

## . CONTENTS .

### ONE • WHAT IS LAW? I

Why It Matters    Disagreement about Law  
The Plain-Fact View    A Threshold Objection  
The Real World    Semantic Theories of Law  
The Real Argument for Semantic Theories

### TWO • INTERPRETIVE CONCEPTS 45

The Semantic Sting    An Imaginary Example  
A First Look at Interpretation  
Interpretation and Author's Intention  
Art and the Nature of Intention  
Intentions and Practices    Stages of  
Interpretation    Philosophers of Courtesy  
A Digression: Justice    Skepticism about  
Interpretation

### THREE • JURISPRUDENCE REVISITED 87

A New Picture    Concepts and Conceptions  
of Law    Skeptical Conceptions and Wicked  
Law    Grounds and Force of Law

### FOUR • CONVENTIONALISM 114

Its Structure    Its Appeal    Legal Conventions  
Two Kinds of Conventionalism  
Does Conventionalism Fit Our Practice?  
Does Conventionalism Justify Our Practice?



---

FIVE • PRAGMATISM AND PERSONIFICATION	151
<p>A Skeptical Conception    Does Pragmatism Fit?    Law without Rights    The Claims of Integrity    Community Personified</p>	
SIX • INTEGRITY	176
<p>Agenda    Does Integrity Fit?    Is Integrity Attractive?    The Puzzle of Legitimacy Obligations of Community Fraternity and Political Community Untidy Endnotes</p>	
SEVEN • INTEGRITY IN LAW	225
<p>A Large View    The Chain of Law    Law: The Question of Emotional Damages    A Provisional Summary    Some Familiar Objections    Skepticism in Law</p>	
EIGHT • THE COMMON LAW	276
<p>The Economic Interpretation    Complexities The Question of Justice    The Utilitarian Duty The Egalitarian Interpretation    Equality and Comparative Cost    Private People and Public Bodies</p>	
NINE • STATUTES	313
<p>Legislative Intention    Speaker's Meaning Convictions    Hercules' Method Legislative History    Statutes over Time When Is the Language Clear?</p>	
TEN • THE CONSTITUTION	355
<p>Is Constitutional Law Built on a Mistake?    Liberals and Conservatives    Historicism    Passivism Hercules on Olympus    Theories of Racial Equality    Deciding <i>Brown</i>    Deciding <i>Bakke</i> Is Hercules a Tyrant?</p>	



---

ELEVEN • LAW BEYOND LAW 400

Law Works Itself Pure      Law's Dreams

Epilogue: What Is Law?

Notes 417

Index 455



# INDEX

- Abortion issue, and political integrity, 178, 185, 186
- Accident law. *See* Law of unintended injury
- Acontextual meaning (interpretation), 17, 23, 89, 346-347, 353
- Activism in constitutional interpretation: vs. passivism, 369; vs. law as integrity, 378; and Hercules, 398
- Adjudication: practical politics of, 12; and inclusive integrity, 410. *See also* Judges
- Adjudicative principle of integrity, 167, 176, 218-219, 337. *See also* Integrity, political
- Affirmative action, 393; and antidiscrimination theories, 386-387; and *Bakke* case, 393-397
- Alpers, Svetlana, 419n35
- Ambiguity, and statutory interpretation, 350-353
- Apportioning of costs, principle of, 269
- Art, and author's intention, 55-65
- Artistic interpretation, 50, 51, 53, 54, 55-58, 59-62
- As-if rights, in legal pragmatism, 152-153, 154-155, 158, 161, 162
- Associative (communal) obligations, 195-202; role obligations as, 195-196; conditions of, 199-201; vs. justice, 202-206; legitimacy through, 206-208; and de facto community, 209, 211-212; and rulebook community, 210, 212-213; and community of principle, 211, 213-214, 216 (*see also* Community of principle)
- Austin, J. L., 448n10
- Austin, John, 32, 33-34, 109, 431n2
- Authority, law as, 429n3
- Automobile manufacturer, in institutional responsibility example, 169-171
- Automobiles, as intention example, 100
- Bakke* case, 393-397
- Banned categories, 383-384, 385, 386-387, 388, 394
- Banned sources, 384, 385-386, 388, 394
- Barrister immunity, as integrity example, 219-220, 401, 402
- Bentham, Jeremy: on rights, 374-375; and legal positivism, 432n6
- Berger, R., 450n6
- Bickel, Alexander M., 435n4
- Borderline defense, in positivists' view, 39-43
- Bork, R., 450n5, 451n12
- Brest, Paul, 447n3
- Brown* case, 29-30; as social revolution, 2, 391, 393; remedy in, 30, 389-392; and legal positivism, 37; and conventionalism, 119, 131; and integrity vs. pragmatism, 220-221; and popular morality, 250; and Fourteenth Amendment, 355; and historicism, 366; and passivism, 373-374; Hercules' interpretation of, 379-392, 399;



- and banned sources theory, 384. *See also* Fourteenth Amendment
- Burger, Warren, 21-22, 23, 38
- Busing, school, 221, 392
- Calabresi, G., 433n1, 444nn4, 5
- Cardozo, Benjamin, 417n7
- Cases. *See* Hard cases; Like cases; Pivotal cases
- Causation, example of concept of, 32, 428n27
- Cavell, Stanley, 56-57, 60
- Certainty, value of, 367-368
- Chain of law: and chain novel, 228-232; and character of Scrooge, 232-237; and respecting of text, 238; fit/justification interplay in, 239; statutory interpretation in, 313. *See also* Rope analogy
- Chayes, A., 452n22
- Checkerboard laws: as political compromise, 178-184, 186; and personification of state, 187; and integrity, 217-218
- Choice: communal obligation from, 197-198, 201; in political communities, 207; and public responsibility, 298-299
- Christmas Carol*, A, as chain novel, 232-237
- Civil disobedience, and force of law, 112-113
- Civil law, and unilateralism, 143
- Civil suits, importance of, 1. *See also* Lawsuits
- Clarity of language, and statutory interpretation, 350-353
- Coherence of law, and Elmer's case, 19-20. *See also* Integrity, law as
- Coleman, Jules, 431n4
- Collective consciousness, 64, 422n15
- Collective sympathy, principle of, 269
- Command theory of law, 33-34. *See also* Positivism, legal
- Common law: chain of, 238-239; conflict of rights in, 312. *See also* Emotional damages; Law of unintended injury; Precedent
- Communal obligations. *See* Associative obligations
- Community: and interpretive attitude, 46-47, 49; personification of, 64-65, 167-175, 186-187, 225, 296; and law as integrity, 96; in political integrity, 188-190; "bare" vs. "true," 201-202, 203-204, 207-208; political society as, 208-209; de facto model of, 209, 211-212; rule-book model of, 209-210, 212-213, 345; and love, 215; wealth of, 277 (*see also* Wealth test); pure interpretation of law directed to, 407; and attitude of law, 413
- Community of principle, 211, 213-214; and legitimacy, 214-215, 216; in law as integrity, 243, 244; and integrity, 263, 404, 411; and private responsibility, 300, 309; and legislators' convictions, 328-329, 330, 336; and legislative history, 345-346; and justice, 406
- Comparative cost, and equality, 301-309
- Compartmentalization of law, 251-254
- Compromise: *Brown* remedy as, 30; among political virtues, 176-178; and "checkerboard" laws, 178-184, 435n7; internal vs. external, 179; conventionalist acceptance of, 210; vs. comparative harm principle, 303; in legislators' intents, 323
- Concept-conception distinction, 71-72; for justice, 74
- Conceptions of law, 94-96; issues for, 99-101; and wicked law, 102-104, 108; on grounds and force of law, 109, 112; and legal practice, 139; and legitimacy, 190-191. *See also* Conventionalism; Integrity, law as; Pragmatism, legal
- Concept of law, 92-94, 108-109; and force of law, 109-110, 190
- Concept of Law*, *The* (Hart), 34
- Conflict: among political virtues, 176-178, 188; of abstract rights, 293, 296, 301, 306, 310, 312; of convictions, 330-333, 334



- Consensus: in preinterpretive stage, 66; vs. convention, 135-139
- Consent, legitimacy through, 192-193
- Consequentialism. *See* Economic theory on unintended damage; Policy; Utilitarianism
- Conservatism: of justices, 357-359; and Hercules, 398-399
- Consistency: and political integrity, 219-224; and law as integrity, 227, 228
- Consistency with past: and conventionalism, 130, 131, 132-135, 147; and legal pragmatism, 151, 159-160, 162, 163; and political integrity, 167, 219; and law as integrity, 227
- Constitution, U.S.: and legal canon, 91; and conventionalist view, 115, 138; slavery provisions of, 184; and popular morality, 250; constraints in, 355; and role of Supreme Court, 355-356, 357; unrepresentative framers of, 364; as statute, 379; rationality requirement in, 382, 383, 397. *See also* Supreme Court
- Constitutional adjudication. *See* Interpretation of Constitution
- Constructive claims in law, 228
- Constructive interpretation, 52-53, 54, 56, 61, 62, 65, 423n15; legal theory as, 90; vs. speaker's meaning view, 315, 336. *See also* Interpretation
- Context sensitivity: of legal language, 104-105; and semantic theories, 108
- Contradiction: and skeptical view of integrity, 268-269, 271, 272, 273-274; in liberalism, 274, 441n20
- Convention: in Hart's theory, 34-35; vs. consensus, 135-139; coordination through, 144-146. *See also* Rules
- Conventionalism, 94-95, 114-117, 410; and legal rights, 95, 152; popular view behind, 114, 115, 116, 118, 120; and positivist semantic theories, 115-116; as appeal to protected expectations, 117-120, 139-140; and legal conventions, 120-124; strict vs. soft, 124-130; and consistency with past, 130, 131, 132-135, 147; and attention to statutes or precedent, 130-132, 135; and law as integrity, 134-135, 225, 226, 261, 410, 411; and convention-consensus distinction, 135-139, 145; vs. development of law, 137-138, 157, 409; and democracy, 140, 432n6; fairness of, 140-142; as reducing surprise, 141-144; unilateral, 142-143, 146, 147, 365-366; and coordination, 144-147, 149-150, 156; and legal pragmatism, 147-150, 157, 161, 162, 264; and formal equality, 185; and rule-book model of community, 210, 212-213; and compartmentalization, 251; and easy cases, 265-266; and stability argument, 365; and passivism, 371; and rule of recognition, 431n2; and habit of obedience, 431n2
- Conversational interpretation, 50, 51, 52, 53-55, 64-65, 315
- Convictions: in legislative intent, 324, 327-337, 361; in constitutional interpretation, 361-362
- Coordination: through conventions, 144-146; and pragmatist view, 148, 149; through retrospective rulemaking, 156-157; and legal pragmatism, 158-159
- Corporations, in institutional responsibility example, 169-171
- Counterfactual mental states, 325-327, 328
- Courtesy: interpretive attitude toward, 47-49; constructive interpretation of, 52; intentions in 58, 59; and stages of interpretation, 66; philosophical account of, 68-73; and skepticism, 79, 81-82; as convention, 122; and judge's function, 228; vs. justice, 424n20
- Cover, Robert, 438n27
- Creative interpretation, 50, 51-52, 53-54, 56, 58, 62, 65, 228



- Criminal cases, and importance of law, 1. *See also* Cases
- Criminal law, unilateralism in, 143
- Criminal process, consistency and integrity in, 224. *See also* Procedural due process
- Critical legal studies, 271-274; and liberalism, 274-275, 440n19, 441n20
- Davidson, Donald, 438n22
- Democracy: and protected expectations, 146; and legislators' intent, 364; and constitutional passivism, 370-371, 372; and Hercules' approach, 398, 399; and legal positivism, 432n6
- Dilthey, Wilhelm, 419n2
- Disagreement: dilemma on, 43-44, 45-46; interpretive conception of, 46-47, 86 (*see also* Interpretation); subjective vs. objective, 76-77, 79-80, 82-83 (*see also* Skepticism); on grounds and force of law, 111, 112-113; over legal conventions, 122. *See also* Empirical disagreement; Theoretical disagreement in law
- "Discovering" law, vs. theoretical disagreement, 5-6
- Discrimination. *See* Racial discrimination
- Distinctions: external vs. internal perspective on law, 13-14; strict vs. relaxed doctrine of precedent, 24-26; standard vs. borderline uses of "law," 39; borderline cases vs. pivotal cases, 41-42 (*see also* Easy-case problem); interpreting practice vs. acts or thoughts of participants, 63-64; meaning vs. extension, 71; concept vs. conception, 71-72; justification vs. content of rights, 106-107; weak rights vs. no rights (in wicked system), 107-108; grounds vs. force of law, 109-110, 356; explicit vs. implicit extension of convention, 123; strict vs. soft conventionalism, 124; convention vs. consensus (agreement in conviction), 136, 145-146; arguments about vs. within rules, 137-138; paradigms vs. conventions, 138-139; "bare" vs. "true" community, 201; competition vs. contradiction in principle, 268-269; academic vs. practical elaboration of moral theory, 285-286; rights vs. collective strategies, 293, 381-382; use vs. assignment of property, 300; clear vs. unclear language, 351; inclusive vs. pure integrity, 405-406
- Distinguishing of precedents, in *McLoughlin* case, 26, 27, 28
- Dred Scott case, and passivism, 374
- Due process. *See* Procedural due process
- Duty: to obey law, 112-113; to be just, 193; to maximize wealth, 286-288. *See also* Political obligation
- Earl (Judge), 18-20, 22, 36, 38, 40, 43, 130
- Easy-case problem, 353, 449n14
- Economic approach to law, 272
- Economic theory on unintended damage, 276-280; and reasonable-person rule, 280-282; and contributory negligence, 282-283; fit of, 283-285; and wealth maximization, 286-288; and utilitarianism, 288-295
- Egalitarian principle: and integrity, 222; and government, 296; and racial equality, 381; and constitutional rights, 381-382. *See also* Equality
- Egalitarian theory on unintended damage, 295, 312; and public vs. private responsibility, 295-296, 299-300, 309-310; comparative cost in, 301-309
- Eighth Amendment, 355, 357
- Eliot, T. S., 421n11
- Elmer's case, 15-20; and principle that no one should profit from own wrong, 20; and snail darter case, 21; and natural-law interpretation,



- 36; and legal positivism, 37; and interpretation of law, 87; and post-interpretive stage, 100; and conventionalism, 115, 122, 123, 125, 130; and legal pragmatism, 158. *See also* Statute of wills
- Ely, John Hart, 450n5, 451nn11, 15
- Emotional damages: and *McLoughlin* case, 24, 26-27, 240-250, 258-259 (*see also* *McLoughlin* case); and conventionalism, 116-117
- Empirical disagreement, about law, 4, 5, 31, 33, 37. *See also* Truth and falsity
- Endangered Species Act, 20; legislative history of, 22, 347; and intentions about dam construction, 23; as interpretation example, 313, 315, 321-323, 325-327, 328, 339, 340, 341, 349, 352-353. *See also* Snail darter case
- Equality: and family relationships, 204-205, 402; and wealth maximization, 291-295; conceptions of, 297-299; of resources, 297-298, 299, 301-309, 312, 403-404, 407-408; and public vs. private responsibility, 299-301; skepticism about, 372-373. *See also* Egalitarian principle
- Equal protection: and segregated education, 29-30, 357, 360, 362-363; and Fourteenth Amendment framers, 30, 362; and political integrity, 185; and Supreme Court role, 357; historical interpretation of, 360-361; as required of states, 381-382, 403; Hercules' approach to, 381-392, 402; and affirmative action, 395-396
- Erdlich, G., 431n5
- Ewald, William, 433n2
- Expectations. *See* Predictability; Protected expectations
- Explicit extension of convention, 123-124, 125, 126, 127, 128-129, 130, 131, 142
- Extension, and meaning, 71
- External skepticism, 78-85, 266-267, 272, 373, 412, 428n27
- Fact, issues of, 3, 11-12
- Fairman, Charles, 418n28
- Fairness, 164-165; and conventionalism, 140-142; and integrity, 166, 263, 404-405; and justice, 177; in conflict with other virtues, 177-178, 188, 404; and "checkerboard" laws, 178, 179, 180, 182, 183; and equal protection, 185; in pragmatist view, 187; in community of principle, 213, 214; in law as integrity, 225, 243, 256; in Hercules' treatment of *McLoughlin*, 242, 249-250, 259; and statutory interpretation, 320, 338, 340-341, 342, 347, 349, 350; and legislative history, 342, 364-365; and historicism, 360; and passivism, 374, 376-378; vs. transient majority, 377; and activism, 378; and subject-classification theory of racial justice, 387; and pure integrity, 406
- Fair play: as defense of legitimacy, 193-195; and rulebook community, 213
- Family relationships, and equality, 202, 204-205, 402
- Fascism, as outside present law, 408
- Federal system: political integrity in, 186; and Supreme Court power, 357; certainty vs. substance of allocations in, 368; equality mandate in, 381-382, 403
- Feinberg, Joel, 434n10
- Fellini, Federico, intention of, 56-57
- Fessler, D., 439n9
- Fidelity to law: issue of, 3, 5; and plain-fact view, 7-8; and snail darter case, 23; as political obligation, 208; and historicism, 362, 363
- Fifth Amendment, 355
- "Finger-crossed" defense, 39, 40, 41
- Finnis, John, 419n32
- Fish, Stanley, 424n16, 425n23
- Fiss, Owen, 452n22
- Force of law: and grounds of law, 110-111; and conceptions of law, 112; and civil disobedience, 112-113; vs. integrity in adjudication, 218-219. *See also* Legitimacy



- Foreseeable injuries: common-law principle on, 26-27; in Hercules' approach, 241, 245-249
- Fourteenth Amendment, 29; and segregated education, 30; internal compromise outlawed by, 185; as constraint, 355; and Supreme Court role, 357; and historicism, 360, 361, 395-396; and racially segregated education, 360-361; and changed circumstances, 365; and right against discrimination, 382-392; and affirmative action, 395-397. *See also* Equal protection
- Frank, Jerome, 417n6
- Frankfurter, Felix, 358
- Fraternal associations, 200-201. *See also* Associative obligations
- Fugitive Slave Law, 111, 219
- Gadamer, H. G., 55, 62, 420n2
- Gaps in law: and plain-fact view, 8-9; and positivism, 37-39; and conventionalism, 115, 116-117, 118, 126, 144. *See also* Hard cases; "Making" law
- Gavison, Ruth, 418n29
- Goodman, Nelson, 447n5
- Gordon, Robert, 422n15, 440n18
- Gray (Judge), 17-18, 20, 21, 36, 38, 40, 43-44, 130
- Gray, J. C., 428n2
- Grey, Thomas, 421n6, 450n5
- Grounds of law, 4, 11; truth and falsity of, 4, 6; plain-fact view of, 6-11; and semantic theories, 31-43; shared criteria for, 43-44; and force of law, 110-111, 218; and conceptions of law, 112; and civil disobedience, 112-113; in law as integrity, 225, 261-262
- Group consciousness, 64, 422n15
- Habermas, Jürgen, 420n2, 422n14
- Hand, Learned, 1
- Handicapped persons, and equality of resources, 305, 408
- Happiness, in utilitarianism, 288-295
- Hard cases: in plain-fact view, 10; in semantic theories, 39, 44; postinterpretive questions in, 99-100; in Nazi system, 105, 106; and interpretation, 106; conventionalist approach to, 115, 125, 128-129, 132, 139, 157; pragmatist treatment of, 158-160, 161, 163; and law as integrity, 226, 229, 255-256, 258, 265-266, 411; Hercules vs. real judges in, 264-265; and easy cases, 265-266, 353-354, 449n14; popular view of, 266; and critical legal studies, 275; market-simulating approach to, 300; and law's dreams, 410; "no right way" view of, 412. *See also* Gaps in law; "Making" law
- Hare, R. M., 445n11
- Harr, C., 439n9
- Hart, H. L. A., 34-35, 109, 431n2
- Hegel, G. W. F., 14
- Hercules, 239-240, 276, 380-381, 411; on *McLoughlin* case, 240-250, 258-259, 268-271; and local priority, 251, 252-254; and compartmentalization, 252; as applying personal convictions, 259-260; as fraud, 260-263, 266; as arrogant, 263-264; as myth, 264; noncontradictory assumption by, 268; and critical legal studies, 272, 273-274, 275; statutory interpretation by, 313-314, 316-317, 330, 337-341, 342, 343, 347, 348-353, 354, 363, 379-380; and hard vs. easy cases, 354; constitutional interpretation by, 379-391, 392, 393-394, 396-399; as tyrant, 399; and pure law, 400; constraints on, 401-402; disagreement with, 412
- Hermes, statutory interpretation by, 317-337, 361
- Historicism in constitutional adjudication, 359-365; and stability, 365-369; and affirmative action, 395-396
- History: and legal practice, 12-14; of justice, 73; of development of law, 89-90, 137-138, 157, 409; and law as integrity, 227-228; in critical legal studies, 273; legislative,



- 314-315, 342-347, 350, 388, 405.  
*See also* Consistency with past
- Holmes, Oliver Wendell, 14
- House of Lords: confidential-records  
 decision by, 2-3; and precedent,  
 25-26; in *McLoughlin* case, 27, 38;  
 in conventionalist view, 115; and  
 barrister immunity, 220, 401
- Hutchinson, Allan, 442n20, 449n13
- Hyek, F., 433n13
- Ideals, political. *See* Virtues, political
- Inclusive integrity, 405, 406, 407,  
 410
- Institutional identity, 68-70
- Institutional responsibility, 168-171
- Integrity, law as, 95-96, 216,  
 225-227, 254-258, 410-412; and  
 precedent, 118, 240, 401-402; on  
 making new law, 119-120; soft con-  
 ventionalism as, 127-128; and con-  
 ventionalism, 134-135, 225, 226,  
 261, 410, 411; and legal rights, 152,  
 312; as continuing interpretation,  
 226-227, 228, 239; and history,  
 227-228, 273; and chain of law,  
 228-238, 239, 313; and Hercules on  
*McLoughlin* case, 239-250, 258-259,  
 268-271; local priority in, 250-254,  
 402-403, 405, 406; and people as  
 interpreters, 252; and objections  
 against Hercules, 259-266; and  
 hard vs. easy cases, 265-266; skepti-  
 cism toward, 266-271; and critical  
 legal studies, 271-275; and accident  
 law, 301, 309; statutory interpreta-  
 tion under, 313-314, 316 (*see also*  
*Interpretation of statutes*); and  
 Hercules' interpretation of statutes,  
 338-340, 342, 347, 349-350; and  
 Marshall's argument, 356; in lib-  
 eral-conservative distinction, 358;  
 and historicism, 360; and value of  
 certainty, 367; and passivism, 371;  
 vs. activism, 378; and judicial su-  
 pervision, 392; and banned catego-  
 ries theory, 394; and law working  
 itself pure, 400; and legislative su-  
 premacy, 401-402; and constraints  
 on equality, 403; inclusive vs. pure,  
 405-407; and purer law, 406-407;  
 and utopian dreams, 407-410. *See*  
*also* Hercules
- Integrity, personal, 166
- Integrity, political, 165-166; as dis-  
 tinct political virtue, 166, 176-177,  
 178, 183-184, 188, 262-263, 411;  
 and legal rights, 166-167; efficiency  
 of, 166-167, 188-189; in legislation  
 and in adjudication, 167, 176,  
 217-219; and consistency, 167,  
 219-224; and personification of  
 community, 167-175, 186-187; in  
 conflict with other virtues, 176-178,  
 188; and "checkerboard" laws,  
 178-184, 186, 217-218; and U.S.  
 Constitution, 184-186; and com-  
 munity, 188-190; and legitimacy,  
 191-192, 193; in community of  
 principle, 211, 213-214, 216, 263,  
 404, 406, 411 (*see also* Community  
 of principle); sovereignty of,  
 217-219; and legislative convic-  
 tions, 329, 336-337; stability as,  
 368; and equality of resources, 404,  
 407-408 (*see also* Resources, equal-  
 ity of); and judgment, 410
- Intention: in conversational interpre-  
 tation, 50; and constructive inter-  
 pretation, 54; and social  
 interpretation, 54, 58, 59, 62-65;  
 and artistic interpretation, 55-58;  
 and interpretation structure, 58-59;  
 and aesthetic value, 59; statement  
 of vs. promise, 345. *See also* Purpose
- Intentions of legislators: and Elmer's  
 case, 18-19; and snail darter case,  
 21-23; as issue, 100; change in atti-  
 tude about, 137-138; in pragmatic  
 view, 158; Hercules' view on, 313,  
 314, 316-317, 348, 350; speaker's  
 meaning view of, 314-316,  
 317-327, 335-337, 348, 350, 352,  
 361; as against repeal or amend-  
 ment, 318-319; and realistic alter-  
 natives, 322; and convictions, 324,  
 327-337, 361; and legislative his-  
 tory, 342-347; and time, 348-350;  
 and Fourteenth Amendment,  
 360-363, 365, 388, 396; and histor-



- icism, 360-366, 367, 368-369; vs. passivism, 369
- Internal skepticism, 78-86, 412; about chain novel, 230-231; toward law as integrity, 267-271; in critical legal studies, 272-274; in passivism, 373; about morality, 427n27. *See also* Skepticism
- Interpretation, 50; as interpretive concept, 49; scientific, 50-51, 53; and purpose, 50-52, 56, 58-59, 62-65, 228; conversational, 51-52, 53-54, 64-65, 419n2; constructive, 52-53, 54, 56, 61, 62, 65, 90, 315, 336, 423n15; and individual acts vs. collective practices, 54-55, 63-65; artist's-intention method of, 54-62; literary, 59, 66; stages of, 65-68; vs. invention, 66, 67; assumptions or convictions in, 67-68; and institutional identity, 68-70; and concept-conception distinction, 71-72 (*see also* Conceptions of law); and paradigms, 72-73, 91-92; of justice, 73-76, 424n20 (*see also* Justice); skepticism about, 76-86, 237-238, 426n27; law as, 87-89, 90-92, 101-102, 226-227, 228, 410-411; fit and justification in, 139, 230, 231, 239, 255, 257, 410-411; of justice by citizens, 189-190, 211; of community, 203-204, 207 (*see also* Community); of political practices, 215; and law as integrity, 225-227, 228, 239 (*see also* Integrity, law as); vs. dichotomy of finding and inventing law, 228; chain novel as, 229-238; and dichotomy of freedom and constraint, 234-235; formal and substantive opinions in, 236-237; respecting of text in, 238; and Hercules in *McLoughlin*, 240-250, 258-259, 268-271 (*see also* Hercules); competitive and contradictory principles in, 241, 268-269; as fitting judicial decisions vs. opinions, 247-248, 284-285; local priority in, 250-254, 402-403, 405, 406; political convictions in, 259-260
- Interpretation of Constitution: and *Brown* case, 29-30; liberalism vs. conservatism in, 357-359; historicism in, 359-369, 395-396; passivism in, 369-378, 396; activism in, 369, 378, 398; and American vs. foreign legal practice, 378-379; Hercules' approach to, 379-392, 393-394, 396-399; and individual rights, 381-382; and racial discrimination, 382-392; and remedies, 390-392; and affirmative action, 393-397. *See also* Constitution, U.S.
- Interpretations of law. *See* Conceptions of law; Conventionalism; Integrity, law as; Pragmatism, legal
- Interpretation of statutes, 16-17, 313-314; literal, 17-18, 99-100, 130; legislators' intentions in, 18-19, 21-23, 313, 314-327 (*see also* Intentions of legislators); in conventionalist view, 114-115, 122, 130-131; disagreement over, 122; and consistency with past, 132, 133-134; in legal pragmatist view, 148, 154-155, 162; Hercules' method for, 313-314, 316-317, 330, 337-341, 342, 343, 347, 348-353, 354, 363, 379-380; legislative history in, 314-315, 342-347; legislators' convictions in, 324, 327-337; and time, 348-350; and "uncertainty" of language, 350-353. *See also* Statutes
- Interpretive attitude: and disagreement, 46-47; toward courtesy, 47-49 (*see also* Courtesy); inside view of, 49, 76; and stages of interpretation, 65-68; as objective, 76-78, 79-80, 81-82; and internal skepticism, 78-79 (*see also* Internal skepticism); and foreign legal systems, 102-104, 107; and wicked law, 105-108; of conventionalism, 116; toward conventional practices, 122-123; as needing paradigms not conventions, 138-139; toward associative obligations, 197, 198, 203-204



- Interpretive stage, 66; and Nazi "law," 104
- "Inventing" law, vs. theoretical disagreement, 5-6. *See also* "Making" law
- Invention vs. interpretation, 66, 67
- Issues: of law, 3; of fidelity, 3, 5, 7; of morality, 3, 7; of fact, 3, 11-12 (*see also* Empirical disagreement; Truth and falsity); of repair, 9; in postinterpretive stage, 99-101
- Johnson, J. W., 432n5
- Judges: mechanical, 8, 18; discretion of, 9; as intuitive decision makers, 10-11; popular opinion about, 11; in exploration of legal practice, 14-15; and doctrines of precedent, 24-26; legal realism view of, 36; interpretation by, 87, 410; and jurisprudence, 90; and force of law, 112, 218-219; and conventionalism, 115, 117, 119, 125-126, 128, 148, 157-158, 226; and protected expectations, 129-130; and consistency with past, 132-134; and legal pragmatism, 148-149, 151-157, 158-163, 226; and political integrity, 167; and integrity in adjudication, 217, 218, 225; and law as integrity, 226-227, 228, 238-239, 244, 245-246, 255-258; as authors and critics, 228-229; and Hercules, 239, 264-265 (*see also* Hercules); and explicit statement of principle, 247; statutory interpretation by, 314, 324, 333-334, 342 (*see also* Interpretation of statutes); liberal vs. conservative, 357-359; and minority rights, 375; in school desegregation cases, 391-392; constraints on, 401-403, 410; interpretive questions for, 412
- Jurisprudence (philosophy of law): and theoretical disagreement in law, 6; skepticism toward, 85; in legal arguments, 90; and grounds vs. force of law, 111, 112; and lawyers, 380; of racial integration, 391-392; law's dreams by, 407-410
- Justice, 164, 165; and law, 7, 97-98; and natural law theory, 35-36; as interpretive concept, 73-76, 424n20; in legal pragmatism, 151, 187; and integrity, 166, 189-190, 263, 404-405; in personal behavior, 174; fairness as, 177; in conflict with other virtues, 177-178, 188, 404; and "checkerboard" laws, 180-183; and equal protection, 185; duty to support, 193; vs. communal obligations, 202-206; in community of principle, 213, 214; in law as integrity, 225, 243, 256, 262; in Hercules' treatment of *McLoughlin*, 242, 249-250, 259; academic vs. practical elaboration of, 285-286, 287, 290-291; and duty to maximize wealth, 286-288; utilitarian, 288-295 (*see also* Utilitarianism); in Hercules' interpretation of statutes, 338; skepticism about, 372-373; and passivism, 374-376; in pure integrity, 405-406
- Kant, Immanuel, and self-legislation, 189
- Kennedy, Duncan, 438n26, 440nn16, 18
- Klare, K., 440nn16, 18
- Korematsu* case, 376
- Kuhn, Thomas, 421n4
- Langen, P., 431n5
- Law: empirical disagreement about, 4, 5, 31, 33, 37; grounds of, 4, 11, 112 (*see also* Grounds of law); theoretical disagreements about, 4-6, 11 (*see also* Theoretical disagreement in law); plain-fact view of, 6-11, 15, 20, 31 (*see also* Plain-fact view of law); and justice, 7, 97-98; vague guidelines in, 8, 9; as social phenomenon, 12-14, 418n29; external and internal perspectives on, 13-14; as coherent whole, 19-20; and skepticism, 79, 85-86, 268; centrifugal and convergent forces in, 87-89; paradigms of, 88, 89, 91-92;



- development of, 89-90, 137-138, 157, 409; concept of, 92-94, 108-110, 190; basic questions on, 94; conceptions of, 94-96, 99-101 (*see also* Conceptions of law); and morality, 96-98, 100, 430n5; in wicked places, 101-108, 206; chain of, 228-238, 239, 313; compartmentalization of, 250-254; economic approach to, 272; as worked pure, 400, 406-410; constraints on, 401-403, 410; empire of, 407, 413; utopian dreams of, 407-410; cunning of, 409; as authority, 429n3. *See also* Statutes
- Law, theories of. *See* Conventionalism; Integrity, law as; Legal realism; Plain-fact view of law; Positivism, legal; Pragmatism, legal; Semantic theories of law
- Law as integrity. *See* Integrity, law as
- Law as interpretive concept, 87-89, 90-92, 410-411; and analysis of interpretation, 50; and law in wicked places, 101-102; and force of law, 111; and law as integrity, 226-227, 228; and chain of law, 228-238, 239, 313; and liberal-conservative distinction, 357-358; and interpretivist-noninterpretivist distinction, 360
- Lawsuits: significance of, 1-3; issues raised in, 3; under unilateralism, 143. *See also* Cases; Hard cases
- Law of unintended injury: economic theory of, 276-285, 310 (*see also* Economic theory on unintended damage); and utilitarianism, 288-295; egalitarian interpretation of, 295-309, 312; and resource egalitarianism, 297-298, 299, 301-309, 312, 403-404; antiliberalism argument from, 441-444n20
- Leader, Sheldon, 448n11
- Legal conventions, 114, 120-124. *See also* Conventionalism
- Legal language, flexibility of, 104-105
- Legal philosophy. *See* Jurisprudence
- Legal positivism. *See* Positivism, legal
- Legal practice: as argumentative, 13; identifying of, 90-91; conventions in, 120-124; and legal pragmatism, 158-160; and law as integrity, 225; and rise of Supreme Court, 356; constraints on, 401-403, 410; non-computability of, 412
- Legal realism, 36-37, 153, 161-162; vs. law as integrity, 228; and critical legal studies, 272
- Legal rights. *See* Rights, legal
- Legal theory: aspects of, 11-12; "external," 14; grounds and force of law in, 110. *See also* Theoretical disagreement in law; Theory of legislation
- Legislation: in conceptions of law, 99; as communication, 315, 329, 348. *See also* Statutes
- Legislation, interpretation of. *See* Intentions of legislators; Interpretation of statutes
- Legislative history, 314-315; of Endangered Species Act, 22, 347; official statements of purpose in, 342-347; and passage of time, 350; and Fourteenth Amendment rights, 388; and procedural due process, 405
- Legislative integrity, 167, 176, 217-218. *See also* Integrity
- Legislative responsibility, 319-320, 341
- Legislative supremacy: as constraint, 401; as fairness, 405; and justice, 406
- Legitimacy, 190-192; through tacit consent, 192-193; and duty to be just, 193; through fair play, 193-195; through communal obligations, 206-208; and community of principle, 214-215, 216
- Lewis, David, 431n3, 433n14
- Liberalism: critical legal studies on, 274-275, 440n19, 441n20; of justices, 357-359; and Hercules, 398-399
- Libertarianism, 297, 299, 301; and semantic sting, 73, 76



- Like cases: like treatment of, 165; and political integrity, 219-224. *See also* Consistency with past; Precedent
- Literal interpretation, 17-18; as issue, 99-100; as strict-conventionalist criterion, 130
- Literary criticism, judge's function compared to, 228-229
- Literary interpretation: author's intention in, 59; preinterpretive stage in, 66
- Local priority, in interpretive judgments, 250-254, 402-403, 405, 406
- Lochner* case, 374, 375, 398
- Lukes, Stephen, 425n21
- Lyons, David, 431n4
- McLoughlin* case, 23-29, 38-39; and natural-law interpretation, 36; and legal positivism, 37; and protected expectations, 118; in law as integrity, 120; and legal convention, 122; and soft conventionalism, 126; and strict conventionalism, 131; and consistency with past, 133; under unilateralism, 142; and surprise, 142, 143; and legal pragmatism, 159, 162-163; and integrity, 177; and integrity vs. pragmatism, 220; and chain of law, 238-239; Hercules' treatment of, 240-250, 258-259, 268-271
- Madison, James, 436n9
- Majoritarian system: integrity in, 165, 177-178; and utilitarianism, 290-291; vs. constitutional rights, 356; and passivism, 373-377; in Hercules' approach, 398; and fairness, 435n3. *See also* Democracy
- "Making" law: vs. theoretical disagreement, 5-6; and conventionalism, 117, 119, 126, 131-132, 142; and law as integrity, 119-120; consistency with past in, 132-133. *See also* Gaps in law; Hard cases
- Marbury v. Madison*, 370
- Market-simulating rules, 277; in duty to maximize wealth, 286-288; in utilitarianism, 288-295; and egalitarianism, 295, 300-309
- Marshall, John, 356-357
- Marxism: and justice, 74, 75, 425n 21; as outside law, 408
- Meaning: in interpretive attitude, 47, 50; of practice vs. individuals, 54-55, 63-65; and extension, 71
- Meaning of law, 32. *See also* Semantic theories of law
- Melamed, A. Douglas, 444nn4, 5
- Mental states of legislators, 314, 318, 321-324, 335-336; communication of, 315; and Hercules' method, 316; counterfactual, 325-327, 328; and legislation as communication, 348; and historicism, 361. *See also* Intentions of legislators
- Mill, James, 435n2
- Miller, Jonathan, 421n7
- Morality: in legal judgment, 1; and plain-fact view of law, 7, 8, 9; and *McLoughlin* case precedent, 28, 127; vs. policy, 28-29; and natural law theory, 35-36; skepticism toward, 78-86, 427n27; vs. taste, 82-83; and law, 96-98, 100, 430n5; vs. conventionalism, 118-119; in interpretation of conventions, 122; and soft conventionalism, 128; in legal pragmatism, 151-152, 160, 187; and political integrity, 166, 189-190; of personified community, 168-175; and political obligation, 191; associative obligations in, 196-201; in fairness of decisions, 250; and compartmentalization of law, 252; and Hercules' decision, 262; academic vs. practical elaboration of, 285-286, 287, 290-291; and duty to maximize wealth, 286-288; utilitarianism, 288-295 (*see also* Utilitarianism); promise-keeping, 344-345, 346; and Fourteenth Amendment, 365; and liberalism, 441n19. *See also* Political morality
- Moral ledger, 306
- Nagel, Thomas, 174, 426n24, 434n12
- Natural law theories, 35-36; and morality-law connection, 98; justice-



- law connection in, 98, 102; and law as integrity, 263; and Hercules, 397
- Nazi Germany: and rule of recognition, 35; "law" in, 102-108; and group responsibility, 172, 173
- Negligence: contributory, 282-283; comparative, 283
- Negligence law: and nuisance law, 253-254; interpretation of, 276, 292-293, 312 (*see also* Law of unintended damage)
- Nelson, William, 436nn9, 10
- Neurath, Otto, 111, 139
- Nietzsche, Friedrich, and paradigms of justice, 75
- Nihilism in law: semantic theorists' fear of, 44; and law as illusion, 101
- Novel, chain, 228-232; Scrooge in, 232-237; "real" novel in, 238; and law, 239
- Nozick, Robert, 437nn18, 19, 445n14
- Nuisance law: and negligence law, 253-254; interpretation of, 276, 292-293, 312 (*see also* Law of unintended damage)
- Oakley, John, 417n13
- Objectivity, 82-83; and interpretive attitude, 76-78, 79-80, 81-82; and hard cases, 266; and external skepticism, 267. *See also* Empirical disagreement; Truth and falsity
- Obligation. *See* Morality; Political morality; Political obligation
- Obligations of community. *See* Associative obligations
- Opacity of statements and convictions, 331-332, 362
- Paradigms, 72-73; of justice, 75-76; of law, 88, 89, 90, 91-92; conventionalist, 121; and interpretive attitude, 138-139; conservation of species as, 341; and hard vs. easy cases, 354. *See also* Pivotal cases
- Parental domination: as integrity example, 202, 203, 204-205; and equal protection, 402
- Parfit, Derek, 424n19
- Parliament, and statutory interpretation, 344
- Passivism in constitutional adjudication, 369-378; issues in, 370; and fairness, 374, 376-378; and justice, 374-376; and affirmative action, 396; and Hercules, 398
- Performative acts: promises as, 344-345; legislation as, 346
- Perry, M., 450n5
- Personification of community or state, and political integrity, 167-175, 186-187, 225, 296
- Philosophy of law. *See* Jurisprudence
- Pivotal cases: vs. "borderline" defense of positivism, 41-43; and disagreement, 45. *See also* Paradigms
- Plain-fact view of law, 6-11; and sample cases, 15, 20, 31; and semantic/positivist theories, 31, 33, 37, 39, 40; on judges' opinions, 90; and Marshall's dictum, 356
- Plessy v. Ferguson*, 29-30, 118-119, 376, 379, 387, 389, 399
- "Point" (purpose): and interpretation, 58-59; of law, 87-88, 94, 95, 141, 150, 356; of judicial decision, 138; of statute, 343. *See also* Purpose
- Policy arguments: in *McLoughlin* case, 27-29; vs. principle, 221-224, 243-244, 310-312, 338-339, 381; and legal remedies, 390; in legislation vs. adjudication, 410. *See also* Economic theory on unintended damage
- Polinsky, M., 445n7
- Political morality: issues of, 3; and *Brown* case, 30; and law as integrity, 96, 239, 263; and conceptions of law, 101; and wicked law, 105, 108; vs. protected expectations, 117; and surprises, 141; vs. force of law, 218-219; and explicit announcing of principle, 247-248; and hard cases, 256, 258; and interpretation, 260, 378, 411; and statutory interpretation, 316, 319-320, 343, 345-346; in constitutional interpretation, 366-367, 374; in uto-



- pian legal politics, 408-409. *See also* Morality
- Political obligation, 191; and associative obligations, 196, 201, 205-206, 216; and emigration, 207
- Politics: law as, 8, 9-10; of adjudication, 12, 380-381; and borderline cases, 41; as debate, 211
- Popper, Karl, 421n4
- Positivism, legal, 33-35, 37-43; and justice-law connection, 98; and morality-law connection, 98; and wicked law, 102; inflexible use in, 104; and nature of law vs. force of law, 109; and law as authority, 429n3; and democracy, 432n6. *See also* Semantic theories of law
- Posner, Richard, 444n1, 445n7
- Postema, G., 433n13
- Postinterpretive stage, 66; legal issues in, 99-101; conventionalist claims in, 116, 117; in interpretation of Constitution, 358
- Powell, H. J., 452n22
- Powell, Lewis, 22-23
- Pragmatism, legal, 95, 151-153, 158-160, 161, 410; and justice-law connection, 98; and conventionalism, 147-150, 157, 161, 162, 264; and morality, 151-152, 160, 187; as-if strategy of, 152-153, 154-155, 158, 161, 162; and legal rights, 152-153, 154-155, 158, 160-164; and prospective rulemaking, 155-157; and development of legal culture, 157; and law as integrity, 220, 225, 226, 244, 261, 410, 411; and compartmentalization, 251; activism as, 378
- Precedent: relaxed doctrine of, 24, 25-26; strict doctrine of, 24-26, 401; and convergence of interpretation, 88; in conception of law, 99; and conventionalism, 115, 121-122, 123, 130, 131-132; disagreement over interpretation of, 122; and consistency with past, 132, 133-134; changes in doctrine of, 138; in legal-pragmatist view, 148, 154-155, 158-159, 162; in Hercules' approach, 240-250, 258-259, 337, 399, 401-402; as constraint, 401; as procedural due process, 405. *See also* Chain of law
- Predictability: vs. flexibility, 146-150, 154; through compartmentalization, 252; value of, 367-368. *See also* Protected expectations
- Predictive hypothesis, judge's opinion as, 36-37
- Preinterpretive stage, 65-66; for justice, 75; as contingent and local, 91; for law, 91, 92; and Nazi "law," 103, 104, 105
- Principle: and compromise, 179-184, 435n7; community of, 211, 213-214, 404, 406 (*see also* Community of principle); in political integrity, 221-224; vs. policy, 221-224, 243-244, 310-312, 338-339, 381; contradictory vs. competitive, 241, 268-269, 274; explicit recognition of, 247-248; in utilitarian justification, 290. *See also* Rights
- Procedural due process, 166-167; in conflict with other virtues, 177-178, 404; and integrity in adjudication, 218-219; in law as integrity, 225, 243; in Hercules' interpretation, 338; in political integrity, 404-405; and pure integrity, 406
- Promises: and responsibilities of public officials, 174-175; statutes as, 344-345
- Property: abstract rights in, 293, 300-301 (*see also* Rights); in conceptions of equality, 296, 297-301; and equality of resources, 297-298, 299, 407; policy vs. principle on, 310-311. *See also* Law of unintended injury
- Propositions of law, 3-4; grounds of, 4, 6, 11 (*see also* Grounds of law); truth or falsity of, 4-5, 32, 417n5; semantic theories on, 31, 32-44; and causation analogy, 31-32; and core vs. penumbral uses, 39-43, 419n34; and pivotal cases, 41-43; in law as integrity, 225



- Protected expectations: as conventionalist ideal, 117-118, 119, 120, 129-130, 139-140; and soft conventionalism, 128; and democracy, 140; fairness of, 140-142; and predictability vs. flexibility, 143-150
- Protestant attitude toward law, 413; and integrity, 190; and compartmentalization, 252
- Pure integrity, 405-407
- Purpose: and interpretation, 50-52, 56, 58-59, 62-65, 228; in statutory interpretation, 100; in legislative history, 343-347; in Fourteenth Amendment, 365. *See also* Intention; "Point"
- Quine, W. V. O., 421n3, 447n6
- Quota system. *See* Affirmative action
- Racial discrimination: and associative obligation, 204; constitutional right against, 382-387
- Racially segregated education: and "discovered" vs. "invented" law, 6; and *Brown* case, 29-30, 387-389 (*see also Brown* case); and busing, 221, 392; and Supreme Court role, 357; and historicist interpretation, 360-361, 362-363; and fairness, 377; remedies against, 389-392; and affirmative action, 393-397
- Rationality requirement, of Constitution, 382, 383, 397
- Rawls, John, 192, 193, 440n19, 424n17, 435n1, 437nn16, 17, 18
- Raz, Joseph, 424n18, 428n1, 429n3
- Realism, legal. *See* Legal realism
- Reasonable-person rule, 280-282, 284, 306-307
- Repair, 9; and positivist view, 38, 40
- Resources, equality of, 297-298, 299, 301-309, 312, 403-404, 407-408
- Responsibility: institutional, 168-171, 189; collective, 172-173, 175; of political officials, 173-175; principle of, 269-270; public vs. private, 295-296, 299-300, 309-310 (*see also* Rights, legal); legislative, 319-320, 341
- Reverse discrimination. *See* Affirmative action
- Rights: in simulated markets, 277; vs. collective strategies, 292-293, 381-382; and comparative cost, 307-308, 309; and constitutional passivism, 375, 376-378; and remedies, 390; vs. communal good, 408. *See also* Principle
- Rights, legal, 93, 152; and conventionalism, 95, 152; vs. other forms of rights, 117; and legal pragmatism, 152-153, 154-155, 158, 160-164; and law as integrity, 244; abstract (*prima facie*), 293, 296, 301, 306, 310, 312; judicial protection of, 356; and historicism, 368-369; against racial discrimination, 382-392; enforcement of, 390-392; as protecting fairness vs. justice, 451n11
- Rights, political: and personification of community, 173-174; and integrity, 223; and policy, 311-312
- Rope analogy: and institution of courtesy, 69-70; and Nazi "law," 103. *See also* Chain of law
- Rousseau, Jean Jacques, and self-legislation, 189
- "Rule" of law, 93
- Rulemaking, prospective vs. retrospective, 155-157
- Rule of recognition, in Hart's theory, 34-35
- Rules: coordination through, 145-146; in utilitarian justification, 290. *See also* Convention; Principle
- Scarman, Lord, 28, 38
- Scrooge, interpretation of, 232-237
- Segregation. *See* Racially segregated schools
- Self-government, and political integrity, 189
- Semantic sting, 45-46, 68, 70, 73, 87; and legal system, 91; and legal paradigms, 92; and wicked law, 103; and Hercules' decision, 262; and constitutional adjudication, 360



- Semantic theories of law, 31-37; legal positivism, 33-35, 37-43 (*see also* Positivism, legal); natural law theories, 35-36, 98, 102, 263, 397; legal realism, 36-37, 153, 161-162, 228, 272; defenses of, 37-43; and core vs. penumbral uses, 39-43, 419n34; and pivotal cases, 41-43; as escape from legal nihilism, 43-44; and justice, 73, 74; impossible goal of, 90; positivism-natural law contest in, 98; and wicked law, 102, 103, 108; inflexible use in, 104; and nature of law vs. force of law, 109; and conventionalism, 115-116; and consistency in principle, 135
- Shavell, S., 445n7
- Skepticism: and interpretation, 76-86, 237-238, 426n27; internal and external, 78-85, 266-267 (*see also* External skepticism; Internal skepticism); about morality, 79, 84-85, 427n27; toward law, 79, 85-86, 268; legal pragmatism as, 95, 160; toward associative institution, 203, 205; toward law as integrity, 228, 261, 266-271; about chain novel, 230-231, 237-238; in critical legal studies, 271-274; interpretive vs. historical argument in, 273; and passivism, 372-373; about hard cases, 412; and liberalism, 441n19
- Skinner, B. F., 14
- Slavery, and political integrity, 184
- Snail darter case, 20-23; and legal positivism, 37; and strict conventionalism, 125, 131; and soft conventionalism, 125-126; as interpretation example, 313, 317, 328, 330-333, 337-338, 342, 347
- Social contract theory, 192-193
- Social interpretation, 50, 51, 54, 58, 59, 62-65
- Social science, and interpretation, 55, 64, 68, 422n14. *See also* History
- Society. *See* Community
- Sociology: and legal practice, 12-14; in *Brown* case, 30
- Soft conventionalism, 124, 125-128
- Soper, Philip, 431n4
- Sound-truck example, on fair play, 194
- Speaker's meaning view of statutory interpretation, 314-316, 317-318; and questions of authorship, 318-320; composite intention in, 320-321, 335-337; hopes and expectations in, 321-324, 325; and legislators' conviction, 324, 327-337; canonical moment in, 348, 350; and unclarity, 352; and historicism on Constitution, 361
- Stability, as historicism rationale, 365-369
- State, personification of, 167-175, 186-187
- State of nature, and legitimacy, 194
- Statute: as document vs. law, 16-17; "checkerboard," 178-184, 186, 187, 214, 217-218; and community of principle, 214; Constitution as, 379. *See also* Interpretation of statutes
- Statute of wills, 16, 18, 122, 132, 317, 346-347, 351, 352
- Statutory interpretation. *See* Interpretation of statutes
- Stevens, John Paul, 449n3
- Subject classification account of right against discrimination, 382-383, 385, 386, 387
- Supreme Court, U.S.: power of, 2, 355-357; in snail darter case, 21, 131; precedent from, 25; in *Brown* case, 29-30; in conventionalist view, 118-119; on vague definition of crimes, 143; abortion ruling by, 185, 186; liberals vs. conservatives on, 357-359; in historicist interpretation, 366; and *Marbury v. Madison*, 370; and passivism, 375-376. *See also* *Brown* case; Snail darter case
- Sutherland, A., 431n5
- Swift, Jonathan, 433n2
- Testing cases. *See* Pivotal cases
- Textual integrity, of statutes, 338-340, 342, 347, 349-350
- Theoretical disagreement in law, 4-5, 11; vs. "inventing" law, 5-6; and



- plain-fact view, 6-11, 31, 37 (*see also* Plain-fact view of law); and Elmer's case, 20; and snail darter case, 23; and *Brown* case, 30; and semantic theories, 31-43 (*see also* Semantic theories of law); and shared factual criteria, 43-44, 45-46; as interpretive, 87
- Theories of law. *See* Conventionalism; Integrity, law as; Legal realism; Plain-fact view of law; Positivism, legal; Pragmatism, legal; Semantic theories of law
- Theory, academic vs. practical, 285
- Theory of legislation: and statutory interpretation, 17, 23; change in, 137
- Thought and expression, 315
- Tort law, skepticism about, 268. *See also* Law of unintended injury
- Traditional practices: gender interpretation of courtesy as, 72-73; and equality, 202, 204-205, 402; and racial discrimination, 383, 389. *See also* Courtesy
- Transaction costs, 278-280, 287
- Transparency of statements and convictions, 331-332, 363
- Tribe, Laurence, 436nn9, 10
- Truth and falsity: of grounds of law, 4, 6; of propositions of law, 4-5, 32, 417n5. *See also* Empirical disagreement; Objectivity
- Tushnet, Mark, 440n19
- Unclarity of language, and statutory interpretation, 350-353
- Unilateral conventionalism (unilateralism), 142-143, 146, 147, 365-366
- Utilitarianism, 288-295; and semantic sting, 73; and equality, 292-295, 297, 298; and personal responsibility, 309-310; and racial discrimination, 383, 384; in purified law, 408
- Utopianism: political philosophy as, 164; in legal politics, 408-409
- Values: and interpretive attitude, 47, 48; in constructive interpretation, 52-53; and artistic interpretation, 55, 57; of art, 59-62; of integrity, 188; of certainty, 367-368
- Verstehen*, 420n2
- Virtues, political, 164-165; conflicts among, 117, 188, 404. *See also* Fairness; Integrity; Justice; Procedural due process
- Wakefield, John, 449n13
- Waldron, Jeremy, 437n14
- Walzer, Michael, 425n20
- Warren, Earl, 29-30, 359
- Wealth, community: definition of, 277, 286-287; duty to maximize, 286-288; in utilitarianism, 288-295
- Wealth test, 276-280; and reasonable-person rule, 280-282; and contributory negligence, 282-283; fit of, 283-285
- Welfare, in utilitarianism, 288-295
- Williams, Bernard, 426n24
- Wittgenstein, Ludwig: and form of life, 63; rope analogy of, 69-70; on communication of thought, 315