Index

abortion
  Dobbs v. Jackson Women's Health Organization, 141
  morals regulations for, 141
  Roe v. Wade, 145–46
Adams, John, 38
Adams, Willi Paul, 93–94
administrative bureaucracy and power, delegation of
  anti-administrativist movement, 135, 192, 266
  expertise in, 188–93
  Major Questions Doctrine, 191–92
  New Deal policies and, 189, 190
  under nondelegation doctrine, 188
  skepticism of, 190–91
  special purpose authorities, 189–90
administrative law, 197–98
  police power and, 251–53
Administrative Procedure Act (1946), US, 116, 262–63
adult entertainment, moral regulation of, 143
  judicial evaluation of, 144
Affordable Care Act, US, 268, 269–70
Agins v. Tiburon, 214, 215–16
alcohol and drug consumption, moral regulation of, 140, 144, 148
Ambler Realty Co. v. Village of Euclid, 118–21
amendments, to constitutions. *See also* Constitution, US
  to state constitutions, 74, 125
animal welfare laws, 150
animus, legal, 244–48
  equal protection doctrine, 245
  against LGBTQ+ populations, 247–48
anti-administrativist movement, 135, 192, 266
anti-commandeering doctrine, 265
arbitrariness, 242–44
  inclusiveness and, 244
  proceduralist review of, 243
  salus populi principle, 244
  sic utere principle, 244
  synoptic review, 243
Articles of Confederation, in US Constitution, 21, 22, 47
  federalism under, 51–52
assisted suicide, 241–42
Austin, Benjamin, 76
authoritarianism, concerns about, 310–13

Baker v. Carr, 249
Banner, Stuart, 67
  on natural law, 81, 82–83, 73
Barbier v. Connolly, 90–91
Barnett, Randy, 96, 125
Barron, David, 182–83
Barron v. Baltimore, 69, 222, 264
Baumol, William, 321–22
Bentham, Jeremy, 68
Berman v. Parker, 134, 152, 218, 325
Bernick, Evan, 96, 125
Bill of Rights, 69–70, 81–82, 201
  in Delaware, 23
  morals regulation and, 145–46
  natural rights in, 223–24
BiMettalic v. State Board of Equalization, 210–11
Binford v. Sununu, 159
Blackstone, William, 76
  British legal philosophy and, 68
  on police power, 45–46, 60
"boundary picking," 108–9, 201
Bowers v. Hardwick, 142, 146
Brady, Maureen, 79
Brandeis, Louis (Justice), 72, 111
Brennan, William (Justice), 98–99
Brick Presbyterian Church v. Mayor of New York, 56–57
Briffault, Richard, 180

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Brown, Adam, 32
Brown v. Maryland, 26, 53
Buchanan v. Warley, 114
Buck v. Bell, 114
Bullman-Pozen, Jessica, 183, 275
Burger, Warren (Chief Justice), 166
Bush, George Herbert Walker, 135
Bush, George Walker, 135
Buttetieg, Pete, 304

Calder v. Bull, 69, 152
  judicial review and, 221
Campbell, Jud, 203–4, 207, 234, 229, 230
Cardozo, Benjamin (Justice), 201
Carpenter, Daniel, 189
Cedar Point Nursery v. Haddid, 11, 216
Champion v. Ames, 140–41
Charles River Bridge v. Proprietors of Warren Bridge, 70
Chevron v. NRDC, 266
citizen safety. *See* public safety policies
The City of Cleburne v. Cleburne Living Center, 202, 243
City of Erie v. Pap's A. M., 143
The Civil Rights Cases, 289
Claeys, Eric, 120
classical legal thought, 96
Cleveland Telephone Co. v. City of Cleveland, 99
Clinton, Bill, 135
command-and-control regulations, 322
Commentaries on the Laws of England (Blackstone), 45
Commerce Clause, 140–41
common good constitutionalism, 186–87
common goods, zoning laws and, 120–21
common law
  development as legal theory, 80
  judicial intervention and, 30, 31–32, 179
  judicial review and, 69
    state constitutions and, 30–32
  private property law and, 69–70
  sic utere principle in, 55
  state constitutions influenced by, 30–31, 55–64
    judicial intervention and, 30, 31–32
    judicial review and, 30–32
  zoning laws and, 122
Commonwealth v. Alger, 58–60, 79–80
Commonwealth v. Tewksbury, 250–51
Conchatta v. Miller, 144
consent principles, in state constitutions, 22–24
  evolution of, 23
  good governance and, 23–24
Constitution, US. *See also* Bill of Rights; Contract Clause, in US Constitution; rights, individual, in US Constitution
  Articles of Confederation, 21, 22, 47
    federalism under, 51–52
  Commerce Clause, 140–41
  Eminent Domain clause in, 65
  First Amendment
    during Covid-19 pandemic, 160
    free speech and, 203–5
    individual rights under, 202–5, 206–7
    morals regulations and, 143
  Fourteenth Amendment, 70–71, 109–10, 226–29
    Due Process Clause of, 146
    original meaning of, 96
  interpretation of, 81
  judicial review in, 81–82
  Ninth Amendment, 226–29
  political strategy and, 48–51
  public meaning of, 48–51, 77
  purpose of, 48–51
  Reconstruction amendments, 264
    salus populi principle and, 289
  Second Amendment, 206–7, 298–300
  state constitutions influenced by, 2–3
  Supremacy Clause in, 53
  Tenth Amendment, 51–52, 54, 226–29
constitutional avoidance canon, 250
Constitutional Convention, 22, 26
constitutionalism
  administered, 134–35
  British, 29
  common good, 186–87
  laissez faire, 84–87
    The Slaughterhouse Cases, 95
  libertarian, 86–87, 142
  republican tradition of, 47–48
constitutionalism, American, 2–3
  classical liberal theory and, 28–29
  criticism of, 47–48
  federalism and, 276–78
  interpretive method for, 81
  public meaning of, 48–51
  purpose of, 48–51
  strategic approaches to, 48–51
constitutions. *See* state constitutions, state constitutionalism and
contestation of rights, 229–31
Contract Clause, in US Constitution, 65, 82
  eminent domain under, 65–66
  liberty of contract, 103
    morals regulations and, 142
    restriction of state regulatory authority and, 68

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

private property under, 65–66
property rights under, 69–70
state authority under, 65–66
contract rights
during Lochner era Supreme Court, 88–95
police power and, 43
Cooley, Thomas, 42, 95, 126, 180–81
Cornell, Saul, 205–6
countermajoritarian mechanisms
during Lochner era Supreme Court, 86–87
during Progressive era, 100
state constitutions as, 32–33, 101
Covid-19 pandemic
due process during, 210
First Amendment and, 160
Jacobson v. Massachusetts, 159
police power and, 158–62
public health regulation during, 158–62, 169–70, 308–10
First Amendment protections, 160
legal reasoning for, 160–61
sic utere principle and, 286–87
state constitutional power during, 5
scope of, 160
separation of powers, 175–76
culture wars, 149–50
Cushman, Barry, 108–9

Dartmouth College cases, 63–64
De Mortibus Maris (Lord Hale), 71–72
Declaration of Independence, 18
Declaration of Rights, in Pennsylvania state constitution, 20
Delaware
Bill of Rights, 23
state constitution in, 29
delegation. *See* administrative bureaucracy and power, delegation of; nondelegation doctrine
democracy, 327–29
state constitutions and
legislative supremacy in, 25
representative democracy and, 24–25, 93–94
DeShaney v. Winnebago County, 305–6
Devlin, John, 175
Devlin, Lord, 142
Dillon, John, 181, 196
disclosure regulations, 320
discrimination cases
Plessy v. Ferguson, 7, 71, 74, 91–94, 289
Harlan dissent in, 92–94, 244–45
Yick Wo v. Hopkins, 92
District of Columbia v. Heller, 205, 299–300
Diver, Colin, 243
Dobbs v. Jackson Women's Health Organization, 141, 224
Dubber, Markus, 7, 60, 310
due process, 208–11
during Covid-19 pandemic, 210
restriction of state regulatory authority and, 68
Due Process Clause, of Fourteenth Amendment, 146
Dunning–Kruger effect, 328
duty of public care, 186
Dworkin, Ronald, 142
dynamic federalism, 270–76
education policies and, 272
health policies and, 272
dynamic police power, 270–76

early legislative policies, in US, 67–68
common law traditions and, 68
natural law principles and, 67–68
positive law and, 68
purpose of, 68
sic utere principle in, 68
statutory lawmaking, 67
education, right to, 228
education policy, 272
Eisenstadt v. Baird, 145–46
Ellickson, Robert, 153–54
Ely, John Hart, 249
Emergency Powers of the Governor Act of 1945 (Michigan), US, 176
Emerson, Blake, 186
eminent domain
under Contract Clause, 65–66
Holmes on, 102
Horwitz on, 128
jus publicum principle and, 101–5
Pennsylvania Coal v. Mahon, 86, 101, 102–4, 128
Kohler Act and, 103
takings law and, 103–4
police power and, 101–5
during Progressive era, 101–5
property rights and, 214–15
salus populi principle and, 152
in urban settings, 152
Eminent Domain clause, in US Constitution, 65
The End of Liberalism (Lowi), 190
environmental protection policies, 300–2
Flint water crisis and, 301
new governance traditions, 300–1
environmental racism, 300
equal protection, right to, 208–11
animus and, 245
Erie Canal, construction of, 65
Ernst, Daniel, 188, 197–98

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Euclidean zoning, 118–21
executive powers, in state constitutions, 19, 201
  unbundled executive power, 174
expertise, 327–29
  in administrative bureaucracy and power, 188–93
  skepticism of, 190–91

Federal Communications Act, US (1934), 262
Federal Communications Commission, 88
Federal Trade Commission Act, US, 262
federalism, federal power and
  American constitutionalism and, 276–78
  Articles of Federation, 51–52
  Brown v. Maryland, 53
  dynamic, 270–76
    education policies and, 272
    health policies and, 272
  expansion of, 270
  Gibbons v. Ogden, 52
  McCulloch v. Maryland, 53
  during New Deal era, 263
  New York v. Miln, 53–54
  opportunistic, 272–73
  over commerce issues, 54–55
  police power and, 51–55
    conceptual approach to, 261–62
    dynamic, 270–76
    expansion of, 262–66
    Major Questions Doctrine, 266
    national, 266–70
    salus populi principle and, 265–66
  principal-agent formulation, 273–74
  "separate spheres" analysis of, 270–71
Federalist Papers (Hamilton and Madison), 105
  infrastructure in, 64–65
  state constitutionalism in, 18, 22, 36, 230
Feinberg, Joel, 142
Field, Stephen (Justice), 211
Finnis, John, 142
First Amendment
  during Covid-19 pandemic, 160
  free speech and, 203–5
  individual rights under, 202–5, 206–7
  Lochnerism and, 11
  morals regulations and, 143
Fishkin, Joey, 109–10
Fiss, Owen, 124
Fleming, James, 167
Fletcher, George, 142
Fletcher v. Peck, 69–70
Flint water crisis, 301
Food & Drug Safety Act, US, 262
Forbath, William, 109–10
Forbes' Case, 80–81, 250–51
formalism, 96
Foucault, Michel, 7, 310
Fourteenth Amendment, 70–71, 109–10, 226–29
  Due Process Clause of, 146
  original meaning of, 96
Frankfurter, Felix (Justice), 72, 204
Franklin, Ben, 26
Freund, Ernst, 42, 60, 87, 114, 188, 197–98
  on localism of police power, 181–82
  on police power, 138
Friedman, Barry, 305, 306–7
Friends of Danny Devito v. Wolf, 159
Frug, Gerald, 182–83

gambling, morals regulation of, 140–41
Gardner, James, 2–3
George, Robert, 142
Georgia Lactation Consultant Practice Act, US, 237
Gerken, Heather, 183, 271, 275
Gestle, Gary, 20, 220
Gibbons v. Ogden, 52, 264–65, 308
Gillman, Howard, 90, 109–10, 125
Gluck, Abbe, 271
Godkin, Edwin, 106
Goldberg, Suzanne, 139
Goldberg v. Kelly, 212
Gomillion v. Lightfoot, 249
Gonzales v. Raich, 267
Gorsuch, Neil (Justice), 178–79, 308–9
governance structures. *See also* regulatory governance; *specific topics*
  analysis of, 331–32
  authoritarianism concerns and, 310–13
  as control mechanism, 310–13
Grad, Frank, 137
Granger laws, 71
Great Britain
  constitutionalism in, 29
  legal philosophy and thought in, 68
  US colonies' relationship with, 18
Great Society, 11
Gregory v. Ashcroft, 265
Griswold v. Connecticut, 145–46
guns and firearms, regulation of, 297–300
  District of Columbia v. Heller, 205, 299–300
  New York State Rifle & Pistol Ass'n v. Bruen, 205, 298–300
  public opinion on, 298
  Supreme Court and, 298–300
Gunther, Gerald, 241

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Hale, Lord, 71–72
Hamilton, Alexander, 22, 201, 272–73. *See also* Bill of Rights; *Federalist Papers* (Hamilton and Madison); rights, individual, in US Constitution
Hand, Learned, 201
Harlan, John (Justice), 90–91, 241, 242
  Plessy v. Ferguson dissent, 92–94, 244–45
harm principle, 139–40
Hart, H. L. A., 142
Hart, Henry, 251
Hartog, Dirk, 196
Hawaii Housing Authority v. Midkiff, 152
health care, right to, 228
health policies, 272
heuristics, 326
Hohfeld, John Wesley, 197–98
Holmes, Oliver Wendell (Justice), 72, 97–98, 201
  on eminent domain, 102
home rule mechanisms, for police power, 181–82
Honore, Tony, 142
Horwitz, Morton, 81, 103, 122, 128
  on eminent domain, 128
housing policies
  access and affordability mechanisms, 291–96
  zoning laws and, 291–93
    construction prohibitions under, 292
    criticism of, 294
    NIMBY movement, 293
    YIMBY movement, 293, 294
Hulseboch, Daniel, 36
Hunter decision, 180–81
Hurst, J. Willard, 8, 61–62
hyper-localism, police power and, 183–84

Illinois Central Railroad v. Illinois, 100
imperium in imperio concept, 181, 182
In re Abbott, 159–60
In re Tahiti Bar, 144
incentive-based regulations, 320–21
individual rights. *See* rights, individual, in US Constitution
infrastructure
  in Federalist Papers, 64–65
  modern examples of, 163
  Novak on, 64
  police power and, 64–67
  during Progressive era through massive public investment, 87–88
  as public policy, 64–67
  public rights to, 64
  Scheiber on, 65
  wealth inequality and, 302–5
initiative lawmaking, 106
International News Service v. Associated Press, 97–98
interpretation, judicial
  legal canon for, 250–51
    of constitutional avoidance, 250
  during Legal Process era, 251
  for police power, 250–51
  presumptions in, 250–51
Interstate Commerce Act, US, 262–63
Issacharoff, Sam, 249

Jacobson v. Massachusetts, 94–95, 114, 159, 308
Jefferson, Thomas, 28, 38
Jew Ho v. Williamson, 113
judicial intervention
  in common law traditions, 30, 31–32
  individual rights and, 203
  during Lochner era Supreme Court, 86–87
  state constitutions and, 31–32
judicial review
  Calder v. Bull and, 221
  in common law traditions, 30–32, 69
  establishment of, 68–72
  individual rights and, 221–23
  Marbury v. Madison, 30–31, 221
  self-dealing and, 249
  state constitutions and, 30–32
  in US Constitution, 81–82
jus publicum principle, 69–70
  eminent domain and, 101–5
  during Lochner era Supreme Court, 106–7
  nuisance laws and, 61
  during Progressive era, 100
  public rights and, 63

Kahn, Alfred, 319
Kahneman, Daniel, 326
Kelo v. City of New London, 71, 152, 218
Kendrick, Leslie, 246
Kennedy, Anthony (Justice), 146, 147, 245
Kennedy, Duncan, 96
Kohler Act, US, 103
Kovacs v. Cooper, 134

labor laws
  National Labor Relations Act, 88, 262
  under National Labor Relations Act, 88
  during Progressive era, 88
laissez faire constitutionalism, 84–87
  Lochner era Supreme Court and, 84–87, 107–11
  police power and, 107–11
  The Slaughterhouse Cases, 95
land use regulations, police power and, 153
lawmaking. *See* early legislative policies, in US

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Lawrence v. Texas, 146, 245–46, 247–48
Lawton v. Steele, 113
Lee, Sophia, 134–35
Legal Process era, 251
Legal Realism movement, 108
legislative powers, of states, under state constitutions, 19
legislative skepticism, 73
  initiative lawmaking and, 106–7
  jus publicum principle and, 106–7
  during Lochner era Supreme Court, 105–7
  during post-Reconstruction era, 93
  during Reconstruction era, 86
LGBTQ+ populations
  animus against, 247–48
  Bostock v. Clayton County, 247–48
  Lawrence v. Texas, 146, 245–46, 247–48
  moral regulations and, 149–50
  Obergefell v. Hodges, 147–48, 247–48
  Romer v. Evans, 147, 245–46, 247–48
  United States v. Windsor, 247–48
liability rule, in takings law, 324
liberal theory, American constitutionalism and, 28–29
libertarian constitutionalism, 86–87, 142
liberty of contract, 103
  restriction of state regulatory authority and, 68
liberty rights, 28–32
  presumption of liberty, 193–94
The License Cases, 60, 70, 89
Lincoln, Abraham, 329
Linde, Hans, 98–99
Lindsley v. Natural Carbonic Gas Co., 115
Lingle v. Chevron, 217
Liquormart v. Rhode Island, 144
Little Rock v. Arkansas, 169
localism, of police power, 180–84
  arguments for, 183
  disadvantages in, 183–84
  home rule mechanisms, 181–82
  hyper-localism, 183–84
  imperium in imperio concept, 181, 182
  in nineteenth century, 181–82
  origins of, 180
  skepticism of, 184
Lochner era, for US Supreme Court, 255–56
  conceptual approach to, 84–87
  contract rights during, 88–95
  countermajoritarian elements during, 86–87
  individual rights during, 201, 204–5
  Jacobson v. Massachusetts, 94–95, 114
  judicial intervention during, 86–87
  jus publicum principle during, 106–7
  laissez faire constitutionalism and, 84–87, 107–11
  legislative skepticism during, 105–7
  Mugler v. Kansas, 89–91, 93–94, 125, 131–32
  Munn v. Illinois, 8, 71, 72, 74, 89, 131–32
  Plessy v. Ferguson, 7, 71, 74, 91–94, 289
    Harlan dissent in, 92–94, 244–45
  property rights during, 88–95
  regulatory takings law, 86
  state-building during, 84
  zoning laws and, 118–21
Lochner v. New York, 84, 107–8
Locke, John, 224–26, 235
Londoner v. Denver, 210
Lowi, Theodore, 190
Lucas v. South Carolina Coastal Council, 214–15
Lutz, Donald, 3, 18
  on consent theory, 23

Madison, James, 18, 28, 38, 272–73. *See also* Bill of Rights; *Federalist Papers* (Hamilton and Madison); rights, individual, in US Constitution
  on tyranny, 203
Major Questions Doctrine, 191–92
  federalism and, 266
  police power and, 266
majoritarianism. *See* countermajoritarian mechanisms
Mansfield & Swett v. Town of W. Orange, 119, 121
Marbury v. Madison, 30–31, 69
  judicial review and, 221
Marshall, John (Chief Justice), 52, 267, 297
Marshfield, Jonathan, 164, 177–78
  on nondelegation doctrine, 178–79
Marvin v. Trout, 140–41
Massachusetts, Contract Clause in, 65–66
Masterpiece Cakeshop v. Colorado, 245–46
Matthews v. Eldridge, 212
McCormack, Bridget, 178–79
McCulloch v. Maryland, 53, 269
McQuillin, Eugene, 180
Members of the Medical Licensing Board of Indiana, et al. v. Planned Parenthood Great Northwest, 224
Merrill, Thomas, 213
Michelman, Frank, 213
Michigan
  Emergency Powers of the Governor Act of 1945, 176
  Flint water crisis, 301
  nondelegation doctrine in, 176–77
Mill, John Stuart, 139–40
Minnesota Rate Case, 131–32
Mississippi, zoning laws in, 130
morals regulations

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

for abortion, 141
for adult entertainment, 143
judicial evaluation of, 144
for alcohol and drug consumption, 140, 144, 148
through animal welfare laws, 150
under Commerce Clause, 140–41
criminalization of sex work, 148–49
culture wars and, 149–50
First Amendment and, 143
for gambling, 140–41
harm principle and, 139–40
individual liberty and, 141–42
Bill of Rights and, 145–46
libertarian constitutionalism and, 142
liberty of contract and, 142
legitimacy of, 142–43
against LGBTQ+ populations, 149–50
Mill on, 139–40
Novak on, 138–39
police power and, 138, 150–51
public indecency statutes, 166
for public safety, 145
under Restatement (Second) of Torts, 145
scope of, 139–40
sic utere principle and, 139–40, 142–43, 144–45
in state constitutions, 137
origins of, 137–38
Mugler v. Kansas, 89–91, 93–94, 125, 131–32
Muller v. Oregon, 108–9
Munn v. Illinois, 8, 71, 72, 74, 89, 131–32

Nachbar, Thomas, 258
National Complete Streets Coalition, 297
National Labor Relations Act, US (1935), 88, 262
national police power, 266–70
National Pork Producers Council v. Ross, 265
natural law
Banner on, 81, 82–83, 73
police power and, 73
natural rights, 58, 78, 81, 223–26
in Bill of Rights, 223–24
Locke on, 224–26, 235
police power compared to, 227–28
property and, 73
Nebbia v. New York, 84–85, 108–9, 237
Nedelsky, Jennifer, 24, 126
negative rights, 220
New Deal, 11, 134–35, 262–63
administrative bureaucracy under, 189, 190
federalist expansion during, 263
Second New Deal, 262
New Hampshire
lack of chief executive in, 20
state constitution for, 82–83
New Jersey
state constitution of, 136
zoning laws in, 119–20
New York
Forbes' Case, 80–81
state constitution for, 201
New York State Rifle & Pistol Ass'n v. Bruen, 205, 298–300
New York v. United States, 261
Newsom, Gavin, 271
NFIB v. Sebelius, 269–70
NIMBY movement, 293
Ninth Amendment, 226–29
nondelegation doctrine, 176–79
administrative power limits under, 188
Major Questions Doctrine and, 191–92
Supreme Court support for, 191
Novak, William J., 42
on morals regulations, 138–39
on police power, 7–8, 76, 122
on positive rights, 236
on rights to public infrastructure, 64
on *salus populi* principle, 58, 125–26
on state constitutional rights, 220
nudges, 326–27
nuisance laws
jus publicum principle and, 61
moral nuisance, 145
police power and, 79
public infrastructure and, 79
Restatement (Second) of Torts, 145
sic utere principle and, 56, 57
Nussim, Jacob, 322

Obergefell v. Hodges, 147–48, 247–48
occupational licensing
police power and, 157–58
Uniform Bar Exam and, 158
O'Connor, Sandra Day (Justice), 146–47, 217–18
Oklahoma, state constitution of, 136
"On Participation" (Pitkin and Shumer), 184
O'Neal, Emmett, 105
opportunistic federalism, 272–73
originalist interpretations, of state constitutions, 164

Paine, Thomas, 203, 223
Parmet, Wendy, 169–70
patria potestas, 45
Pearson, Susan, 84
Penn Central case, 214, 215–16, 233
Pennsylvania
Declaration of Rights, 20
state constitution in, 29

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Pennsylvania Coal v. Mahon
eminent domain and, 86, 101, 102–4, 128
Kohler Act and, 103
takings law and, 103–4, 128
People ex rel LeRoy v. Hurlbut, 180–81
People v. Adams, 159
The People's Welfare (Novak), 7–8, 76
public morality in, 138–39
performance-based regulations, 321
Pigovian taxes, 321–22
Pildes, Richard, 249
Pitkin, Hannah Fenichel, 184
Planned Parenthood v. Casey, 146–47
Plessy v. Ferguson, 7, 71, 74, 91–94, 289
Harlan dissent in, 92–94, 244–45
Poe v. Ullman, 241
police power. *See also* federalism, federal power and; localism, of police power; *salus populi* principle; *sic utere* principle; *specific cases; specific topics*
Blackstone on, 45–46, 60
Brick Presbyterian Church v. Mayor of New York, 56–57
Brown v. Maryland, 26
in *Commentaries on the Laws of England*, 45
Commonwealth v. Alger, 58–60, 79–80
conceptual approach to, 1–11, 158–62
analysis of, 331–32
contract rights and, 43
as control mechanism, 45–46
Covid-19 pandemic and, 158–62
early legislative lawmaking as influence on, 67–68
eminent domain and, 101–5
expansion of, 10
federalism and, 51–55
Fourteenth Amendment and, 70–71
Freund on, 138
general welfare protections and, 55–64
Gibbons v. Ogden, 52
historical development of, 45
history of, 3–5
role of Supreme Court in, 3–4
as household management, 46
infrastructure and, 64–67
judicial interpretation of, 250–51
laissez faire constitutionalism and, 107–11
The License Cases, 60, 89
litigation over, 4
morals regulations and, 138, 150–51
national, 266–70
natural law and, 73
natural rights compared to, 227–28
Novak on, 7–8, 76, 122
nuisance laws and, 79
obscurity of, 178–79
occupational licensing and, 157–58
during post-Reconstruction era, 88–95, 124
practical purpose of, 6–7
private property and, 101
property rights and, 43
public health regulation and, 158–62, 169–70
public works and, 64–67
during Reconstruction era, 72–75
regulatory takings doctrine, 104–5
salus populi principle and, 62, 63, 152
federalism and, 265–66
The Slaughterhouse Cases, 70–71, 90, 125
as social control mechanism, 46
state constitutions and, 72, 228
as core component of, 2
structural approaches to, 5
in urban settings, 151–57
eminent domain issues, 152
for land use regulations, 153
for tenant protection, 155
zoning laws, 153–56
Vanderbilt v. Ames, 63
"wicked problems" and, 193
zoning laws and, 121–22
police power national, 266–70
political rights, 213
political skepticism
state constitutions and, 18, 25–28, 36–37
Wood on, 26, 86
popular sovereignty, through state constitutions, 22–24
constitutional structure, 125
good governance and, 23–24
in post-revolutionary era, 23
positive rights, 226–29
Novak on, 236
public safety policies and, 306
right to education, 228
right to health care, 228
sic utere principle and, 228–29
Post, Robert, 3
post-Reconstruction era. *See also* Lochner era, for US Supreme Court; Progressive era
administrative policy during, 87–95
collective welfare policy, 93
legislative skepticism during, 93
national legislation policy during, 87–95
expansion of, 88
for police power, 88–95, 124
in Supreme Court cases, 88–95
property rights during, 93, 211

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

reasonableness standards during, 111–16
unreasonable statutes during, 93
Pound, Dean Roscoe, 197–98
power, structuring of, 193–94
Precautionary Principle, 288
preemption, 269–70
presumption of liberty, 193–94
Primus, Richard, 279–80
private law
public law compared to, 9
sic utere principle in, 55
private property law
in classic common law traditions, 69–70
under Contract Clause, 65–66
police power and, 101–5
during Progressive era, 98–99, 127
under state constitutions, 37, 38
privilege-no right, 197–98
proceduralist review, of arbitrariness, 243
Progressive era. *See also* Lochner era, for US Supreme Court
administrative policy during, 87–95
Bureau of Animal Industry, 88
countermajoritarian instruments during, 100
eminent domain during, 101–5
Federal Communications Commission, 88
jus publicum principle during, 100
labor laws during, 88
massive public investment during, 87–88
national legislation policy during, 87–95
expansion of, 88
for police power, 88–95, 124
in Supreme Court cases, 88–95
private property rights during, 98–99, 127
property rights during, 211
public trust doctrine, 100
public welfare policy during, 185, 186–87
reasonableness standards during, 111–16
salus populi principle during, 63
sic utere principle during, 63
takings law during, 101
Progressivism, 47–48
property, definition of, 103
property rights, 211–18. *See also* private property law; zoning laws
Agins v. Tiburon, 214, 215–16
under Contracts Clause, 69–70
eminent domain and, 214–15
freedom to use, 56
International News Service v. Associated Press, 97–98
The License Cases, 60, 70
during Lochner era Supreme Court, 88–95
during modern era, 212–13
natural rights and, 73
Penn Central case, 214, 215–16, 233
police power and, 43
political rights and, 213
during post-Reconstruction era, 93, 211
during Progressive era, 211
reconfiguration of, 211–12
salus populi principle and, 215
under state constitutions, 28–32
private property protections, 37, 38
takings cases, 214–15, 216–18
Pruneyard Shopping Center v. Robins, 216–17
public choice theory, 318–19
public health regulation
during Covid-19 pandemic, 158–62, 169–70, 308–10
First Amendment protections, 160
legal reasoning for, 160–61
Little Rock v. Arkansas, 169
police power and, 158–62
public indecency statutes, 166
public interest, 72
public law, private law compared to, 9
public meaning, of constitutions, 48–51, 77
public purpose requirement, 106
public rights, 28
jus publicum principle and, 63
public safety policies
citizen safety and, 145, 296–97
as positive right, 306
reimagination of, 305–8
public trust doctrine
during Progressive era, 100
public welfare policy and, 185
state constitutions and, 28
"public use"
eminent domain and, 13
in takings cases, 11
public welfare policy, requirements of, 185–88
common good constitutionalism, 186–87
cost-benefit analysis of, 186
development of, 185
as duty of public care, 186
during Progressive era, 185, 186–87
public trust doctrine and, 185
salus populi principle and, 288–91
Vermeule on, 186–87
public works, police power and, 64–67

Raffensberger v. Jackson, 237–39, 257
Rakove, Jack, 36–37, 201
Randolph, Edmund, 26
ratemaking authorities, 131–32
rational choice theory, 32

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Rawls, John, 167–68
Reaching our Sisters Everywhere (ROSE), 237
Reagan, Ronald, 135
reasonableness standards, 240–42, 260
  judicial review and, 240–41
  during post-Reconstruction era, 111–16
  during Progressive era, 111–16
Reconstruction amendments, 264
  salus populi principle and, 289
Reconstruction era. *See also* post-Reconstruction era
  legislative skepticism during, 86
  police power at end of, 72–75
Redish, Martin, 204
regulatory governance. *See also* takings law
  administered constitutionalism and, 134–35
  anti-administrativism and, 135
  conceptual approach to, 283–85
  intervention techniques
    classic models, 318–21
    command-and-control regulations, 322
    disclosure regulations, 320
    incentive-based regulations, 320–21
    performance-based regulations, 321
    taxation, 321–23
  modern approaches to, 133–36, 162–63
  New Deal policies, 134–35
  nudges in, 326–27
    heuristics and, 326
  public choice theory, 318–19
  public faith in, 135
  rights revolution and, 136
  at state level, 134–35
    growth of, 134–35
regulatory takings doctrine, 104–5
  Lochner era Supreme Court, 86
Rehnquist, William (Chief Justice), 267
Reich, Charles, 212
Renton v. Playtime Theatres, 143
representative democracy, 24–25, 93–94
Restatement (Second) of Torts, 145
right to education. *See* education, right to
right to health care. *See* health care, right to
rights, individual, in US Constitution, 68–72. *See also* property rights; *specific rights*
  in Bill of Rights, 69–70, 81–82, 201
    in Delaware, 23
    morals regulation and, 145–46
    natural rights, 223–24
  "boundary picking" and, 108–9, 201
  Campbell on, 203–4, 207
  conceptual approach to, 200–8
  contestation of, 229–31
  definition of, 229–31
  due process, 208–11
    during Covid-19 pandemic, 210
    restriction of state regulatory authority and, 68
  to equal protection, 208–11
  expansion of, 202
  federal power and, 201
  under First Amendment, 202–3, 206–7
    during Covid-19 pandemic, 160
    free speech, 203–5
    Lochnerism and, 11
    morals regulations and, 143
  judicial intervention and, 203
  judicial review and, 221–23
  during Lochner era of Supreme Court, 201, 204–5
  during modern era, 230–31
  natural, 58, 78, 81, 223–26
    in Bill of Rights, 223–24
    Locke on, 224–26, 235
    police power compared to, 227–28
    property and, 73
  negative rights, 220
  original forms of, 201
  political, 213
  positive, 226–29
    Novak on, 236
    public safety policies and, 306
    right to education, 228
    right to health care, 228
    sic utere principle and, 228–29
  salus populi principle and, 204, 207
  under Second Amendment, 206–7
  under state constitutions
    form of, 219–21
    function of, 219–21
    individual rights in, 219
  as trump of federal power, 207–8
rights revolution, 136
Roberts, John (Chief Justice), 233, 247, 269–70
Rodriguez, Cristina, 183
Roe v. Wade, 141, 145–46
Romer v. Evans, 147, 245–46, 247–48
ROSE. *See* Reaching our Sisters Everywhere (ROSE)
Rossi, James, 63–64
rule of law, 188–93

Sacks, Albert, 251
safety policies. *See* public safety policies
salus populi principle, 9, 10
  arbitrariness and, 244
  eminent domain and, 152
  individual rights and, 204, 207

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

Novak on, 58, 125–26
police power and, 62, 63, 152, 288–91
federalism and, 265–66
during Progressive era, 63
property rights and, 215
public welfare and, 288–91
Reconstruction amendments and, 289
zoning laws and, 117–18, 119
Sanders, Anthony, 223
Sassen, Saskia, 182–83
Sato, Sho, 182
Sax, Joseph, 216–17
Scalia, Antonin (Justice), 174–75, 205
Schad v. Mount Ephraim, 143
Scheiber, Harry, 8, 42, 72, 238, 324–25
on infrastructure construction, 65
Schleicher, David, 292
Schmitt, Carl, 51
Schragger, Richard, 182–83
Schwartzman, Micah, 246
Second Amendment, 206–7, 298–300. *See also* guns and firearms, regulation of
Second New Deal, 262
Securities & Exchange Acts, US, 262
Seifter, Miriam, 175, 198
self-dealing, 248–50
judicial review and, 249
skepticism of, 249–50
self-enforcing equilibrium, 32–33
"separate spheres" analysis, of federalism, 270–71
separation of powers, in state constitutions, 88, 166, 173–79
during Covid-19 pandemic, 175–76
nondelegation doctrine, 176–77, 178–79
of plenary power, 174
statutory interpretation of, 176
unbundled executive power, 174
sex work, criminalization of, 148–49
SFAA v. Harvard, 209
SFAA v. U. North Carolina, 209
Shapiro, Martin, 165
Shaw, Lemuel (Justice), 106–7
Sherman Antitrust Act, US, 262
Shill, Gregory, 296–97
Shoked, Nadav, 184
Shumer, Sara, 184
sic utere principle, 69–70, 285–88
arbitrariness and, 244
Brick Presbyterian Church v. Mayor of New York, 56–57
in common law, 55
during Covid-19 pandemic, 286–87
damage and, 286
in early lawmaking, 68
morals regulations and, 139–40, 142–43, 144–45
nuisance laws and, 56, 57
positive rights and, 228–29
Precautionary Principle, 288
in private law, 55
during Progressive era, 63
tort law and, 91, 286–87
Vanderbilt v. Adams, 57
skepticism
of administrative bureaucracy, 190–91
of expertise, 190–91
legislative, 73
during Reconstruction era, 86
of localism of police power, 184
political
of state constitutions, 18, 25–28, 36–37, 86
Wood on, 26, 86
of self-dealing, 249–50
of zoning laws, 156
Skowronek, Stephen, 262
The Slaughterhouse Cases
laissez faire constitutionalism and, 95
police power in, 70–71, 90, 125
Smart America, 297
Smith, Adam, 45
Smith, Henry, 213
social control, through police power, 46
Sotomayor, Sonia (Justice), 247
Souter, David (Justice), 242, 266–67
special purpose authorities, 189–90
Spencer, Herbert, 204
state constitutions, state constitutionalism and. *See also specific states*
amendments to, 74, 125
British constitutionalism and, 29
common law traditions and, 30–31, 55–64
judicial intervention, 30, 31–32, 179
judicial review, 30–32
conceptual approach to, 137
consent principles in, 22–24
evolution of, 23
good governance in, 23–24
Constitutional Convention, 22, 26
as countermajoritarian mechanism, 32–33, 101
during Covid-19 pandemic, 5
scope of constitutional powers, 160
democracy and
legislative supremacy, 25
representative, 24–25, 93–94
executive powers under, 19, 201
failure of, 2–3
Federalist Papers and, 18, 22, 36, 230

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

state constitutions, state constitutionalism (cont.)
good governance through, 3, 32–35
consent principles and, 23–24
as project, 34–35
individual rights in, 219
legislative powers under, 19
limits on, 26–27
separation of, 88, 166
length and stability of, 32
Major Questions Doctrine and, 191–92
modern developments in, 136–51, 162–63
governance strategies, 137
morals regulation, 137–38
positive rights, 136–37
morals regulations in, 137
origins of, 137–38
Novak on, 220
objectives of, 2, 3
originalist approach to, 164
police power and, 72, 228
as core component of constitutions, 2
political strategy and, 48–51
popular sovereignty through, 22–24
through constitutional structure, 125
good governance and, 23–24
in post-revolutionary era, 23
property rights and, 28–32
private property protections, 37, 38
public meaning of, 48–51, 77
public rights and, 28
public trust doctrine and, 28
purpose of, 17–18, 48–51
reform as constitutional reset, 25–28
through skepticism, 86
renaissance for, 98–99
representation and, 24–25
democracy and, 93–94
during revolutionary era, 18–22
active governance as goal of, 20, 201
colonials' connection to Great Britain, 18, 29
constitutions as instruments of governance, 21
early framers of state constitutions, 18–20, 21
political legacy of, 21–22
right to liberty, 28–32
separation of powers in, 88, 166, 173–79
during Covid-19 pandemic, 175–76
nondelegation doctrine, 176–77, 178–79
plenary power, 174
statutory interpretation of, 176
unbundled executive power, 174
skepticism of, 18, 25–28, 36–37
Wood on, 26, 86
structure of, 25–28
popular sovereignty through, 125
subordination in, 22–24
Tarr on, 18, 29, 36, 41, 266
on changes in state constitutions, 136, 220
theories for, 2–3
political, 63–64
rational choice theory, 32
US Constitution as foundational influence on, 2–3
state regulatory authority, restriction of
through due process, 68
through liberty of contact, 68
State v. Reid, 206
state-building, during Lochner era Supreme Court, 84
Stevens, John Paul, 146
subordination, in state constitutions, 22–24
Sunstein, Cass, 248, 288, 326
Supremacy Clause, 53
Supreme Court, US. *See also* Lochner era, for US Supreme Court; *specific cases*
gun regulation and, 298–300
history of police power and, 3–4
Major Questions Doctrine and, 191
nondelegation doctrine and, 191
during post-Reconstruction era, 88–95
Sutton, Jeff, 31, 137, 181–82, 219
synoptic review, of arbitrariness, 243

takings law, 230, 323–26. *See also specific cases*
liability rule, 324
during Progressive era, 101
property rights and, 214–15, 216–18
"public use" in, 11, 71
Taney, Roger B. (Chief Justice), 60, 70
Tarr, Alan, 18, 29, 36, 41, 266
on state constitutional changes, 136, 220
taxation, 321–23
Pigovian taxes, 321–22
Taylor, Frederick Winslow, 189
tenant protections, police power and, 155
Tenth Amendment, 51–52, 54, 226–29
Terminiello v. Chicago, 202–3
Texas v. Johnson, 202–3
Thaler, Richard, 326
Thayer, James Bradley (Justice), 201
A Theory of Justice (Rawls), 167–68
Thomas v. Smith, 121
Thorpe v. Rutland & Burlington Railroad Co., 63–64
Thurlow v. Massachusetts, 140
Tiebout, Charles, 274
Tiedeman, Christopher, 42, 100, 125–26
Tomlins, Christopher, 7, 80, 310

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016

tort law
general welfare protections under, 55–64
Restatement (Second) of Torts, 145
sic utere principle and, 91, 286–87
transportation policies, 296–97
National Complete Streets Coalition, 297
Smart America, 297
Tribe, Laurence, 108
Trump v. Hawaii, 247
Trustees of Dartmouth College v. Woodward, 82
Tversky, Amos, 326
tyranny, Madison on, 203

Uniform Bar Exam, 158
United States (US). *See also* Constitution, US; constitutionalism; New Deal; state constitutions, state constitutionalism and; Supreme Court, US; *specific states*; *specific topics*
Administrative Procedure Act, 116, 262–63
Affordable Care Act, 268, 269–70
Bureau of Animal Industry, 88
culture wars in, 149–50
Declaration of Independence, 18
Federal Communications Act, 262
Federal Communications Commission, 88
Federal Trade Commission Act, 262
Food & Drug Safety Act, 262
Interstate Commerce Act, 262–63
Kohler Act, 103
National Labor Relations Act, 88, 262
Securities & Exchange Acts, 262
Sherman Antitrust Act, 262
Voting Rights Act of 1965, 290
United States Dep't of Agriculture v. Moreno, 244–45
United States v. Lopez, 261, 265
United States v. Morrison, 261, 266–67
United States v. Windsor, 247–48, 265
urban blight, 153
Urofsky, Melvin, 127
US. *See* United States (US)

Vanderbilt v. Adams, 57
Vanderbilt v. Ames, 63
Vattel, Emer de, 45, 310
Vermeule, Adrian, 63–64, 186–87
vested rights, 65, 96
Village of Belle Terre v. Boraas, 153
Virginia
state constitution in, 23
zoning laws in, 121
Virginia v. Black, 203
Voting Rights Act of 1965, US, 290

Waldron, Jeremy, 207–8
Washington v. Davis, 209
Washington v. Glucksburg, 241–42
water law doctrines, 100
wealth inequality, infrastructure and, 302–5
Weber, Max, 189
Weingast, Barry, 59
Weisbach, David, 322
West Coast Hotel v. Parrish, 84–85
Whiggish political theory, 139–40
White, G. Edward, 44
White, Ted, 77, 108–9, 201, 238
Whitmer, Gretchen, 176
Wickard v. Filburn, 267
"wicked problems," police power and, 193
Williams, Robert, 26, 137
Williamson v. Lee Optical, 237–38, 255–56
Wilson, James, 38
Wisconsin Legislature v. Evers, 176
Wood, Gordon, 18, 20, 24–25, 26, 86

Yick Wo v. Hopkins, 92, 202, 244–45
YIMBY movement, 293, 294
Young, Ernie, 272–73, 274

Zackin, Emily, 227, 229
zoning laws, 117–22
Ambler Realty Co. v. Village of Euclid, 118–21
Claeys on, 120
as common good, 120–21
in common law tradition, 122
early establishment and regulation of, 117–18
Euclidean, 118–21
housing policies and, 291–93
construction prohibitions and, 292
criticism of, 294
NIMBY movement, 293
YIMBY movement, 293, 294
during Lochner era Supreme Court, 118–21
Mansfssield & Swett v. Town of W. Orange, 119, 121
in Mississippi, 130
in New Jersey, 119–20
police power and, 121–22
salus populi principle and, 117–18, 119
skepticism of, 156
Thomas v. Smith, 121
in urban settings, 153–56
in Virginia, 121

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 15 Nov 2026 at 13:14:58, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009127370.016