

Index

- abortion rights, 40, 153
- absolute immunity, 203
- ACCA. *See* Armed Career Criminal Act
- Active Liberty* (Breyer), 241
- Adams, John, 133, 142
- Adams, Thomas S., 16
- administrative agencies, 200
- adverse parties, 175–177
- AFDPA. *See* Antiterrorism and Effective Death Penalty Act of 1996
- affirmative action programs, 11, 166–168
- Affordable Care Act, 46, 106, 107–108, 172, 194, 230–231, 241
- African-Americans, voting rights of, 153
- Age Discrimination in Employment Act, 222
- Agricultural Adjustment Act of 1938, 106
- Aleinikoff, T.A., 154
- Alito, Samuel, 45, 63–64, 67, 78, 90, 91, 109, 206–207, 210, 220, 227, 228, 280n44, 281n49
- Amal, Akhil Reed, 73, 161
- American Civil Liberties Union, 114
- American Indians, 166
- American Whigs, 134
- Americans with Disabilities Act, 230
- Amtrak, 53
- animal cruelty, 59
- anonymous (or pseudonymous speech), 114, 190–191
- anonymous electioneering, 117
- antiabortion picketing, 121–123, 191–192
- Anti-Federalists
 - anonymous speech and, 191
 - Bill of Rights and, 144
 - constitutionalism and, 159
 - diversity of, 141
 - elitist conception of government, 134
 - federalism and, 174
 - property rights and, 173
 - separation of powers and, 143
- Antiterrorism and Effective Death Penalty Act of 1996 (AFDPA), 206
- Appointments Clause, 102, 103
- Arizona, 51
- Armed Career Criminal Act (ACCA), 75, 77–78
- Article III (Standing and Adverse Parties), 175–177
- Articles of Confederation, 24, 152
- assisted suicide, 41, 169–170
- AUMF. *See* Authorization for Use of Military Force
- Authorization for Use of Military Force (AUMF), 98–99
- automobile dealer fraud, 129, 211–212, 225
- Bailyn, Bernard, 145, 150
- Balanced Treatment for Creation Science and Evolution Science in Public Schools Instruction Act, 29
- bankruptcy, 213
- Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 226
- Bankruptcy Act, 96, 226
- Barnett, Randy, 139, 236
- BCRA. *See* Bipartisan Campaign Reform Act of 2000
- Berger, Raoul, 22, 175
- Berman, Mitchell, 167
- Bibas, Stephen, 185
- Biden, Joseph, 9, 10, 11
- Bill for Proportioning Crimes and Punishments, 163

- Bill of Rights, 8
 history, 144
 originalism and, 144
 plutocracy and, 188
 primacy of jury and, 235
 ratification of, 135
 religious freedom and, 156
 right to trial by jury and, 79
 Bipartisan Campaign Reform Act of 2000
 (BCRA), 115, 116
 Black, Hugo, 13
 Black Lungs Benefits Reform Act, 222
 Blackmun, Harry, 38, 56, 59, 68, 87, 114, 158–159,
 173, 204, 211, 214, 216, 221, 222, 272n21,
 284n6, 289n5, 291n16, 295n13, 343n33,
 349n48
 Blackstone, William, 33–34, 178, 181, 198
 Blackstonian theory, 140–141
 blue-collar crimes, 209–211, 237
 Bork, Robert, 16
 Boston Council, 171
 Boston Tea Party, 178–179
 Brady Handgun Violence Prevention Act, 50
 Brady Act, 174
 Brandeis, Louis D., 27, 42
 Brennan, William J., Jr., 19, 29, 38, 40, 53, 56–57,
 58, 66, 95–96, 114, 148, 264n94, 272n21,
 278n40, 284n6, 286n4, 289n5, 295n13,
 349n48
 Breyer, Stephen, 13, 14, 45, 59, 63–64, 67, 83–84,
 85, 90, 91, 93, 99, 109, 134, 147, 158,
 185–186, 198, 207, 210, 223, 241, 280n44,
 281n49, 337n29
 bribery, 213–214, 215
 Brisbin, Richard, 189
 Burger, Warren, 159
 Burger Court, 33, 67, 156
 Bush, George W., 30, 51–52

 Calabresi, Steven, 52
 California Code, 227
 campaign financing, 115–116, 187–190
 capital punishment, 33, 35, 149
 Cardozo, Benjamin, 35
 carjacking, 209
 Catholic Church, 194
 Center for Public Interest Law, 114
 central bank, creation of, 142
 Chauncy, George, 169
 check fraud, 211
Chevron deference, 222
 Chief Justice, nomination of, 151
 child abuse, 72, 87
 child labor laws, 149
 child support, 227
 Chinese, 166
 Citizen's United, 116
 Civil Rights Act of 1871, 203, 204
 civil statutory opinions, liberal, 221–228
 bankruptcy, 226
 child support, 227
 debt collection, 225–226
 employment discrimination, 221–222
 environmental laws, 222–223
 freedom of information, 224
 gender discrimination, 227
 preemption, 227
 price discrimination, 224–225
 price fixing, 225
 telecommunications services, 221
 tort liability, 223–224
 voters' rights, 227
 Civil War, 167, 240
 class actions, 226, 232
 Clean Air Act, 223
 Clean Water Act, 47–48, 96
 Clinton, George, 144
 cocaine, possession of, 35
 Coke, Edward, 180–181
 colonial commerce, 171
 colonies, separation of powers in, 150
 Colorado, laws on homosexuality, 42, 168–169
Commentaries on the Laws of England, 33, 198
 Commerce Clause, 46, 106–110, 171, 241
 Communications Act of 1934, 221
 compulsory school attendance, 193
 concurrent sentences, 84
 conduct as speech, 178–179
 confessions, 86–87
 confirmation hearings, 7–11
 conflicted opinions, 187–195, 240
 anonymous (or pseudonymous speech), 190
 antiabortion picketing, 121–123, 191–192
 campaign financing, 187–190
 free exercise of religion, 124–126
 political speech, 113–120
 religion, 192–195
 confrontation, 185
 Confrontation Clause, 86–91, 144, 184–186
 child accusers, 87
 face-to-face confrontation, 88
 forfeiture or waiver of rights, 90–91
 nontestimonial statements, 89
 objective test, 90
 Roberts test, 89
 scientific evidence, 89–90
 consecutive sentences, 84
 conservative opinions

- affirmative actions, 166–168
- Commerce Clause, 171
- constitutional criminal procedure, 162–163
- criminal procedures, 33–37
- due process, 163–164
- federalism, 174–175
- First Amendment
 - Establishment Clause, 28–31
 - free speech, 27–28
 - Religion Clauses, 28–31
- government power and regulation, 46–52
- government takings, 173–175
- individual rights, 155–170
- privacy and individual rights, 38–45
- privacy and related doctrines, 168–170
- Religion Clauses, 155–157
- Second Amendment, 31–32, 157–162
- self-incrimination, 164–165
- standing and adverse parties, 175–177
- statutory, 229–232
 - class actions, 232
 - minority rights, 229
 - securities fraud, 230
- constables, 179
- Constitution, 8
 - Article I, 15
 - Article I, § 8, 106
 - Article III, 199
 - Article III, § 2, cl. 3, 79
 - intent and meaning of, 16–17
 - originalism and, 17–18
 - ratification of, 135
- Constitutional Convention, separation of powers and, 151
- Constitutional Convention (1987), 163
- constitutional criminal procedure, 162–163
- constitutional decisions, conflicted, 240
 - antiabortion picketing, 121–123
 - free exercise of religion, 124–126
 - political speech, 113–120
 - punitive damages, 127–129
- constitutional interpretation, 20
- constitutional opinions, conservative criminal procedures, 33–37
- First Amendment
 - Establishment Clause, 28–31
 - free speech, 27–28
 - Religion Clauses, 28–31
- government power and regulation, 46–52
- privacy and individual rights, 38–45
- Second Amendment, 31–32
- contraception, 16, 38, 40
- contributions, 113–117
- Controlled Substances Act (CSA), 106
- Corbin, Caroline, 195
- Cornell, Saul, 141, 144, 146, 155, 159, 168, 191
- corporate political speech, 189–190
- corporations, 194
- corruption, 187–188
- Corruption in America* (Teachout), 187–188
- Court of Appeals, 103
- courts-of-appeals opinions, 10
- Crawford, Michael, 88–89
- The Creation of the American Republic, 1776–1787* (Wood), 187
- creation science, 29
- credit card fraud, 211–212
- criminal procedure, constitutional, 33–37
- cross burning, 57–58, 236
- cruel and unusual punishment, 162–163
- Davies, Thomas, 179, 181, 182, 184, 185–186
- “deadly weapon” presumption, 80–81
- death penalty, 33–34, 83, 162
 - age of offender, 33, 34
 - mental retardation of criminals, 34
 - Victim Impact Statement, 34
- debt collection, 225–226
- decentralization of power, 188
- decision-making principles, 12–24
 - federalism, 24
 - judicial restraint, 22–23
 - majoritarianism, 22–23
 - originalism, 15–20
 - separation of powers and, 24
 - state decisis*, 22–23
 - textualism, 13–15
 - tradition, 20–22
- DeConcini, Dennis, 11
- Defence of Marriage Act (DOMA), 44–45, 176
- delegation of powers, 7–8
- detention, 68
- discovery rule, 226
- discrimination, 221–222
 - in employment, 221–222
- discriminatory intent, 52
- DNA sample, 64–65
- “The Doctrine of Standing as an Essential Element of Separation of Powers,” 24
- double jeopardy, 186
- Double Jeopardy Clause, 72–75
- Drakeman, Thomas, 155
- drug laws, 149
- drug testing, mandatory, 65–66, 182
- drug trafficking, 218
- drug-sniffing dog, use of, 65
- drunk driving, 65
- DuBois, W.E.B., 237

due process, 163–164
 Due Process Clause, 70–72
 in Fifth and Fourteenth Amendments, 164
 Lochner-type due process, 164
 parental rights and, 170
 pre-New Deal Supreme Court's interpretation of, 164
 procedural flaws and, 27
 punitive damages under, 127–128
 rights against congressional actions in, 168
 sentencing factor and, 83
 separation of powers, 164
 substantive due process, 164
 violation of, 72
 dummy corporations, 211
 Dworkin, Ronald, 20, 163, 164
 dying declarations, unsworn, 184

 Easterbrook, Frank, 150, 189
 economic freedom and rights, 46
 economic rights, 46–47
 Eighth Amendment, 20, 33–35, 162, 163
 Eisgruber, Christopher, 144
ejusdem generis principle, 76
 electioneering communications, 115
 Eleventh Amendment, 50, 105, 139
 Ellsworth, Oliver, 194
 Ely, James W., 173
 employment discrimination, 221–222
 Endangered Species Act (ESA), 47
 enemy combatant, 98–99
 Enron Corp., 215
 Environmental Defense Fund, 222
 environmental laws, 149, 222–223
 Environmental Protection Agency (EPA), 223
 EPA. *See* Environmental Protection Agency
 Equal Employment Opportunity Commission, 222
 Equal Protection Clause, 41–42, 124, 125, 130, 169, 270n22
 Eskridge, William, 15, 138, 197
 Establishment Clause, 28–29, 31, 124, 155, 156–157, 195, 238
 Ethics in Government Act, 102
 evidence, fabrication of, 204–205
 Ex Post Facto Clause, 207
 excessive fines, 269n20
 exclusionary rule, 16, 149
 Executive Branch, uncertain status of, 151
 executive power, 103
 exercise of religious beliefs, 124–126
 expenses, 113–117
 expert witnesses, 89–90
 extortion, 214

Fair Debt Collection Practices Act (FDCPA), 225–226
 fair reading, 14
 faith-based incentives, 30
 faux originalism, 140–141
 FCC. *See* Federal Communications Commission
 FDCPA. *See* Fair Debt Collection Practices Act
 FECA. *See* Federal Election Campaign Act of 1971
 federal agencies, delegation of powers to, 7–8
 Federal Aviation Administration, 223
 Federal Communications Commission (FCC), 221
 Federal Election Campaign Act of 1971 (FECA), 113
 Federal Militia Census (1802), 174
 federal minimum wage, 149
 Federal Rules of Civil Procedure, Rule 59, 97
 Federal Rules of Evidence, 205–206
 federal securities law, 149
 Federal Tort Claims Act, 203, 223
 federalism, 174–175
 diversity in, 141
 implementation of, 150
 separation of powers and, 24, 101–105
The Federalist, 15, 24, 106–107
 advantages as a substantial document, 143
 No. 10, 189
 No. 22, 188
 No. 27, 174
 No. 36, 174
 No. 39, 188
 No. 47, 102
 No. 48, 102
 No. 49, 102
 No. 50, 102
 No. 51, 102
 No. 66, 151
 No. 73, 103
 No. 78, 102, 152, 198
 Fifth Amendment, 70–78
 capital punishment and, 33
 death penalty and, 162
 Double Jeopardy Clause, 72–75
 Due Process Clause, 70–72, 127–128, 168, 179
 Just Compensation Clause, 173
 preemptory challenges and, 130
 Self-Incrimination Clause, 72, 165
 sentencing, 75–78
 Takings Clause, 49
 violent felonies, 75–78
 fighting words, 178–179
 Finkelman, Paul, 159

- firearms
 - drug trafficking and, 218
 - selling of, without license, 216
- First Amendment, 55–60
 - affirmative action and, 11
 - aid to religions and, 155
 - campaign financing and, 187
 - corporate speech and, 116–119, 190
 - Establishment Clause, 28–31
 - flag-burning, 56–57
 - free speech, 27–28, 55–60, 178–179, 190, 236–237
 - overbreadth doctrine, 55–56
 - Religion Clauses, 10, 28–31, 155–156, 157, 193
 - symbolic expressions, 178–179
 - violation of, 119, 122
- First and Second National Bank, 171
- Fiss, Owen, 18
- flag burning, 56–57, 178–179
- Flaherty, Martin, 150–151
- Florida Supreme Court, 51–52
- food laws, 149
- foreclosures, 225–226
- forfeiture doctrine, 185–186
- forfeiture of rights, 90–91
- Fourteenth Amendment
 - affirmative action and, 166–167
 - Due Process Clause, 83, 127–128
 - Equal Protection Clause, 130
 - Establishment Clause, incorporation of, 156–157
 - gay rights and, 168
 - incorporation, 31
 - mandatory drug testing, 182
 - preemptory challenges and, 130
 - right to keep and bear arms, 158
 - school segregation and, 167
 - women's rights and, 168
- Fourth Amendment, 61–69
 - buccal swab, 64–65
 - definition of, 61
 - detention, 68
 - drug-sniffing dog, use of, 65
 - drunk driving, 65
 - exclusionary rule of, 35
 - frisk, 66–67
 - GPS tracking device in, 63–64
 - mandatory drug testing, 65–66
 - plain view doctrine, 62
 - search and seizure, 179–180
 - special cases, 65–69
 - standard, 61
 - student rights, 35
 - visual surveillance, 63
 - warrantless arrest, 180–181
 - warrantless search of automobiles, 67–68
- Frankfurter, Felix, 93
- Franklin, Benjamin, 134
- fraud, 211–218
- free exercise of religion, 124–126
- Free Exercise of Religion Clause, 124, 125, 193, 194
- free speech, 27–28, 58–59, 178–179, 238
- Free Speech Clause, 21, 190
- Freedman's Bureau Act of 1865, 166
- Freedman's Bureau Act of 1866, 166
- Freedman's Bureau Bill of 1864, 166
- Freedom of Information Act, 224
- freedom of speech, 236–237
- Freedom of Speech Clause, 156
- French Revolution, 135
- Frickey, Philip, 197
- Fried, Charles, 142
- Friendly, Henry, 13
- Friends of Development, 35
- frisk, 66–67
- Gallatin, Albert, 176
- Garner, Bryan, 138
- gay rights, 42–44, 149, 168–169
- Gedicks, Frederick, 199
- gender discrimination, 227
- Gerry, Eldridge, 135, 141
- Giannella, Donald, 195
- Gilded Age, 240
- Ginsburg, Ruth, 39–40, 45, 47–48, 59, 63–64, 75, 84, 89–90, 91, 99, 107–108, 109, 119, 126, 134, 194, 207, 210, 215, 218, 220, 221, 223, 228, 280n44, 281n45, 282n14, 284n6, 284n13, 284n16, 296n14, 344n8, 346n62
- golf, 230
- Gore, Al, 51–52
- government power and regulation, 46–52
- government takings, 173–175
- government-provided counsel, 16
- GPS tracking device, 63–64, 192
- Great Compromise, 140
- Guantanamo Bay, 98
- guilty plea, 162
- gun control, 31–32, 153, 159
- gun rights, 160
- Gun-Free School Zones Act of 1990, 106
- habeas corpus*
 - certificate of appealability, 37
 - claim of actual innocence and, 37
 - competence of counsel, 37
 - constitutional rulings, 37
 - extended, 98–100

habeas corpus (cont.)

final state judgment, 37
 to foreign nationals, 53
 Interstate Agreement on Detainers, 37
 one-year statute of filing, 37
 petition for, 206–207
 petition to bar, 37
 second or successive petition, 37
 for state prisoners, 16
 terrorism and, 165
 time requirement, 37
 unlawfully seized evidence and, 35
 Hamilton, Alexander, 135, 137, 142, 143
 Hand, Learned, 13
 Harlan, John Marshall, 58
 Hart, Henry M., Jr., 13, 198
 Hartz, Louis, 240
 hate speech, 179
 Hay, John, 160–161
 hearsay evidence, 86
 Henry, Patrick, 144
Hillary: The Movie, 116
 historic landmark-preservation law, 126
 Hobbs Act, 213–214
 Holmes, Oliver Wendell, Jr., 27
 homosexuality, 42–44
 honest-service fraud, 215
 Hutchison, Thomas, 150
 Hutchison, William R., 156

The Ideological Origins of American Federalism
(LaCroix), 150

illegal immigrants, 158
 immigration, 201–203
 Immigration and Nationality Act, 201
 Immigration and Naturalization Act (Act), 203
 Immigration and Naturalization Service, 201
 inadmissible aliens, 202
 insider trading, 217
The Institutes and Laws of England (Coke),
 180–181
 intent to kill or harm, 209
 Internal Revenue Code, 216
 Interstate Agreement on Detainers, 37

Jackson, Robert, 104, 259n31
 Jacob Wetterling Crimes against Children and
 Sexually Violent Offender Registration
 Act, 108–109
 Jefferson, Thomas, 135, 137, 142, 155, 163, 188
 Jehovah's Witnesses, 56, 193
 judges, acceptance of power, 152
 judicial activism, textualism and, 199
 judicial power, 101, 199

judicial restraint, 22–23, 153
 jurors, prospective, 130
 jury
 preemptory challenges, 130–131
 primacy of, in criminal prosecutions, 235–236
 jury trial, right to, 95–97, 182–184
 Juvenile Delinquency Act, 218–219

Kagan, Elena, 45, 59, 63–64, 109, 179, 211, 223
 Katzman, Robert, 199
 Kennedy, Anthony, 42–43, 45, 51, 56, 59, 67,
 74–75, 90, 91, 99, 109, 114, 115, 116, 126, 147,
 176, 206–207, 223, 281n49, 295n13, 345n32,
 348n45
 Kennedy, Ted, 8, 11
 kickbacks, 214–215
 kidnapping, 85
 Knapp, Aaron, 183
knowingly requirement, 214
 Konig, David, 134, 155, 160–161
 Kopelman, Andrew, 199
 Kozuskanich, Nathan, 160
 Kramer, Larry, 140
 Ku Klux Klan Act, 194
 Kungys, Juozas, 202–203

labor picketing, 192
 LaCroix, Alison, 150
 laissez-faire, 172
 landmarks preservation, 49
 Langbein, John H., 183
The Legal Process, 13, 198
 legislative history, 199
Lemon test, 29
 lenity, rule of, 209, 212, 217
 Lerner, Renée Lettow, 183
 Lessig, Lawrence, 188
 Levy, Leonard, 147, 163
 libel, 55
 liberal, 2
 liberal opinions, 178–186
 arrest, 179–180
 civil statutory opinions, 221–228
 bankruptcy, 226
 child support, 227
 debt collection, 225–226
 employment discrimination, 221–222
 environmental laws, 222–223
 freedom of information, 224
 gender discrimination, 227
 preemption, 227
 price discrimination, 224–225
 price fixing, 225
 telecommunications services, 221

- tort liability, 223–224
- voters' rights, 227
- Confrontation Clause, 184–186
- criminal opinions, 208–220
 - blue-collar crimes, 209–211
 - sentencing, 218–220
 - white-collar crimes, 211–218
- double jeopardy, 186
- free speech, 178–179
- jury trial, 182–184
- search and seizure, 179–182
- special cases, 201–207
 - immigration and naturalization, 201–203
 - procedural issues, 206–207
 - prosecutorial immunity, 203–205
 - rules of evidence, 205–206
- liberalism, 1
- liberty, 141, 174
- life sentence, 35
- Livingstone, Edward, 176
- Locke, John, 1
- Macedo, Stephen, 153
- Madison, James, 24, 51, 135, 142, 165, 173, 188, 189
- Magna Carta, 163, 164
- mail fraud, 211–212
- Maitland, Frederic William, 142
- majoritarianism, 22–23
- Manchester Liberalism, 1
- mandatory drug testing, 65–66
- Manning, John, 15, 143
- manslaughter, 70–72, 85, 162
- Marian Statutes, 184
- marijuana, 106
- Marshall, John, 48, 106–107, 143, 152, 176–177
- Marshall, Thurgood, 38, 53, 56, 59, 66, 114, 204, 216, 227, 272n21, 284n6, 286n4, 295n13, 343n33, 349n48
- Mason, George, 51, 141, 152
- Massachusetts, 173
 - criminal practice in capital crimes, 162
 - executive-branch appointments in, 150
 - hard labor in 1786, 163
- materiality of misrepresentation, 211
- A Matter of Interpretation* (Scalia), 161
- McConnell, Michael, 167
- McConnell, Mitch, 11
- McCormick, Robert, 213
- Medicaid, 149
- medical malpractice, 226
- medical marijuana, 106
- Medicare, 149
- Meese, Edwin, 16, 201
- meliorist, 1
- mens rea*, 216–217
- Merkel, William G., 160
- Metzenbaum, Howard, 9–10, 11
- Michigan Chamber of Commerce, 114
- Mikva, Abner, 199
- militias, duty to serve in, 161
- minority business enterprises (MBEs), 38
- Miranda* Rule, 16, 36, 72, 149, 205, 239
- misappropriation theory of securities fraud, 217
- misrepresentation, 211
- monarchy, 135
- money laundering, 217–218
- monotheistic religions, 157
- Morgan, Edmund, 159
- Morris, Gouverneur, 138
- Morrison, Alexia, 102
- multiple personalities, 204
- murder, 70–72
- National Bank Act, 228
- national banking system, creation of, 142
- National Organization for Women, 114
- National Railroad Passenger Corp. (Amtrak), 53–54
- National Voter Registration Act of 1993 (NVRA), 227
- Native American Church, 124–125
- natural law, 237
- naturalization, 201–203
- Necessary and Proper Clause, 107, 109, 171
- Nelson, William, 133, 166, 173, 183
- New Deal, 240
- night-walker statutes, 67
- Ninth Amendment, 14
- nonconstitutional opinions, 197–200
- nonoriginalists, 241
- nontestimonial statements, 184, 185
- Noonan, John, T., Jr., 173, 193
- nude dancing, 28
- nude pictures, 55–56
- NVRA. *See* National Voter Registration Act of 1993
- Oaks, Dallin, 147
- Obama, Barack, 146
- obscenity, 58
- O'Connor, Sandra, 27, 38, 39, 55–60, 68, 71, 73, 83–84, 87, 88–89, 99, 114, 115, 125, 128, 129, 157, 193–194, 206, 213, 218, 268n29, 272n21, 278n40, 291n16, 296n6, 343n33, 345n32, 345n37, 349n48
- nonjudicial writings of, 246–248

Office of the Legal Counsel, 102
 Old Order Amish, 193
 Olson, Theodore, 102
 one man, one vote, 16
 originalism, 15–20, 139–145, 147, 181
 balancing and, 154
 Bill of Rights and, 144
 conscientious, 240
 conservative jurisprudence and, 19
 constitutional meaning and, 140
 framers and, 142–143
 fundamental problem in, 240
 government and, 141
 Great Compromise and, 140
 history, 133–136
 history and historical principles, adherence to, 240–241
 “law office” history and, 145–146
 legal community and, 145
 major problem with, 146–147
 Platonic ideal of, 149
 ratification of state conventions and, 143
 stare decisis doctrine and, 22–23
 violation of historical practice in, 146
 originalists
 moderated, 149
 qualified, 149
 overbreadth doctrine, 55–56

 Papists, 157
 parental rights, 21, 170
 Park Service regulations, 10
 partial immunity, 203
 patronage, 21
 petition signing, 118
 Philadelphia Convention, 16, 24, 172
 Pitney, Mahlon, 192
 plain view doctrine, 62
 Planned Parenthood Federation of America, 114
 plantation economy, 141
 pledge of allegiance, 30, 156–157
 plutocracy, 188
 political speech, 113–120
 anonymous electioneering, 117
 contributions, 113–117
 expenses, 113–117
 polygamy, 169
 polytheistic religions, 157
 pornography, 179, 214
 Posner, Richard, 19, 138, 145, 198
 Powell, H. Jefferson, 137, 141, 142, 147, 166, 177, 191, 241, 328n47, 349n48
 preambles, 160–161

Prebyterians, 156
 preemption, 227
 preemptory challenges, 130–131
 President
 impeachment of, 151
 powers of, 151
 press freedom, 59
 Presser, Stephen, 154
 price discrimination, 224–225
 price fixing, 225
 privacy rights, 38–45, 168–170
 private property, 188
 Privy Council, 171
 probable cause, 203
 probation, 219
 procedural protection and rights, 206–207
 prohibition, 171
 property rights, liberty and, 174
 proportionality principle, 162
 prosecutorial immunity, 203–205
 prospective jurors, 130
 Protestantism, 156
 pseudonymous (or anonymous speech), 114, 190–191
 public rights, 96
 public schools, 29
 punitive damages, 127–129
 Pure Food and Drug Act, 241
 Puritan New England, 155

 Quakers, 160
 qualified immunity, 203

 race discrimination
 minority business enterprises and, 38–39
 in schools, 16
 in student admissions, 39
 radio advertisements, 116
 Rakove, Jack, 145, 146, 159
 Raleigh, Walter, 185
 Ramar, Akhil Reed, 179
 Randolph, Edmund, 135
 Rawls, John, 2
Reading Law: The Interpretation of Legal Texts, 14, 15, 138
 Reed, Richard, 203
 Rehnquist, William, 11, 36, 43, 44, 51–52, 56, 57, 59, 87, 88, 97, 99, 114, 115, 131, 172, 185, 219, 220, 228, 272n21, 278n40, 291n16, 295n13, 297n6, 345n37, 348n45, 349n48
 Reid, John Phillip, 134, 174
 religion
 conflicted opinion on, 192–195
 free exercise of, 124–126

- in schools, 30
- separation of church and state, 238
- taxpayers and, 30
- Religion Clauses, 10, 155–156, 157, 193
- Religious Freedom Restoration Act of 1993 (RFRA), 125–126
- religious schools, 30
- republicanism
 - corruption and, 188–189
 - experiment in, 148
- resentencing, 219–220
- residual clause, 77
- Restatement of Torts* (1935), 181
- Revolutionary War, 173, 187
 - debt, 168
- RFRA. *See* Religious Freedom Restoration Act of 1993
- right to counsel, 92–94, 149
- right to die, 41, 169–170
- right to trial by jury, 79–85. *See also* Sixth Amendment
- Robbins, Jonathan, 176
- Roberts, John G., Jr., 39–40, 45, 51, 59, 63–64, 68, 86, 105, 109, 118, 153, 220, 223, 228, 230, 280n44, 286n4
- Roberts, Paul Craig, 90
- Robinson-Patman Act, 224–225
- Roeber, A. Gregg, 156
- Rossum, Ralph, 151–152
- routine auto checkpoints, 35
- rule of lenity, 209, 212
- rules of evidence, 205–206
- Rutledge, John, 135

- Sacks, Albert M., 13, 198
- Salem Witch Trials of 1692, 134
- same-sex marriage, 42, 45, 109
- sanity of prisoner, 162
- Santeria religion, 125
- Scalia, Antonin
 - agreement/disagreement with liberal SC decision of, 249
 - biography, 7
 - confirmation hearings, 7
 - Justices with whom Scalia served, 245
 - originalism of, 14, 238–242
 - conservative tendencies in, 239
 - dedication to, 239
 - historical assumptions in, 238–239
 - selective and passionate, 238
 - reputation as a conservative, 239–240
 - textualism of, 13–15, 239
- Schnapper, Eric, 166
- school prayer, 28–29
- school segregation, 167
- school vouchers, 30
- science, teaching in public schools, 29
- scientific evidence, 89–90
- search and seizure, 61–69, 179–182
 - buccal swab, 64–65
 - detention, 68
 - drug-sniffing dog, use of, 65
 - drunk driving, 65
 - frisk, 66–67
 - GPS tracking device in, 63–64
 - mandatory drug testing, 65–66
 - plain view doctrine, 62
 - special cases, 65–69
 - standard, 61
 - visual surveillance, 63
 - warrantless search of automobiles, 67–68
- search warrant, 204
- Second Amendment, 31–32, 157–162
 - Anti-Federalists and, 159
 - “bear arms” in, meaning of, 160
 - demolition of the preamble, 160–161
 - gun rights, 160
 - originalism and, 158
 - textualism-originalism and, 159
- securities fraud, 215, 217, 230
- Sedition Act, 141, 178
- segregation, 167
- Self-Incrimination Clause, 36, 72, 164–165. *See also* Fifth Amendment
- sentencing, 75–78
- Sentencing Commission, 84, 104–105
- Sentencing Guidelines, 84
- Sentencing Reform Act of 1984, 84, 104–105
- separation between church and state, 28
- separation of powers, 24, 101–105, 150
 - as antidote to tyranny, 151
 - Constitution and, 151
 - Constitutional Convention’s approach to, 151
 - due process and, 164
 - revenue law and, 154
- Seventeenth Amendment, 51
- Seventh Amendment, 20
 - diversity case, 96–97
 - originalist approach to, 183
 - preemptory challenges and, 130
 - right to jury trial, 95–97, 183
- sex crimes against children, 87
- Sex Offender Registration and Notification Act (SORNA), 108–109
- sex offenders, 209
- sexually oriented businesses, 27–28
- Shapiro, Barbara, 182
- Simon, Paul, 11

- Sixth Amendment
 - Confrontation Clause, 86–91
 - confrontation right, 91
 - death penalty and, 83
 - nontestimonial statements and, 184
 - preemptory challenges and, 130
 - right to counsel, 92–94
 - right to trial by jury, 79–85
 - tainted evidence and, 37
- Skilling, Jeffrey, 215
- slander of title, 128–129
- slave economy, 141
- Smith, Adam, 1
- Smolla, Rodney, 27
- Soames, Scott, 139
- Social Security system, 149
- sodomy, 38, 42, 169
- soft money, 115
- solitary confinement, 162
- Solum, Lawrence B., 240
- SORNA. *See* Sex Offender Registration and Notification Act
- Sotomayor, Sonia, 45, 59, 63–64, 109, 223, 225–226, 280n44
- Souter, David, 89–90, 91, 99, 147, 174, 221, 222, 281n46, 284n13, 284n16, 345n37, 346n62
- sovereign immunity, 50, 105
- sovereignty, divisible, 150
- Specter, Arlen, 11
- standing doctrine, 239
- standing parties, 175–177
- stare decisis* doctrine, 22–23, 44, 77, 149, 239, 242
- state immunity, 50
- statute of limitations, 226
- statutes, interpretation of, 197
- statutory construction, 230
- statutory maximum, 83–84
- statutory opinions, conservative, 229–232
 - class actions, 232
 - minority rights, 229
 - securities fraud, 230
 - sports, 230
- Stevens, John Paul, 19, 41, 63, 68, 71, 72, 73, 89–90, 91, 96, 99, 114, 115, 117–118, 119, 126, 128–129, 158, 190, 200, 205, 209, 213, 214, 220, 224–225, 228, 241, 272n21, 284n13, 284n16, 284n18, 286n4, 288n11, 289n5, 295n13, 343n33, 344n6, 349n48
- Stone, Harlan, 46
- stop and frisk, 35
- Story, Joseph, 137, 152, 156
- substantive due process, 164
- suicides, assisted, 169–170
- Sunstein, Cass, 145, 175
- supervised release, 219–220
- Suspension Clause, 99
- symbolic expressions, 178–179
- Taft, William, 192
- Takings Clause, 49, 168, 173–175. *See also* Fifth Amendment
- Taliban, 98
- tax cases, 215–216
- tax fraud, 81–82
- Teachout, Zephyr, 187–188
- telecommunications services, scope of, 221
- Ten Commandments, 29–30, 157
- Tenth Amendment, 168
- terrorism, *habeas corpus* and, 165
- Terry* stop, 67, 181–182
- testimonial statements, 185
- textualism, 13–15, 137–139
 - benefits of, 199
 - canons of construction in, 138
 - close reading of words in, 138
 - judicial activism and, 199
 - original understanding in, 138–139
 - placement of clauses in, 138
 - vagueness and, 137–138
- Thomas, Clarence, 30, 43, 44, 45, 63–64, 67, 72, 81, 89–90, 91, 97, 98, 107, 108, 109, 131, 165, 167, 185, 206–207, 208, 220, 227, 228, 235–237, 278n40, 280n44, 281n49, 283n49, 296n1, 344n6, 346n62, 348n45
- concurrency
 - in *Bush v. Gore*, 51–52
 - in *McIntyre v. Ohio Elections Commission*, 117–118, 190–191
 - in *Town of Greece v. Galloway*, 156–157
- dissent, 115
 - in *EEOC v. Abercrombie & Fitch Stores*, 222
 - in *Jennings v. Stephens*, 206
 - in *Virginia v. Black* cross-burning case, 236
- on freedom of speech, 236–237
- liberal opinions, 235
 - constitutional, 237
 - nonconstitutional, 237
- on natural law, 237
- nonliberal opinions, 237
- originalism and, 149, 235, 242
- originalist opinions, 91, 235–236
- on primacy of jury in criminal prosecutions, 235–236
- social philosophy of, 147
- TILA. *See* Truth in Lending Act
- Tillman Act, 116

- title insurance companies, 225
 Tocqueville, Alexis de, 114
 tort liability, 223–224
 trademark infringement, 101
 tradition, 20–22, 148
 Treanor, Michael, 138, 152, 173
 trespass
 personal, 180
 property, 71
 Tribe, Laurence H., 18, 27, 188–189
 criticism of Scalia's approach to *stare decisis*,
 149
 Truth in Lending Act (TILA), 225
 Tuckor, Thomas Tudor, 168
 Tushnet, Mark, 161
 tyranny, 24

 U.S. Customs Service, 65–66
 unreasonable search, 68
 usury, 227–228

 Vermont, 173
 Vice President, powers of, 151
 Victim Impact Statement (VIS), 34
 video games, 58–59
 Violence Against Women Act of 1994, 46
 violence in video games, 58–59
 violent felonies, 75–78. *See also* Fifth Amendment
 Virginia Military Institute, 41–42
 visitation rights, 170

voir dire, 109
 Voting Rights Act, 39–40, 153, 229

 waiver of rights, 90–91
 Waldman, Michael, 161
 warrantless arrest, 179–182
 warrantless search of automobiles, 67–68, 181
 Warren, Mercy Otis, 133
 Warren Court, 16, 147, 156
 Washington, George, 1793 declaration of
 neutrality, 191
 Wetterling Act, 108–109
 Whigs, 164
 White, Byron, 28, 59, 68, 114, 204, 213, 295n13,
 349n48
 white-collar crimes, 211–218, 237
 Whittaker, Charles Evans, 180
 Wilkinson, J. Harvie, 19, 158–159
 Wilson, James, 51, 152
 witness-tampering, 210
 women's rights, 11, 149
 abortion rights, 40, 153
 discrimination in employment and, 221
 Fourteenth Amendment and, 168
 Wood, Gordon, 134, 142, 144, 155, 172–173, 187,
 188, 193
 workplace testing for drugs, 65–66
 Wurzelbacher, Samuel Joseph, 146

 Zlotnick, David M., 73