  
*McCulloch v. Maryland*, 21–22  
 National Archives on, 10–11  
 ninth amendment, 29–30  
 nonexistent emergency clause, 168–71  
   in *Steel Seizure case*, 170–71  
 original meaning arguments over, 53–63  
 persuasiveness in,  
   substantive rules in, procedural rules compared to, 181  
 preamble of, 24  
 public perception of, 1–3  
 right to vote, 167–68  
 separation of powers in, 55–56  
   in structural arguments, 67–68  
 seventh amendment, 8–9  
 structural arguments over, 63–68  
 as supreme Law of the Land, 2  
 tenth amendment, 29–30  
 textual arguments over, 43–53  
   for Bill of Rights, 52  
   common law tools, 44  
   construction as distinct from interpretation in, 44  
   for establishment of military, 48–50  
   *McCulloch* principle and, 50  
   in *McCulloch v. Maryland*, 45–46, 50  
   *Slaughter-House Cases*, 48  
 twenty-fifth amendment, 7–8  
 twenty-first amendment, 34  
 twenty-sixth amendment, 35–36  
 two-fold logic of inquiry, 23–24  
 vice president in, impeachment and, 6–8  
 constitutional amendments. *See also specific amendments*  
 under Article V, 156–59  
   Civil War amendments, 157–58  
   *Leser v. Garnett*, 158  
   *Plessy v. Ferguson*, 158  
 constitutional avoidance canon, 128–29  
*Constitutional Fate* (Bobbitt), 41  
 constitutional law. *See also* original meaning arguments; persuasiveness; presuppositions  
 advocacy of, x  
 American government influenced by, 5, 17–18  
 anti-originalists and, 14  
 arguments, x  
   forms of, 41  
 Declaration of Independence as, 5–6  
 as deductive logic, xiv  
 democratic legitimacy of, 32–33  
 enumeration principle, 17–18, 26–27  
 historical legacy of, ix  
 persuasiveness of, ix  
 police power principle, xiii  
 politics and, 3  
 as practice, xi  
   by lawyers, 2  
   legitimacy of, xii  
 problem-solving through, 203–6  
 questions of authorization, 17–24  
   for governmental actions, 18–19  
 questions of prohibition, 17–24  
 reasoning and, x, xii  
   Holmes on, 99–100  
   Scalia on, 99–100  
 state autonomy under, in presuppositions of constitutional law, 30–31  
 theoretical approach to, ix–xiv  
 constitutional lawyers  
 goals and purposes of, 4  
 on original meaning arguments, for written constitution, 62  
 in practice, of constitutional law, 2  
 constitutional precedents, scope of, 82–90  
 constitutional reasoning  
 by executive branch  
   for attorney general office, creation of, 137–38  
   for diplomatic appointments, 137  
   distinctive features of, 138–46  
   for Office of Legal Counsel, 138–39  
   sources of, 137–46  
   in US Congress, 150  
*The Constitutional Separation of Powers between the President and Congress*, 81, 143  
 Constitution-in-practice. *See also* original meaning arguments  
 American government and, 5, 17–18  
 arguments derived from, 69–105 (*See also specific arguments*)  
 conceptual approach to, 69  
 completeness of, 29–30

## Constitution-in-practice (cont.)

*The Constitutional Separation of Powers between the President and Congress*, 81

content of, 2–3

doctrinal reasoning

in analysis of constitutional problems, 93

in arguments for precedents, 90–104

in Supreme Court decisions, 94

dormant commerce clause in, 154

limitations of, 10

military under, establishment of, 48–50

original meaning arguments for, 57

persuasiveness and, 180

in Supreme Court precedent, 181–82

political practice arguments for, 75–78

constitutional prohibitions in, 78

in *McCulloch v. Maryland*, 75–76

in *NLRB v. Noel Canning*, 76–78

in *Youngstown Sheet & Tube Co. v. Sawyer*, 76

precedents for, arguments from, 78–90

analogical reasoning in, 88–89

authority of, 99–104

in *Bush v. Gore*, 86–87

in *Calder v. Bull*, 91

in *Carpenter v. United States*, 86

change of, 99–104

constitutional, scope of, 82–90

creation of, 99–100

in *Davidson v. New Orleans*, 104

definition of, 82–83

in *Dickerson v. United States*, 100, 101

doctrinal reasoning in, 90–104

in *Eisenstadt v. Baird*, 102–3

facial/as-applied distinction in, 87–88

in *Goldwater v. Carter*, 96–98

in *Griswold v. Connecticut*, 102–4

horizontal, 79–82

in *Manning v. Caldwell*, 89–90

in *Marks v. United States*, 97–98

in *McCulloch v. Maryland*, 83

in *Midlock v. Apple Vacations W., Inc.*, 79

in *Miranda v. Arizona*, 100–2

in *Obergefell v. Hodges*, 103

overrule of, 104–5

in *Poe v. Ullman*, 102

in *Robinson v. California*, 89–91

stare decisis, 79–80, 90–91

in *Taylor v. United States*, 86–87

in *United States v. Hill*, 86–87

in *United States v. Lopez*, 83–85, 86, 87, 88–89, 98

in *United States v. MacEwan*, 98–99

in *United States v. Morrison*, 88–89

in *United States v. U.S. Shoe Corp.*, 88

in *United States v. Woodberry*, 86–87

vertical, 79–82, 100

in *Washington v. Glucksberg*, 104

in *Youngstown Sheet & Tube Co. v. Sawyer*, 94–95

rational basis analysis and, 116–19

in judicial review, 117–19

*Katzenbach v. McClung*, 119

*Trump v. Hawaii*, 118

*United States v. Carolene Products Co.*, 117–18

*United States v. Hatch*, 119

*United States v. Lopez*, 118–19

rules and principles of, 32

scope of, xiii

textual arguments, traditional arguments compared to, 69

tradition-based arguments for, 69–75

for Bill of Rights, 69, 73

in fifth amendment, 69–70

in fourteenth amendment, 69–70

in *Planned Parenthood v. Casey*, 72–73

for privacy rights, 71–72

in *Roe v. Wade*, 72–73

textual arguments compared to, 69

in *Troxel v. Granville*, 72

in *United States v. Stanley*, 74

Continental Congress, Second, 48–49

contract law, 4

Court of Common Pleas, 185

criminal law, 4

*Dartmouth College v. Woodward*, 58–59

*Davidson v. New Orleans*, 104

Declaration of Independence

as constitutional law, 5–6

procedural due process in, 159

deductive logic, in constitutional law, xiv

Dellinger, Walter, 16

democratic governance

politics in, 107

priority of, 115–20

*DeShaney v. Winnebago County Dept. of Social Services*, 135

*Dickerson v. United States*, 100, 101

Dillon's Rule, 29

diplomatic appointments, 137

diplomatic recognition, 65

disanalogy, analogy and, 89

*District of Columbia v. Heller*, 36, 57

doctrinal reasoning

in Constitution-in-practice

in analysis of constitutional problems, 93

in arguments for precedents, 90–104

in Supreme Court decisions, 94

- in precedents, in Constitution-in-practice, 90–104
- dormant commerce clause, 153–55
  - in Constitution-in-practice, 154
  - Quill Corp. v. North Dakota*, 183
  - South Dakota v. Wayfair, Inc.*, 183, 197–98
- due process. *See* procedural due process; substantive due process
- Easterbrook, Frank H., 177
- eighteenth amendment, 34
- Eisenstadt v. Baird*, 102–3
- eleventh amendment
  - Chisholm v. Georgia*, 164–65
  - state sovereign immunity under, 164–66
- Elliot, Jonathan, 62
- Ellsworth, Oliver (Chief Justice), 95–96
- enforcement powers, for Congress, 166–67
- enumeration principle
  - in Congress, 148
  - in constitutional law, 17–18, 26–27
  - in structural arguments, for written Constitution, 66
- equal protection, heightened scrutiny for, in federal courts, 121–22
- Erie R. Co. v. Tompkins*, 236
- executive branch, institutional perspective of, 136–47
  - constitutional reasoning in
    - for attorney general's office, creation of, 137–38
    - for diplomatic appointments, 137
    - distinctive features of, 138–46
    - for Office of Legal Counsel, 138–39
    - sources of, 137–46
  - Hamdi v. Rumsfeld*, 136–37
  - Hamilton on, 137
  - Jefferson on, 137
  - on judicial review, 145–46
  - under Judiciary Act of 1789, 146
  - McCulloch v. Maryland*, 140–41
  - on presidential power
    - decline on execution of unconstitutional statute, 144–45
    - veto power, 143–44
  - Randolph on, 137
  - on solicitor general's clients, 146–47
  - for Supreme Court precedent, 140
  - United States v. Providence Journal Co.*, 147
- extra-constitutional powers, of federal government, 36–38
- extra-constitutional prohibitions, of constitutional law, 36–38
- Farrand, Max, 62
- federal common law, 234–36
  - Erie R. Co. v. Tompkins*, 236
- federal courts. *See also* institutional perspective; Supreme Court
  - on Article III, limitations of, 107–15
  - balance and balancing in, 124–28
    - Kassel v. Consolidated Freightways Corp.*, 126–27
    - Pike balancing, 126–27
    - primary criticism of, 126
  - charter of negative liberties and, 135–36
    - in American political community, 136
    - DeShaney v. Winnebago County Dept. of Social Services*, 135
  - heightened scrutiny in, 120–24
    - Boos v. Barry*, 124
    - for equal protection, 121–22
    - for free speech doctrines, 122–23
    - for fundamental rights, 121, 122
  - judicial power of, 106
  - judicial review of statutes, 128–31
    - of Affordable Care Act, 130–31
    - Bond v. United States*, 129
    - constitutional avoidance canon, 128–29
    - Gregory v. Ashcroft*, 129
    - of nonseverability provisions, 130
    - rational basis analysis in, 117–19
  - justiciability doctrines and, 107–11
    - application of, 110
    - Ashwander v. Tennessee Valley Authority*, 116
    - criticism of, 110
    - Gilligan v. Morgan*, 113
    - Hamdi v. Rumsfeld*, 115
    - Nixon v. United States*, 111–13, 115
    - no-manageable-standards idea, 113–14
    - political question doctrine, 111–13
    - Rucho v. Common Cause*, 113–14
    - standing requirements, 110–11
  - procedural due process in, 132–34
    - Hamdi v. Rumsfeld*, 133–35
    - historical legacy of, 132
  - rational basis analysis in, 116–19
    - in judicial review, 117–19
    - Katzenbach v. McClung*, 119
    - Trump v. Hawaii*, 118
    - United States v. Carolene Products Co.*, 117–18
    - United States v. Hatch*, 119
    - United States v. Lopez*, 118–19
  - on rule of law, 132–34
  - Schlesinger v. Reservists Committee*, 107–8
  - separation of powers argument, 109
- federal power
  - Constitution as exclusive source of, 25

- federal power (cont.)  
 extra-constitutional, 36–38  
 legitimacy of, in structural arguments, 64  
 in structural arguments, 64  
*The Federalist Papers* (Madison, Hamilton, and Jay), 62–63  
 fifth amendment, 53, 69–70  
 procedural due process, 159–62  
 substantive due process, 161–62  
 Fifth Congress, 49  
 first amendment, 36  
 free speech doctrines under, heightened scrutiny for, 122–23  
 First Congress, 8, 63, 76  
 foreign commerce clause, 23–24, 154  
 fourteenth amendment, 53, 59–60, 62, 69–70  
 congressional enforcement powers, 166–67  
*PennEast Pipeline Co. v. New Jersey*, 166  
*Pennhurst State Sch. & Hosp. v. Halderman*, 167  
 procedural due process, 159–62  
 Section 5, 166–67  
 substantive due process, 161–62  
*United States v. Morrison*, 166–67  
 fourth amendment, 36  
 free speech doctrines, heightened scrutiny for, 122–23  
 Fried, Charles, 74, 176–77, 229  
 fundamental rights, heightened scrutiny for, 121, 122  
  
*Garcia v. SAMTA*, 187  
 Gerry, Elbridge, 230  
 gerrymandering, state authority and, 32–33  
*Gibbons v. Ogden*, 44, 231  
*Gilligan v. Morgan*, 113  
*Goldwater v. Carter*, 96–98  
 governance. *See* democratic governance; state authority  
*Gregory v. Ashcroft*, 129  
*Griswold v. Connecticut*, 102–4, 163  
 Gun-Free School Zones Act, 84, 87  
  
*Hamdi v. Rumsfeld*, 115, 133–35  
 Hamilton, Alexander, 62–63, 137  
 Hand, Learned (Judge), 185–86, 195  
 Harlan, John Marshall (Justice), 185–86  
*Plessy v. Ferguson* and, dissent in, 199–200  
 Harlan, John Marshall, II (Justice), 102, 186  
*Harper v. Virginia State Board of Elections*, 168  
 heightened scrutiny, in federal courts, 120–24  
*Boos v. Barry*, 124  
 for equal protection, 121–22  
 for free speech doctrines, 122–23  
 for fundamental rights, 121, 122  
  
 “high crimes and misdemeanors,”  
 Constitution, 6–7  
 Hillary, Sir Roger, 233  
 Holmes, Oliver Wendell (Justice), 144, 185–86, 235–36  
 on constitutional law reasoning, creativity in, 99–100  
 horizontal precedents, 79–82  
 Houston, Charles Hamilton, 200–1  
 Hughes, Charles Evans (Chief Justice), 185–86  
  
 impeachment  
 Senate role in, 7–8  
 vice president and, 6–8  
 Indian Commerce Clause, 23–24  
 individual rights, structural arguments for, in written Constitution, 68  
 institutional perspective. *See also* executive branch; federal courts  
 of federal courts, 106–36  
 of Article III, limitations of, 107–15  
 judicial power of, 106  
 priority of democratic governance, 115–20  
 on rule of law, 132–34  
 in *Schlesinger v. Reservists Committee*, 107–8  
 separation of powers argument, 109  
 of legislative branch, principle of asymmetry in, 108  
 on rule of law, in federal courts, 132–34  
 of US Congress, 148–52  
 constitutional reasoning in, 150  
 constitutional views of, 148–49  
 for enactment of legislation, 149–50  
 on enumeration principle, 148  
 on judicial review, 148  
 principle of asymmetry in, 151  
 War Powers Resolution, 150  
 international law, presuppositions of constitutional law and, scope of, 25  
 Interstate Commerce Clause, 23–24  
  
 Jackson, Robert H. (Justice), 95, 185–86  
 Jay, John (Chief Justice), 62–63, 137, 165  
 Jefferson, Thomas, 8, 137  
 Johnson, William (Justice), 234–35  
 judicial ideology, originalist arguments influenced by, 14  
 judicial review  
 establishment of, 11  
 institutional perspective and, 106  
*Marbury v. Madison*, 11–12  
 moral dimension of, 12–13  
 rational basis analysis and, 117–19  
 of state authority, 30

- of statutes, by federal courts, 128–31
  - of Affordable Care Act, 130–31
  - Bond v. United States*, 129
  - constitutional avoidance canon, 128–29
  - Gregory v. Ashcroft*, 129
  - of nonseverability provisions, 130
  - rational basis analysis in, 117–19
  - theoretical approach to, x
  - in written Constitution, 11–12
- Judiciary Act of 1789, 146
- just theory, 22
- justiciability doctrine. *See* federal courts
- Kassel v. Consolidated Freightways Corp.*, 126–27
- Katzenbach v. McClung*, 119
- legal advocacy. *See* advocacy
- Lehmann, Frederick W., 147
- Leser v. Garnett*, 37, 158
- Lincoln, Abraham, 81
- living speech, 190–91
  - Souter and, 190–91
- Lochner v. New York*, 161–62
- logic of authorization, under constitutional law, 25–28
  - authority of states and, 25, 28–31
  - in *McCulloch v. Maryland*, 26
  - under tenth amendment, 26–27
- logic of prohibition, under constitutional law, 25–28
  - authority of states and, 25, 28–31
  - extra-constitutional prohibitions, 36–38
  - in *McCulloch v. Maryland*, 26
  - under tenth amendment, 26–27
- Madison, James, 26–27, 40, 62–63, 75, 137
  - tenth amendment and, drafting of, 164
- Magna Carta, 159
- Manning v. Caldwell*, 89–90
- Marbury v. Madison*, 11–12, 99–100
  - adversarial reasoning and, 178–79
  - Marshall's role in, 12–13, 33, 197
- Marks v. United States*, 97–98
- Marshall, John (Chief Justice), 185–86, 229
  - Dartmouth College v. Woodward*, 58–59
  - Ellsworth and, 95–96
  - Marbury v. Madison* and, 12–13, 33, 197
  - McCulloch v. Maryland*, 21–22
    - just theory and, 22
    - state tax issues in, 21–22
  - on precedent arguments, 99
- Marshall, Thurgood (Justice), 200
- McCulloch, James, 21–22. *See also* *McCulloch v. Maryland*
- McCulloch* principle, 50, 74
- McCulloch v. Maryland*, xi–xii, 42
  - in argument precedents, for Constitution-in-practice, 83
  - common law traditions, 231
  - executive branch and, 140–41
  - Marshall and, 21–22
    - just theory and, 22
    - state taxes issues in, 21–22
  - in original meaning arguments, for written Constitution, 55–56
  - persuasiveness and, 174, 175
  - political practice arguments in, 75–76
  - in structural arguments, for written Constitution, 64–65
  - tenth amendment and, 164
  - in textual arguments, for written Constitution, 45–46, 50
- McLaurin v. Oklahoma State Regents for Higher Ed.*, 201–2
- Midlock v. Apple Vacations W., Inc.*, 79
- military, establishment of, in Constitution-in-practice, 48–50
- Miranda v. Arizona*, 100–2
- moderate originalists, 16
- Monaghan, Henry Paul, 63
- moral commitments, xii, 173
  - of American political community, 69–70
- morality, in judicial review, 12–13
- NAACP. *See* National Association for the Advancement of Colored People
- National Archives, written Constitution in, 10–11
- National Association for the Advancement of Colored People (NAACP), 200–1
- National Bank Act, 40
- National League of Cities v. Usery*, 187
- New York v. United States*, 66
- ninth amendment, 29–30, 162–63
  - Bill of Rights and, 163
  - in *Griswold v. Connecticut*, 163
- Nixon, Richard, 139–40
- Nixon v. United States*, 111–13, 115
- NLRB v. *Noel Canning*, 76–78
- no-manageable-standards idea, 113–14
- nonexistent emergency clause, in written Constitution, 168–71
  - in *Steel Seizure case*, 170–71
- nonseverability provisions, 130
- normative theory, ix
- Obergefell v. Hodges*, 103, 192
- Office of Legal Counsel (OLC), 138–39

- original meaning arguments
  - in Constitution-in-practice, 57
  - for written constitution, 53–63
    - for Bill of Rights, 56–57, 63
    - in *Columbia v. Heller*, 57
  - constitutional lawyers on, 62
  - in *Dartmouth College v. Woodward*, 58–59
  - in fourteenth amendment, 59–60, 62
  - historical sources for, 57–58, 60–63
  - in *McCulloch v. Maryland*, 55–56
  - original public meaning, 62
  - qualifiers for terms in, 54
    - for separation of powers, 55–56
- originalist meaning arguments, for constitutional law, 13–16
  - disadvantages of, 14–15
  - judicial ideology as influence on, 14
  - legal scope of, 13–14
  - moderate originalists, 16
  - Scalia and, 14–15
  - stare decisis and, 15
  - Supreme Court precedents and, 15
- overrule of precedents, for Constitution-in-practice, 104–5
- Paul v. Davis*, 160–61
- PennEast Pipeline Co. v. New Jersey*, 166
- Pennhurst State Sch. & Hosp. v. Halderman*, 167
- personal judgment, role of, 173–77
  - in American political community, 177
- perspective. *See* institutional perspective
- persuasive reasoning, x
- persuasiveness, in constitutional law, ix
  - adversarial thinking and, 177–79
    - individual reflection in, 178
    - intellectual honesty as prerequisite in, 179
  - in judicial review, 178–79
    - Marbury v. Madison*, 178–79
    - United States v. Nixon*, 179
- Constitution-in-practice and,
  - in Supreme Court precedent, 181–82
- extra-legal facts and, 182–84
- historical moment and, influence of, 191–93
- justice as goal, 193–98
- living speech and, 190–91
  - Souter and, 190–91
- McCulloch* principle, 177
- McCulloch v. Maryland*, 174, 175
  - personal judgment in, role of, 173–77
    - in American political community, 177
  - right answers in, 198–99
  - in Supreme Court precedent, 181–82
    - authority of, 184–90
  - theoretical approach to, 172–73
    - in written Constitution,
      - substantive rules in, procedural rules compared to, 181
- Pike balancing, 126–27
- Planned Parenthood v. Casey*, 72–73
- Plessy v. Ferguson*, 158, 189, 192–93
  - case challenges to, 199–202
    - Brown v. Board of Education*, 182, 193–94, 197, 202
    - McLaurin v. Oklahoma State Regents for Higher Ed.*, 201–2
    - Sweatt v. Painter*, 201–2
  - constitutional legacy of, 199–202
  - Harlan dissent in, 199–200
  - Houston and, 200–1
  - “separate but equal” policy, 200–2
- Poe v. Ullman*, 102, 162
- police power principle, xiii
  - in presuppositions of constitutional law, 25, 27, 28
  - in structural arguments, for written Constitution, 66
- political commitments, xii, 12–13, 28–31
  - of American political community, 4, 71, 74–75
- political practice arguments, for Constitution-in-practice, 75–78
  - constitutional prohibitions in, 78
  - in *McCulloch v. Maryland*, 75–76
  - in *NLRB v. Noel Canning*, 76–78
  - in *Youngstown Sheet & Tube Co. v. Sawyer*, 76
- political question doctrine, 111–13
- politics, constitutional law and, 3
- Powell, Lewis F., Jr. (Justice), 97
- precedents. *See* Constitution-in-practice; Supreme Court; *specific cases*
- presidential power
  - decline to execute unconstitutional statute, 144–45
  - veto power, 143–44
- presuppositions, of constitutional law, 24–38
  - constitutional law as law governing political community, 31–36
    - anti-commandeering principle, 35
    - state action requirements, 33–35
  - as exclusive source of federal power, 25
  - extra-constitutional powers of federal government, 36–38
  - federal government response to, 24–25
  - international law and, scope of, 25
  - logic of authorization, 25–28
    - authority of states and, 25, 28–31
    - in *McCulloch v. Maryland*, 26
    - under tenth amendment, 26–27



- logic of prohibition, 25–28  
 authority of states and, 25, 28–31  
 extra-constitutional prohibitions, 36–38  
 in *McCulloch v. Maryland*, 26  
 under tenth amendment, 26–27  
 police power and, 25, 27, 28  
 in resolution of constitutional law problems, 38  
 state autonomy in, 30–31  
*Printz v. United States*, 66–67, 190–91  
 privacy rights, in tradition-based arguments, for  
 Constitution-in-practice, 71–72  
 procedural due process  
*Bell v. Burson*, 159–60  
*Board of Regents v. Roth*, 160, 161  
 in common law traditions, 159  
 in Declaration of Independence, 159  
 in federal courts, 132–34  
*Hamdi v. Rumsfeld*, 133–35  
 historical legacy of, 132  
 in fifth amendment, 159–62  
 in fourteenth amendment, 159–62  
 historical legacy of, 159  
 in US federal courts, 132  
 Magna Carta and, 159  
*Paul v. Davis*, 160–61
- questions of authorization, under constitutional  
 law, 17–24  
 for governmental actions, 18–19  
*Quill Corp. v. North Dakota*, 183
- Randolph, Edmund, 137, 230  
 rational basis analysis. *See* federal courts  
 reasoning. *See also* adversarial reasoning; doctrinal  
 reasoning  
 analogical, for precedents, in Constitution-in-  
 practice, 88–89  
 by analogy, 49–50, 88  
 by Congress, constitutional reasoning, 150  
 constitutional, by executive branch  
 for attorney general office, creation of, 137–38  
 for diplomatic appointments, 137  
 distinctive features of, 138–46  
 for Office of Legal Counsel, 138–39  
 sources of, 137–46  
 constitutional law and, x, xii  
 Holmes on, 99–100  
 Scalia on, 99–100  
 Rehnquist, William H. (Chief Justice), 41–42, 84,  
 139–40  
 Religious Freedom Restoration Act, 82  
*Reno v. Condon*, 68  
 Roberts, John (Chief Justice), 17, 18  
*Robinson v. California*, 89–91  
*Rodriguez v. Popular Democratic Party*, 168  
*Roe v. Wade*, 72–73  
*Rucho v. Common Cause*, 113–14  
 rule of law, federal courts on, 132–34
- Scalia, Antonin (Justice)  
 on constitutional law reasoning, creativity in,  
 99–100  
 as originalist, 14–15  
*Schlesinger v. Reservists Committee*, 107–8  
 Second Continental Congress, 48–49  
 Sedition Act of 1798, 234  
*Seminole Tribe v. Florida*, 41–43  
 Senate, US, impeachment and, role in, 7–8  
 “separate but equal” policy, *Plessy v. Ferguson* and,  
 200–2  
 separation of powers  
*The Constitutional Separation of Powers between  
 the President and Congress*, 81, 143  
 in federal courts, institutional perspective of, 109  
 in written Constitution, 55–56  
 in structural arguments, 67–68  
 seventeenth amendment, 168  
 seventh amendment, 8–9  
*Slaughter-House Cases*, 48, 193  
 slavery, under Article I, 37  
 solicitor general clients, 146–47  
 Souter, David H. (Justice), 41–42, 190–91  
*South Dakota v. Wayfair, Inc.*, 183, 197–98  
 standing requirements, in justiciability doctrines,  
 110–11  
 stare decisis  
 in argument precedents, for Constitution-in-  
 practice, 79–80, 90–91  
 in common law traditions, 228–29  
 in originalist argument, 15  
 state action requirements, 33–35  
 state authority  
 under Article IV, governance structure for states,  
 28–29  
 Dillon’s Rule, 29  
 under eighteenth amendment, 34  
 gerrymandering and, 32–33  
 interstate travel interference, 34–35  
 judicial review of, 30  
 in *McCulloch v. Maryland*, 21–22  
 sovereign immunity, 30  
 taxation issues and, 21–22  
 under twenty-first amendment, 34  
 state autonomy. *See* autonomy  
 statutory law, 9–10  
*Steel Seizure case*, 170–71, 231  
 Stonor, Sir John (Chief Justice), 233  
 Story, Joseph (Justice), 27, 185–86

- structural arguments, over written Constitution, 63–68
- anti-commandeering principles, 67
  - in *Bank Markazi v. Peterson*, 67–68
  - for diplomatic recognition, 65
  - enumeration principles, 66
  - for federal government, legitimacy of, 64
  - for individual rights, 68
  - in *McCulloch v. Maryland*, 64–65
  - in *New York v. United States*, 66
  - police power principles, 66
  - in *Printz v. United States*, 66–67
  - in *Reno v. Condon*, 68
  - for separation of powers, 67–68
  - United States v. Morrison*, 65–66
  - in *Zivotofsky v. Kerry*, 65
- substantive due process
- in fifth amendment, 161–62
  - in fourteenth amendment, 161–62
  - Lochner v. New York*, 161–62
  - Poe v. Ullman*, 162
- Supremacy Clauses
- in Article IV, 19–20
  - in Article VI, 28
- Supreme Court, US *See also* institutional perspective; *specific cases*
- case precedent, in originalist arguments, 15
  - doctrinal reasoning in, for Constitution-in-practice, 94
  - executive branch on, institutional perspective of, 140
  - persuasiveness and, in precedent, 181–82
    - authority of, 184–90
    - structural role of, uniqueness of, 184–90
  - Swett v. Painter*, 201–2
  - Swift v. Tyson*, 235–36
- take care clause, 144
- taxation, in *McCulloch v. Maryland*, 21–22
- Taylor v. United States*, 86–87
- tenth amendment, 26–27, 29–30, 164
- Bill of Rights and, 164
  - Madison drafting of, 164
  - McCulloch v. Maryland*, 164
- textual arguments
- over written Constitution, 43–53
    - for Bill of Rights, 52
    - common law tools, 44
    - construction as distinct from interpretation in, 44
    - for establishment of military, 48–50
    - McCulloch* principle and, 50
    - in *McCulloch v. Maryland*, 45–46, 50
    - Slaughter-House Cases*, 48
    - tradition-based arguments compared to, in Constitution-in-practice, 69
  - tradition-based arguments, for Constitution-in-practice. *See* Constitution-in-practice treaty power, under Article II, Constitution, 28
  - Troxel v. Granville*, 72
  - Trump v. Hawaii*, 118
  - twenty-fifth amendment, 7–8
  - twenty-first amendment, 34
  - twenty-sixth amendment, 35–36
- United States (US). *See* American political community; Constitution, as written; Constitution-in-practice; Supreme Court; *specific topics*
- United States v. Carolene Products Co.*, 117–18
  - United States v. Curtiss-Wright Export Corp.*, 24–25
  - United States v. Hatch*, 119
  - United States v. Hill*, 86–87
  - United States v. Lopez*, 83–85, 86, 87, 88–89, 98, 118–19, 188
  - United States v. MacEwan*, 98–99
  - United States v. Morrison*, 65–66, 88–89, 166–67
  - United States v. Nixon*, 179
  - United States v. Stanley*, 74
  - United States v. U.S. Shoe Corp.*, 88
  - United States v. Woodberry*, 86–87
- vertical precedents, for Constitution-in-practice, 79–82, 100
- veto power, 143–44
- vice president, impeachment and, role of, 6–8
- Violence against Women Act, 166–67
- voting rights, in written Constitution, 167–68
- Warren, Earl (Chief Justice), 197
- Washington, George, 1, 8
- Washington v. Glucksberg*, 104
- Webster, Daniel, 58
- West Virginia State Bd. of Educ. v. Barnette*, 37
- White, James Boyd, 190
- Wirt, William, 137–38, 146
- Woods v. Cloyd W. Miller Co.*, 170
- workable government, 45, 64, 67, 68
  - constitutional goal of, 17–18, 47, 77–78, 83, 95, 123, 136, 140, 169–70, 175–76, 206
- Youngstown Sheet & Tube Co. v. Sawyer*, 76, 94–95, 169, 171, 184–85
- Zivotofsky v. Kerry*, 65