

Index

Acemoglu, Daron, 25-26 independent court systems and Acton (Lord), 15 adjudicative authority, 141-48 ALJs, 141-43 independence of, 141-43 removal of, 142-43 under separation of powers, 142 fact-finding and, 146-47 adjudicative facts, 146-47 judgmental facts, 147 legislative facts, 147 interpretation of, 143-44 Auer deference, 144 Chevron deference, 144 Skidmore deference, 144 through policymaking, 145-46 by congressional approval, 145-46 cost-benefit standards in, 146 default rules, 146 limitations of, 145 restrictions on, 146 scope of decisions, 145 adjudicative facts, 135, 146-47 administrative courts. See also appellate administrative courts judicial review of, 147-48 administrative law. See also adjudicative authority; rule-making authority; separation of powers classical liberalism and, 105-6 fact-finding in, 146-47 and, 51 adjudicative, 135, 146-47 in deference, 135-37 judgmental, 136-37, 147 legislative, 135-37, 147 guidance documents, 149–51 private parties and, penalties against, 151 societal effects of, 52

deferences in, 108-9 establishment of, 107-8 informal adjudication of, 151-52 judicial review, 150 legislative rules, review of, 108-9 REINS Act proposals, 108 substantial-impact test, 150 administrative law judges (ALJs), 141-43 independence of, 141-43 removal of, 142-43 under separation of powers, 142 Administrative Procedure Act, U.S., 137 Aesop's Principle, 208 Affordable Care Act, U.S., 119 African Americans. See also anti-discrimination laws; mass incarceration; race; racism Jim Crow laws against, 49-51 Against Democracy (Brennan), 168 ALJs. See administrative law judges anarcho-capitalism, 256 Anderson, Terry, 69 anti-discrimination laws freedom of conscience under, 53-54 function and purpose of, 48 against hate speech, 48 Jim Crow laws and, 49-52 Civil Rights Act and, 51-52 federal takeover of local governments non-violent protests against, 51 libertarian skepticism of, 47-48, 53 religion under, 53-54 scope of, 48-49 sexual orientation under, 54



Index 302 Bourne, Randolph, 16 anti-discrimination laws (cont.) U.S. Supreme Court rulings on, 55 Bramwell, Baron, 2, 227 Brandeis, Louis, 242-44 under Wagner Act, 49 Brennan, Jason, 168-69, 184, 189 anti-humanitarianism, 21–22 appellate administrative courts, 139-41 Brunnermeier-Parker model, 210-11 Arendt, Hannah, 159-60 bundle-of-rights metaphor, for property, 217-19 association. See freedom of association criticism of, 220-21 Auer doctrine, 112 bureaucratic interests, separation of powers and, deference in, 131, 144 119-20 authority. See adjudicative authority; rule-making The Calculus of Consent, 168 authority California Correctional Peace Officers Association background state action, 275 (CCPOA), 265 capitalism. See also liberal capitalism ballot box voting, 82 consent and, 86-89 anarcho-capitalism, 256 Capitalism and Freedom (Friedman), 18-19 foot voting compared to, 84-89 through informed and rational choice, 84-86 Capitalism and the Historians, 18 through meaningful choice, 84-86 Carens, Joseph, 188 Castro, Martin, 288 in theories of political freedom, 86-89, 103 negative freedom and, 86-89 CCPOA. See California Correctional Peace nondomination and, 86-89 Officers Association positive freedom and, 86-89 Chevron doctrine, 112 Barlow, John Perry, 245-46 deference and, 131-34, 144 Barry, Brian, 20-21 China, 95-96 Bartlett, Bruce, 49-50 Chodorov, Frank, 14, 18 choice of law clauses, 83 Bastiat, Frederic, 15 Civil Rights Act (1964), U.S., 47, 49, 51-52 Baumol, William, 240 Beckett, Katherine, 266 classical liberalism, 232-37 behavioral economists consequentialist arguments, 23 on market failure, 192-93 contextual choice, 271-72 rationality and, 192-93 deontological arguments, 23 context for, 199-200 distribution problems, 276-77, 296-98 psychological concepts, 199-200 externalities and, 270-71 beliefs. See superstitious prior beliefs same sex marriage as, 271 Berlin, Isaiah, 31, 159 fundamental disagreement issues, 275-76, Bernard of Clairvaux, 258 294-96 historical location problems, 277-78, in constitutionalism, 172 298-300 hermeneutics and, 195 definitional issues, 298-99 irrationality and, overoptimism as, 209 substantive issues, 299-300 overoptimism as, 209 individual autonomy under, 280 rationality and, 207-11 institutional preferences in, 233 optimism against procrastination, 208-9 just compensation and, 282 Bill of Rights, 14 libertarianism as distinct from, 233, 256-57 Bismarck, Otto von, 17 moral foundations for, 234 Blake, Michael, 182 regulatory intervention and, 235 Bourgeois Argument, for immigration, 186-90 scope of, 22-23 conflicts within, 176 technology and, 237-44, 252-56 ethics in, 188-89 under common law, 243, 255-56 Great Enrichment and, 186-87 distribution of rights and rents, 241 national security issues in, 189-90 institutional environments influenced by,

normative principles in, 187 open borders argument, 190

Bourgeois Equality (McCloskey), 176

legal institutions influenced by, 243-44

personal privacy and, 241-43



private ordering promotion, 255–56	public power and, 170–71
skepticism of, 238	religion and, 170–71
transaction costs and, 236-37	rent-seeking, 170
in personam rights and, 236-37	requirements of, 170
in rem rights and, 236–37	constitutive rules, for rationality, 192
voluntary transactions in, 280	contextual choice, 271–72
welfare economics and, 235-36	cooperative federalism, 97
as welfare enhancing, 234	copyright protections, 223
Clemens, Michael, 34, 184	cost-benefit standards, in adjudicative authority,
climate change	146
pollution problems and, 71–72	court systems. See administrative courts;
property rights and, 65	independent court systems
Clinton, Hillary, 279	crime rates, mass incarceration influenced by,
Coase, Ronald H., 56, 59, 69, 237	263–64
Cobden, Richard, 15	crony capitalism, 229
coercion. See government coercion	crude governmentalism, 26–28
cognitive abilities, irrationality and, 206–7	premises of, 26–27
Cohen, G. A., 29–30	cryptocurrencies, 249
collective action problem, 294–95	crypto-libertarianism, 256
Collier, Paul, 36	cultural nativism, 182–84
common law	cyber-exceptionalist perspective, 246–48
classical liberalism and, 243, 255–56	harm in, 248
pollution problems under, 69	intermediaries and, 248
	permissionless innovation, 247–48, 253
technological changes under, 243, 255–56	
compensatory damages, 216	property rights and, 252
Congress, U.S.	cyberspace. See cyber-utopianism
adjudicative authority of, 145–46	cyber-utopianism, 245–46
rule-making authority of, 121, 123–30	decontrolination of names in Europe
anticipation of congressional positions, 130	decentralization of power, in Europe, 10–13
approval of, 122	by Dutch, 11
through procedural changes, 124–30	in England, 11–12
resubmission limitations for regulatory	from royal absolutism, 11
changes, 129	Declaration of Independence, 13–14
through single rule determination,	Declaration of the Independence of Cyberspace
126–28	(Barlow), 245–46
for take it or leave it regulatory proposals,	defamation, 285–86
128–29	default rules, 146
conjunction fallacy, 200–1	deference, 130–39
consent, 86–89	Auer, 131, 144
consent theory, libertarianism and, 165	Chevron, 131–34
consequentialist arguments, 23	in independent court systems, 108–9
consistence criterion, for rationality, 197	interpretive, 131–35
Constant, Benjamin, 15, 153	legal realism and, 133
constitutionalism of, 153–54	nondelegation doctrine and, 137–39
Constitution, U.S., 14	policy discretion as influence on, 132
limited government under, 111	policymaking and, 137–39
separation of powers established by, 111	Skidmore, 134–35, 144
constitutional law, 291–93	delegation of authority. See adjudicative authority
constitutionalism, 169-73	rule-making authority
bias in, 172	deliberative democracy, 86
of Constant, 153–54	Delong, Brad, 24
open access orders and, 170	democracy
private power and, 170–71	deliberative, 86
wealth and, 171	political realism and, 164



Demographic Argument, for immigration, 176–77,	of forests, 61
185–86	management approach to, 62
in U.S., 185	pollution problems and, 69–71
welfare benefits in, 186	scope of, 63–64
Demsetz, Harold, 60	"Tragedy of the Commons" influenced by,
deontological arguments, 23	59–60, 63
difference principle, 178-79	wealth effects and, 62
Director, Aaron, 3, 18	"Tragedy of the Commons" and, 57–60
discrimination. See also anti-discrimination laws;	conceptual origins of, 58-59
racism	prescriptive government regulation and,
defined, 49	59–60
The Disintegration of Property (Grey), 213-14	private property and, 59-60, 63
distribution problems, 276-77, 296-98	variants of, 59
distributive justice	water rights and, 66-68
egalitarian, 35	water rights and, 65–68
as social justice, 32	ITQ and, 67–68
domestic law, immigration in, 177-78	management approaches to, 66
restrictions on, 177–78	for marine fisheries, 66–68
Due Process Clause, 3	"Tragedy of the Commons," 66–68
duty to rescue and assist, 293	transferability of, 64-65
Dworkin, Ronald, 187	Epstein, Richard, 227, 234, 254, 257, 259
, , , ,	ethics, in Bourgeois Argument, 188–89
economic growth, property rights and, 40	ethnicity, foot voting and, 90-92
economic markets	Europe
behavioral economists and, 192-93	decentralization of power in, 10–13
failure of, 192–93	Dutch and, 11
in France, 12	in England, 11–12
mass incarceration as correlate of, 262-63	royal absolutism and, shift from, 11
neoclassical economists and, 192-93	natural law doctrine in, 11
political realism and, 163	executive orders, on immigration, 189
economic rivalry, 43	executive power
Edge, Rosalie, 64	judicial power in combination with, 112
egalitarian liberalism, 22	legislative power in combination of, 113
egalitarian redistribution, 35	exit voting, 82
eminent domain, 63	externalities, political, 282–86
England	classic liberalism and, 270–71
decentralization of power in, 11–12	same sex marriage as, 271
Levellers in, 11–12	foot voting and, 93-95
English Corn Laws, 15	extreme ideologies, separation of powers and, 116–18
Environmental Kuznets Curve, 62	by government employees, 117–19
environmental protection	by judges, 118–19
climate change	by Presidents, 118
pollution problems and, 71–72	,
property rights and, 65	facts, in administrative law, 146-47
historical context for, 56-57	adjudicative, 135, 146–47
under limited government, 56	in deference, 135–37
pollution problems and, 68–72	judgmental, 136–37, 147
climate change factors, 71–72	legislative, 135–37, 147
under common law principles, 69	Fagan, Jeffrey, 266
property rights and, 69-71	Faith Spotted Eagle, 1
property rights and, 60–68	fascism, 16–17
climate change and, 65	The Fatal Conceit (Hayek), 173
eminent domain and, 63	fear, liberalism of, 158
Environmental Kuznets Curve and, 62	feasance problems, 273–75



Federal Tort Claims Act, U.S., 293	Galston, William, 156
federalism. See cooperative federalism	Geist, Valerius, 64
first-user appropriation, property rights and, 37-39,	Glennon, Robert, 64
44-45	global governance, foot voting influenced by,
Flynn, John T., 18	101–3
folk psychology, 194–95	Godkin, R. L., 14
foot voting, 82	goods
ballot box voting compared to, 84-89	defined, 40–42
through informed and rational choice, 84-86	property rights for, 40-44
through meaningful choice, 84-86	want satisfaction and, 41
in theories of political freedom, 86-89, 103	Gorsuch, Neil, 3
in China, 95–96	government coercion, 272-73
choice of law clauses and, 83	governmentalism. See crude governmentalism
consent and, 86–89	Great Enrichment, 186-87
cooperative federalism and, 97	Great Society, 46
deliberative democracy and, 86	Grey, Thomas, 213-14. See also property; property
expansion of, 95-103	rights
in domestic contexts, 95–99	guidance documents, 149-51
through global governance, implications of,	private parties and, penalties against, 151
101–3	
through international law, implications of,	Hale, Robert, 272, 290-91. See also private power
101–3	Hardin, Garrett, 57-58
through international migration expansion,	harm principle, 2, 283
99–101	in cyber-exceptionalist perspective, 248
in private sector, 98–99	hate speech, 1
individualism in, 84	anti-discrimination laws against, 48
modes of, 82-84	libertarianism and, 48
through international migration, 82–83	Hayek, F. A., 17–18, 42, 74, 173
through jurisdictional choice, 82	on social justice, 33
in private sector, 83	Hazlitt, Henry, 18
negative freedom and, 86–89	Hemel, Daniel, 287
nondomination and, 86–89	hermeneutics, in rationality
positive freedom and, 86–89	bias, 195
refugee status and, 101–2	folk psychology and, 194–95
self-determination objections to, 90–95	neuroeconomics and, 195
by ethnicity and race, 90–92	Herzen, Alexander, 167
free migration and, 93-95	Hirschman, Albert, 82
group rights claims, 90–92	historical location problems, 277–78,
individual rights claims, 92-93	298–300
by national origin, 91	definitional issues, 298–99
political externalities and, 93-95	substantive issues, 299–300
in U.S., 95–96	Hobbes, Thomas, 87
forests, property rights for, 61	holism, 165–66
formal rights, 24	Holland, decentralization of power in, 11
France, free market in, economists' support for, 12	Huemer, Michael, 35, 168–69
freedom. See negative freedom; political freedom;	hukou system, in China, 95–96
positive freedom	Hume, David, 12, 23, 42, 155
freedom of association, 181–82	I.D. (I/D. 1)
freedom of conscience, 53–54	I, Pencil (Read), 75–79
freedom of contract, 233, 243	ideal theory, of justice, 28–31
Freeman, Samuel, 169	moral hazards and, 30
Friedman, Milton, 18–19, 23, 79–80	in social institutions, 30
fundamental disagreement problems, 275–76,	socialism compared to, 29
294–96	ideological beliefs. See extreme ideologies



immigration	limitations of, 223
Bourgeois Argument for, 186–90	transaction costs for, 224-27
conflicts within, 176	technology as, 251-52
ethics in, 188–89	as theory, 222–23
Great Enrichment and, 186–87	interest group pluralism, 219
national security issues in, 189–90	international law
normative principles in, 187	foot voting influenced by, 101–3
open borders argument, 190	immigration in, 177–78
Demographic Argument for, 176–77, 185–86	restrictions on, 178
in U.S., 185	international migration
welfare benefits in, 186	foot voting and
difference principle, 178–79	expansion of, 99–101
under domestic law, 177–78	free migration and, 93–95
restrictions on, 177–78	modes of, 82–83
economic pro-immigration arguments, 184–90	positive freedom and, 88
executive orders on, 189	interpretive deference, 131–35
freedom of association and, 181–82	IP. See intellectual property
under international law, 177–78	irrationality, 204–11
restrictions on, 178 restrictive policies on	bias and, overoptimism as, 209 costs of, 205
*	
cultural nativist arguments, 182–84	dichotomy between rationality and, 195–97
under domestic law, 177–78	limited cognitive abilities and, 206-7
under international law, 178	overoptimism
justifications for, 178–84	as bias, 209
protection of domestic poor arguments for,	as utility-enhancing, 210–11
178–80	social consequence of, 205
self-determination arguments for, 180–82	superstitious prior beliefs, 205
immigration rights, social justice and, 33–36	ITQ. See individual transfer quota
in personam rights	I Th
classical liberalism and, 244	Jefferson, Thomas, 13–14
transaction costs and, 236–37	Jim Crow laws, 49–52
in rem rights	Civil Rights Act and, 51–52
classical liberalism and, 244	federal takeover of local governments
transaction costs and, 236–37	and, 51
independent court systems	non-violent protests against, 51
deferences in, 108–9	Johnson, Gary, 1, 52
establishment of, 107–8	Johnson, Lyndon, 279
individual autonomy, 280	judges
individual transfer quota (ITQ), 67–68	ALJs, 141–43
individualism, in foot voting, 84	independence of, 141–43
industrialization, liberalism influenced by, 14	removal of, 142–43
informal adjudication, 151–52	under separation of powers, 142
intellectual property (IP)	extreme ideologies of, 118–19
academic analysis of, 221–23	on separation of powers, 114–15, 142
copyright protection of, 223, 226	judgmental facts, 136–37, 147
growth of, in modern law, 213	judicial power
labor as, 228	executive power in combination with, 112
language of, 221	legislative power in combination with, 113
libertarianism and, 251–52	judicial review
moral rights protection for, 225	by administrative courts, 147–48
patent protection for, 225	of administrative law, 150
preference-satisfaction and, 227–28	rule-making authority through, 123
as regulation, 226–27	under REINS Act, 126
right to, 221	just compensation, 282
justification of, 222	justice. See ideal theory; social justice



Kirzner, Israel, 18	consequentialist arguments, 23 crypto-libertarianism, 256
labor	deontological arguments, 23
division of	goals of, 81
mass incarceration and, 268-69	hate speech and, 48
property rights and, 45	holism and, denial of, 165-66
as IP, 228	intellectual roots of, 21-22
labor unions	Jim Crow laws and, approach to, 51–52
CCPOA, 265	non-violent protests against, 51
police, 265	legitimacy of state and, 164-65
prison, 265	mass incarceration and, 173-75
under Wagner Act, 49	through over-policing, 174-75
Landes, William, 219–20	political legitimacy and, 175
law. See tort law	as source of unfreedom, 174
Leal, Donald, 69	through "war on drugs," 173–74
Leeson, Peter, 205	nationalism and, denial of, 165-66
legal realism, 133	organicism and, denial of, 165-66
property and, 214	populism and, 166-67
Leggett, William, 14	denial of, 165–66
legislative facts, 135–37, 147	property rights and, 26
legislative power	racism and, 47
executive power in combination with, 113	scope of, 22–23
judicial power in combination with, 113	social justice and, 32–33
legislative rules, 108–9	techno-libertarianism, 256
Levellers, 11–12	technology and, 244–52
liability, 293	cyber-anarchism approach, 249
liberal capitalism, 164	cyber-exceptionalist perspective, 246–48, 252
liberalism. See also classical liberalism	cyber-utopianism perspective, 245–46
as anti-humanitarian, 21–22	extreme view of, 245–49
egalitarian, 22	IP and, 251–52
of fear, 158. See also political realism	moderate view of, 250–52
intellectual roots of, 21–22	thick, 154
in 19th century, 13–16	
industrialization as influence on, 14	in 20th century, 22–23 in U.S., 2
·	
rejection of, 15–16	liberties. See rights and liberties
religion and, 15	liberty, property as constraint on, 233
socialists' response to, 15	"The Liberty of the Ancients Compared With
in U.S., 13–14	That of the Moderns" (Constant), 153
of Rawls, 154–55	limited government
in 20th century, 16–19, 22–23	environmental protection under, 56
criticisms of, 22	separation of powers and, 111
rebirth of, 17–19	under U.S. Constitution, 111
in Russia, 16	Locke, John, 11, 23, 87
welfare state and, development of, 17	on property rights, 37
World War I as influence on, 16–17	first-user appropriation, 37–39, 44–45
"Liberalism of Fear" (Shklar), 157–58	Lomasky, Loren, 183
Libertarian Party, 1	M 1 551
libertarianism. See also constitutionalism; political	Macauley, Thomas, 15
realism	Maddison, Angus, 24–25
anarcho-capitalism and, 256	Marx, Karl, 16
anti-discrimination laws and, skepticism of,	on formal rights and liberties, 24
47–48, 53	mass incarceration, 173-75
as anti-humanitarian, 21–22	as correlate of free market, 262–63
classical liberalism as distinct from, 233, 256–57	crime rates as influence on, 263–64
consent theory and, 165	defined, 261



308

mass incarceration (cont.)

Cambridge University Press 978-1-108-41693-1 — The Cambridge Handbook of Classical Liberal Thought Edited by M. Todd Henderson Index **More Information**

in deregulatory agenda, 269 division of labor argument for, 268-69 non-ideal theory, of social institutions, 29 intergenerational dynamics of, 267-68 North, Douglas, 32 misconceptions about, 261 Nowrasteh, Alex, 180 Nozick, Robert, 20-21, 23, 29, 272 through over-policing, 174-75 political economy of, 264-67 nuisance, 285 through police and prison unions, 265-66 political legitimacy and, 175 Obama, Barack, 260, 279-80 racial disparities in, 260-61 object of choice, rationality and, 198 social welfare provisions and, 263 Olson, Mancur, 294 as source of unfreedom, 174 On Liberty (Mill), 2 as tool of social control, 260 open borders argument, 190 through "war on drugs," 173-74, 266-67 open-access orders, 164, 170 McCloskey, Dierdre, 176, 186 optimism against procrastination, 208-9. See also Mencken, H. L., 14, 18 overoptimism Menger, Carl, 15 organicism, 165-66 mercantilism, 172-73 overoptimism critique on, 33 as bias, 209 microfoundationalism, 162, 168 Brunnermeier-Parker model, 210–11 militarism, 172-73 as utility-enhancing, 210-11 over-policing, 174-75 Mill, John Stuart, 2, 283 Mises, Ludwig von, 17 ownership, property and, 214-15, 217 misfeasance problems, 291-93 criticism of, 220-21 modern states legitimacy of, 164-65 Page, Joshua, 265 as locus of violent power, 166 Paine, Tom, 13 political realism in, 163 patent protection, for IP, 225 development of economic markets, 163

Index

Nagel, Thomas, 179 National Audubon Society, 63 national security, immigration and, 189-90 National Socialism, 16-17 nationalism, 165-66, 172-73 natural law doctrine, in Europe, 11 Nazism, 16-17 negative conceptions of liberty, 31 negative freedom, 86-89 neoclassical economists on market failure, 192-93 rationality and, 192-93, 212 neuroeconomics, 195 Nock, Albert Jay, 14, 18 nondelegation doctrine, 137-39

emergence of, 163 Mont Pelerin Society, 18

moral rights, protection of, 225

in classical liberalism, 234

Morley, Felix, 18

Morriss, Andrew, 62

microfoundations for, 162, 168

political realism and, 162-63

nonfeasance problems, 273-75, 291-93

nondomination, 86-89

Paul, Rand, 47 permissionless innovation, 247-48, 253 personal meaning, 202 personal privacy, technology and, 241-43 Pevnick, Ryan, 182 Pfaff, John, 263-64 pluralism. See interest group pluralism Pogge, Thomas, 33-34 political correctness, 1 political externalities. See externalities political freedom, theories of, 103 consent in, 86-89 negative freedom, 86-89 nondomination, 86-89 positive freedom, 86–89 political libertarianism. See libertarianism political party interests, separation of powers and, 119 political political theory (concept), 155-56 Political Political Theory (Waldron), 160 political realism Arendt on, 159-60 democracy and, 164

economic markets in, development of, 163

liberal capitalism and, 164

modern state and, 163

emergence of, 163



morality and, 162–63	ownership element of, 214–15, 217
open-access orders and, 164	criticism of, 220-21
Shklar on, 157–59	things as element of, 214, 220
Waldron on, 155–56, 160–61	property rights, 24. See also private property
Williams on, 155–56, 159, 161–63	classical liberalism and, 26, 280
pollution problems, 68-72	centrality of rights, 231
climate change factors, 71–72	cyber-exceptionalist perspective and, 252
under common law principles, 69	decentralization of, 233–34
property rights and, 69–71	definition of, 233
populism, 165–67	division of labor and, 45
positive conceptions of liberty, 31	economic growth and, 40
positive freedom, 86–89	in economic history, 38
international migration and, 88	environmental protection and, 60–68
Posner, Richard, 219–20	climate change and, 65
poverty, social justice and, 34–35	eminent domain and, 63
power. See executive power; judicial power;	Environmental Kuznets Curve and, 62
	of forests, 61
legislative power	
preference theory, 197	management approach to, 62
preferences, 286–89 formation of, 286–89	pollution problems and, 69–71
	scope of, 63–64 "Tragedy of the Commone" influenced by
imperfect obligations, 287	"Tragedy of the Commons" influenced by,
private, 288–89	59–60, 63
public, 288–89	wealth effects and, 62
for rectification of past social injustices, 289	fall of Soviet Union and, 214–15
same-sex rights and, 288	as form of regulation, 228–29
preference-satisfaction, IP and, 227–28	for goods, 40–44
prescriptive government regulation, 59-60	Locke on, 37
prescriptive rules, for rationality, 192, 212	Takings Clause, 215
Presidents, U.S., extreme ideologies of, 118	water, 65–68
privacy. See personal privacy	ITQ and, 67–68
private law, 291–93	management approaches to, 66
private ordering, 235	for marine fisheries, 66–68
private parties, guidance documents and, 151	"Tragedy of the Commons," 66–68
private power, 272–73, 290–91	transferability of, 64–65
private preferences, 288–89	protection of domestic poor, 178–80
private property, 37–40	Proudhon, Pierre-Joseph, 233
as form of regulation, 228–29	public preferences, 288–89
institutional standing of, 213	
labor as, 228	race. See also mass incarceration
"Tragedy of the Commons" and, 59–60, 63	criminality as connected with, 258–59
transferability of, 64	foot voting and, 90-92
private sector, foot voting in	racism. See also mass incarceration
modes of, 83	criminality and, 258–59
in private sector, 98–99	libertarianism and, 47
property. See also intellectual property; private	Rand, Ayn, 20–21
property	rationality, 194–204. See also irrationality
bundle-of-rights metaphor, 217–19	Aesop's Principle, 208
criticism of, 220–21	ballot box voting and, 84–86
as constraint on liberty, 233	behavioral economists and, 192–93
defined, 38	context for, 199-200
exchange and, 43	psychological concepts, 199–200
as form of regulation, 219–20	bias and, 207–11
interest group pluralism and, 219	optimism against procrastination, 208-9
legal realism and, 214	overoptimism as, 208–9



rationality (cont.)	justifications for, 178–84
consistence criterion, 197	protection of domestic poor arguments for,
constitutive rules, 192	178–80
defined, 194, 207	self-determination arguments for, 180-82
dichotomy between irrationality and, 195-97	review. See judicial review
foot voting and, 84-86	The Right to Privacy (Warren and Brandeis),
hermeneutics in	242-44
bias, 195	rights and liberties, 24-26. See also immigration
folk psychology and, 194–95	rights; property rights; water rights
neuroeconomics and, 195	formal, 24
meaning context for, 197–99	ideological battles over, 31-32
conjunction fallacy, 200–1	negative conceptions of, 31
ecological, 201–3	positive conceptions of, 31
in experiments, 200–1	self-mastery and, 31
personal meanings, 202	Road to Serfdom (Hayek), 18
temporal monotonicity, 201–2	Robbins, Lionel, 17
neoclassical economists and, 192–93, 212	Robespierre, Maximilien, 74
normative criteria for, 191	Robinson, James, 25–26
object of choice, 198	Rodrik, Dani, 26
preference theory, 197	Roepke, Wilhelm, 17
prescriptive rules, 192, 212	Roland, Gérard, 25–26
purpose and function of, 203–4	Roosevelt, Franklin, 52
role of, 211	Rosenberg, Nathan, 32
· · · · · · · · · · · · · · · · · · ·	· · · · · · · · · · · · · · · · · · ·
in social contexts, 194	Rothbard, Murray, 18, 23
Rawls, John, 29–31, 169, 275	royal absolutism, shift away from, 11
difference principle, 178–79	rule of law, separation of powers and, 111–12
Raz, Joseph, 182	Auer doctrine, 112
Read, Leonard, 14, 75–79	Chevron doctrine, 112
Reagan, Ronald, 279	rule-making authority, 121–41
realism. See legal realism; political realism	of appellate administrative courts, 139–41
refugee status, 101–2	costs for, determination of, 125–26
regulations. See also prescriptive government	deference in, 130–39
regulation	Auer, 131
under classical liberalism, 235	Chevron, 131–34
IP as form of, 226–27	fact-finding and, 135–37
prescriptive government, 59–60	interpretive, 131–35
property as form of, 219–20	legal realism and, 133
property rights as form of, 228–29	nondelegation doctrine and, 137–39
resubmission limitations for, 129	policy discretion as influence on, 132
take it or leave it proposals, 128–29	policymaking and, 137–39
Rehavi, Marit, 267	Skidmore, 134–35
REINS Act, U.S., 123–24	elimination of, 121
administrative law and, 108	through judicial review, 123
determination of single rules, 126–28	REINS Act, 123–24
judicial review under, 126	determination of single rules, 126–28
rules defined under, 125	judicial review under, 126
religion	rules defined under, 125
under anti-discrimination laws, 53-54	statute limitations, 122
liberalism and, 15	by U.S. Congress, 121, 123–30
rent-seeking, 170	anticipation of congressional positions, 130
restrictive policies, on immigration	approval by, 122
cultural nativist arguments, 182-84	procedural changes by, 124–30
under domestic law, 177–78	resubmission limitations, for regulations,
under international law, 178	129



single rule determination, 126–28	Sherman Act, U.S., 255
for take it or leave it regulatory proposals,	Shklar, Judith, 157–59
128–29	Simmons, A. John, 92
Russia	Singer, Peter, 33–34
illiberal views in, 94	Skidmore deference, 134–35, 144
liberalism in, 16	Smith, Adam, 12, 21, 23, 25, 33, 42-43, 46, 171
Marxism in, 16	Smith, R. J., 63
,	Smith, Vernon, 38
Sachs, Jeffrey, 20	social contracts, 287
same-sex rights, 288	theory of, 173
to marriage, 271, 286	social control, through mass incarceration, 260
Samuelson, Paul, 199	social democrats. See socialists
Schlesinger, Arthur, Jr., 18	social institutions
Schmidtz, David, 45, 183	ideal theory in, 30
Scotland, spontaneous evolution of social	non-ideal theory of, 29
institutions in, 12	spontaneous evolution of, 12
Scott, Anthony, 60	*
Seidman, Michael, 282, 298–300	social justice, 32–36 distributive justice as, 32
self-determination arguments, for immigration,	egalitarian, 35
180–82	Hayek on, 33
self-mastery, 31	immigration rights and, 33–36
self-ownership, 280	libertarianism and, 32–33
separation of powers, 106, 109–21	poverty and, 34–35
ALJs under, 142	social welfare provisions, mass incarceration and,
analysis of	263
modern, 116–21	Socialism (von Mises), 17
traditional, 111–16	socialism, ideal theory compared to, 29
bureaucratic interests and, 119-20	socialists, liberalism and, rejection of, 15
extreme ideologies and, 116–18	Soviet Union, fall of, antipathy to property rights a
by government employees, 117–19	influence on, 214–15
by judges, 118–19	special interests, separation of powers and, 120-21
by Presidents, 118	Spencer, Herbert, 15–16
guidance documents, 149	Starr, Sonja, 267
incentives for branches of government under,	state action doctrine, 274
112–13	background, 275
executive and legislative power, combination	Stern, Marc, 55
of, 113	Stigler, George, 18
judicial and executive power, combination of,	Storey, Moorfield, 50
112	substantial-impact test, 150
judicial and legislative power, combination	Sumner, William Graham, 15–16
of, 113	superstitious prior beliefs, 205
limitations on agency powers, 113	Supreme Court, U.S., anti-discrimination law
limited government and, 111	rulings, 55
objections to, 114–16	3 ,,
by judges, 114–15	take it or leave it regulatory proposals, 128–29
in tricameral lawmaking system, 115–16, 120	Takings Clause, 215
political party interests and, 119	techno-libertarianism, 256
rule of law and, 111–12	technology, contemporary
Auer doctrine, 112	benefits of, 239
Chevron doctrine, 112	classical liberalism and, 237–44, 252–56
special interests and, 120–21	under common law, 243, 255–56
in U.S. Constitution, establishment of, 111	distribution of rights and rents, 241
sexual orientation, under anti-discrimination	institutional environments influenced by,
laws, 54	240–41
············	" †" †*



312 Index

technology, contemporary (cont.) Declaration of Independence in, 13-14 legal institutions influenced by, 243-44 Demographic Argument in, for immigration, 185 personal privacy and, 241-43 Federal Tort Claims Act, 293 private ordering promotion, 255-56 foot voting in, 95-96 skepticism of, 238 Jim Crow laws in, 49–52 criticism of, 239-40 under Civil Rights Act, 51-52 defined, 231 Civil Rights Act and, 51-52 enforceability of federal law through, 239 federal takeover of local governments and, 51 freedom of contract and, 233, 243 non-violent protests against, 51 libertarianism and, 244-52 liberalism and, in nineteenth century, 13-14 cyber-anarchism approach, 249 libertarian beliefs in, 2 cyber-exceptionalist perspective, 246-48, 252 mass incarceration in, 173-75 through over-policing, 174-75 cyber-utopianism perspective, 245-46 extreme view, 245-49 political legitimacy and, 175 IP and, 251-52 as source of unfreedom, 174 moderate view, 250-52 through "war on drugs," 173-74 permissionless innovation, 247-48, 253 REINS Act, 123-24 temporal monotonicity, 201-2 determination of single rules, 126-28 Thatcher, Margaret, 279 judicial review under, 126 thick libertarianism, 154 rules defined under, 125 Sherman Act, 255 Thierer, Adam, 247 Thierry, Augustin, 15 tricameral lawmaking system in, 115-16, 120 things, as element of property, 214, 220 deregulation under, obstacles to, 115-16 Thomas, Robert, 32 Wagner Act, 49 Tiebout, Charles, 97 U.S. Congress. See Congress, U.S. Tocqueville, Alexis de, 15 tort law, 280-81 van der Vossen, Bas, 184 "Tragedy of the Commons," 57-60 voice voting, 82 conceptual origins of, 58-59 voluntary transactions, in classical liberalism, 280 prescriptive government regulation and, 59-60 voting. See also ballot box voting; exit voting; private property and, 59-60, 63 foot voting variants of, 59 meaningful choice in, 84-86 water rights and, 66-68 rationality in, 84-86 transaction costs voice, 82 classical liberalism and, 236-37 in personam rights and, 236-37 Wagner Act (1935), U.S., 49 Wakefield, Sarah, 267-68 in rem rights and, 236-37 for IP rights, 224-27 Waldron, Jeremy, 160-61 political political theory concept, 155-56 transferable rights, for water markets, 64-65 tricameral lawmaking system, 115–16, 120 want satisfaction, goods and, 41 deregulation under, obstacles to, 115-16 "war on drugs," 173-74, 266-67 Warren, Samuel, 242-44 Trump, Donald, 279 water rights, 65-68 unfreedom, through mass incarceration, 174 ITQ and, 67-68 United States (U.S.). See also Congress, U.S.; management approaches to, 66 Presidents; separation of powers; Supreme for marine fisheries, 66-68 "Tragedy of the Commons," 66-68 Administrative Procedure Act, 137 transferability of, 64-65 Affordable Care Act, 119 wealth effects, 62 Wealth of Nations (Smith, A.), 21, 25, 42-43, 171 Bill of Rights, 14 Civil Rights Act, 47, 49 Weld, William, 1 Jim Crow laws under, 51-52 welfare economics. See also social welfare Constitution, 14 provisions separation of powers established by, 111 classical liberalism and, 235-36



Index 313

welfare state. *See also* social welfare provisions liberalism and, 17 protection of domestic poor argument and, 180 in 20th century, 17 Wellman, Christopher, 180–81 *Why Not Socialism?* (Cohen), 29–30 Wildeman, Chris, 267–68 Will, George, 52

Williams, Bernard, 155–56, 159, 161–63 Wilson, Harold, 279 Wilson, Woodrow, 16–17 World War I, liberalism influenced by, 16–17

xenophobia, 172-73

Yandle, Bruce, 69-70