Index

abortion, and autonomy and dignity 441–58
  in constitutional adjudication 461, 465, 466, 615–16
  Germany 448–55
  Ireland 442–5, 452–5
  US 443, 445–8, 452–5
Abranches, S. 222
Ackerman, B. 96–7, 230, 234, 251, 340, 346, 347, 352, 353, 534, 565
Ackermann, L. 591, 592, 594, 595, 596
Adler, J. 504
Afghanistan 80–82, 84–6, 88, 89, 91
Agresto, J. 301
Ahidar, R. 423
Ahrons, Y. 169
Ajzenstat, J. 164
Al-Ali, Zaid 77–95
Albania 48, 50
Albert, R. 234, 301
Albertyn, C. 494
Aleinikoff, A. 164, 166, 391
Alesina, A. 118
Alexander, G. 189, 352, 505, 509
Alexander, L. 303
Alexy, R. 389, 390, 391, 592, 604, 617
Alford, R. 418, 618
Allan, J. 312, 459
Allan, T. 488
Allars, M. 245
Allen, Tom 189, 504–18
Alonso García, R. 275
Alston, P. 74, 400
Alter, K. 276
Altman, D. 222
Alvarez, J. 63, 193, 196, 198
Alvaro, A. 504
Amar, A. 98, 360, 417
Ambwani, S. 104
amendment rules see constitutional amendment rules
Amorin Neto, O. 222, 226, 228
Andenaes, M. 563
Anderson, G. 200, 201, 202
Anderson, K. 594
Anderson, L. 365
Andrews, W. 230
Anghie, A. 172
Ankut, P. 53

Appleton, S. 457
Arato, A. 22, 34, 51
Argentina
  bilateral agreements and fair and equitable treatment 196, 199
  CMS 196, 199
  court docket control 635
  dispute resolution 193
  judicial engagement with comparative law 574, 578–9, 581, 584
  legislative and executive powers, separation of 235
  presidential democracy and decree power 228–9
  Simon 67–8
  state responsibility in past human rights violations 65–6, 67
  transitional justice 66–8
Arjomand, S. 436
Aroney, N. 358
Aronson, M. 247
Arsu, S. 75
Asimow, M. 248–9
Aspinall, E. 378
Atiyah, P. 242, 243, 244, 245
Attwood, B. 101, 102
Aung, T. 22
Austin, G. 122
Australia
  Al-Kateb v Godwin 610
  birthright citizenship 151–2, 153–4, 164, 165, 166, 167
  Chu Kheng Lim v Minister for Immigration 144–5
  citizenship and constitutional text 144–5
  citizenship definition 149–50, 163
  citizenship rights 144–5, 158–9
  constitution endurance 115
  constitutional amendments 97, 98, 99, 100, 101–2
  constitutional interpretation 601–2, 605, 606, 610–11
  constitutional temperance campaign 21
  court docket control 629
  dual citizenship 153–4, 155
  dual nationals, restricted rights of 156
  freedom of expression 408, 412–13, 419
  gender-constitutional analysis 21
immigration and detention 610
and indigenous communities 101–2
judicial engagement with comparative law 573, 588
judicial review 304, 312
legislative and executive powers, separation of 246–7
mandatory referenda voting 50
non-citizens 157
notwithstanding clause and bill of rights 302–3
parliamentary systems in common law world 242–7
power to remove cases 100
private individuals, effects on 393
property rights 505, 513
reproductive rights 29
terrorism law 538–9, 542, 543–4
Victorian Charter of Rights and Responsibilities 100
Austria 407, 463, 555–6, 574, 588
Axelrod, R. 213
Ayres, A. 369
Azuela, A. 511

Backer, L. 84
Baer, S. 169
Bagaric, M. 459
Baines, B. 31, 32
Bakan, J. 164–5
Balkin, J. 101, 602, 617
Bamforth, Nicholas 551–67
Banazak, K. 27
Bankowski, Z. 592
Banks, A. 22, 34–5, 46, 47, 376
Bannon, A. 44, 50, 52, 53
Banting, K. 52
Barak, A. 287, 416, 591, 594, 595, 603
Barak-Erez, D. 161, 165, 168, 169, 545
Barber, B. 39
Barendt, E. 406, 408, 409, 415
Barker, E. 473, 474
Barnett, R. 603, 617
Barrionuevo, A. 235
Barron, D. 195
Barros, R. 13
Barsh, R. 179
Bartlett, K. 32, 35
Barzilai, G. 352, 638–9
Basedau, M. 263
Bates, J. 459
Bateup, C. 317
Baun, M. 3
Baxi, U. 193
Baylis, E. 362
Beatty, D. 189, 391, 532, 538, 542, 603–4, 617
Beauvais, J. 193, 195
Beck, U. 201
Been, V. 193, 195
Belgium 115, 485, 486, 574
Bell, J. 247, 251, 613, 616, 620, 621, 622
Bendor, A. 350
Benomar, J. 38, 43, 44, 52, 53
Bentele, U. 573, 595
Benvenisti, E. 66
Berkowitz, D. 119
Berman, P. 191
Bermeo, N. 366
Best, C. 592
BeVier, L. 414
Bhargava, R. 139
Bickel, A. 270, 272, 317, 533, 534, 624–5, 635
Bieber, F. 377
Bilchitz, D. 495, 530
bills of rights see constitutional experimentation
and bills of rights functionality
Bingham, T. 93
Blackstone, W. 512
Blasi, V. 415
Blendon, R. 251
Blount, Justin 38–56
Bobbitt, P. 604, 617–18
Bogdanor, V. 565
Bohmer, M. 66
Boix, C. 115
Bolivia 193
Bollinger, L. 415, 417
Bomhoff, J. 617
Booth, W. 235, 236
Boralevi, L. 1
Borchard, E. 199
Bork, R. 414
Bosnia
Bosnia v Serbia 59, 72
collective presidency 376
constitutional drafting 82–4, 85, 87, 89, 91
veto powers of ethnic groups 82–4
Bosniak, L. 164, 169
Botswana 584, 587
Boudreaux, D. 98
boundaries see citizenship and constitutional boundaries
Bourdieu, P. 192, 197
Boyce, B. 509
Bracey, C. 459
Bradley, A. 300, 315
Bragyova, A. 43
Brancati, D. 369, 371, 377
Brazil
amnesty case and transitional justice 62
consultation process 47
court docket control 627, 635
judicial engagement with comparative law 574
presidential democracy and decree power 226, 228
socio-economic rights 527–8
Brennan, G. 3
Brennan, W. 301
Breslin, B. 44, 120, 130
Brewer-Carías, A.-R. 265, 268
Briffault, R. 360
Brodsky, G. 478
Bronitt, S. 167
Brookfield, F. 172
Brown, H. 639
Brown, L. 247
Brown, N. 437
Brownlie, I. 483
Brubaker, R. 366
Brunner, G. 50
Bryce, J. 194
Bryde, B. 574, 578, 591, 592, 593, 594, 596
Brzezinski, M. 639
Buchanan, J. 3, 104
Bugaric, B. 639
Buhaug, H. 378
Buhler, S. 152, 165, 166, 167
Buitrago, M. 22
Burke-White, W. 200
Burma 22
Bushell, A. 301, 312, 313, 332, 621
Bussani, M. 2
Butler, A. 308, 310, 389
Butler, P. 308, 310
Byrnes, A. 302

Cachard, O. 469
Cairns, A. 159, 168
Calabresi, S. 241, 250–51, 567, 574
Calderia, G. 639
Camen, U. 94
Cameron, I. 542
Cameron, J. 301
Campbell, T. 311, 312, 316, 415
Canada
 abortion rights 458
 bicameralism 310
 bill of rights 300–301, 302, 305–10
 birthright citizenship 151, 152
 citizenship and constitutional text 145–6, 406
citizenship definition 149–50, 163
citizenship rights 145–6, 158, 159
constitution endurance 115
constitution and political parties 257–8
constitutional amendment rules 97, 105
constitutional amendment rules, and power to remove cases 100
constitutional interpretation 601, 605, 606, 611–12
constitutional and ordinary jurisdiction, interplay of 292–4
court docket control 626, 629, 631, 636
criminal activity and freedom of expression 409
dual citizenship 155, 157
emergency provisions 337, 341
equality and discrimination 475, 476–81, 488, 493
equality, and inquiries undertaken 477–8
equality and internal relevance test 477
federalism 245, 341, 358, 362, 368–9
Figueroa 257
freedom of expression 408–13, 415–18
gender-constitutional analysis 21–2, 25
general limitations clause 328, 331
human dignity in constitutional adjudication 460, 464, 465, 478–9
immigration law 537
indigenous peoples and constitutional law 170–76, 182–5
international investment and law, effects of 194
judicial engagement with comparative law 574, 588
judicial review 192, 300–301, 302, 312, 313, 326–7, 330–31
legislation invalidation costs 309
limitations clause 389
Newfoundland 481
non-citizens 152, 157
notwithstanding clause in and bill of rights 300–301, 302, 309, 325, 327–8, 330–31
Oakes 328, 390, 410, 411, 481
parliamentary systems in common law world 244–6
principle of proportionality 390
private individuals, effects on 393, 395
property rights 504–5
proportionality analysis 328, 603–4
religion and multicultural accommodation 431–2
same-sex partnerships 477, 553, 558, 612
social security schemes and equality 480–81
sovereignty, state acquisitions of 172–3
terrorism law 533, 534–5, 537, 540, 542, 543, 544–5, 546
Canivet, G. 591, 592
Cappelletti, M. 268, 278, 280, 281, 282, 294
Capps, P. 464
Carey, J. 39, 116, 216, 218, 227
Carozza, Paolo G. 459–72
Carrio, G. 593
Carroll, S. 35
Case, M. 24, 25, 30
Carey, J. 352
Cass, D. 190
Castano, A. 593
Cederman, L. 370
Chad 44
Chang, H. 195
Chang, W. 573, 588, 593
Chappell, L. 27
Charlesworth, H. 27
Charters, Claire 170–88
Chaskalson, M. 504
Cheddle, H. 394
Cheibub, José Antonio 115, 120, 211–33
Chemerinsky, E. 392
Cheibub, José Antonio 115, 120, 211–33
Chemerinsky, E. 392
Chernykh, S. 217, 219
Chesterman, S. 94
Chile 62, 115, 431
China 423
Chinkin, C. 27
Cisar, E. 237, 239, 240, 242, 248
Citizenship and constitutional boundaries 143–69
Australian constitutional text 144–5, 158–9
birthright citizenship 150–52
Canadian constitutional text 145–6, 158, 159
citizen coordination, and constitutional endurance 116
citizen involvement 98, 103, 107
citizenship definition 148–50, 163
and citizenship law, divergent approaches 148–62
comparative approaches, challenges for 162–3
dual nationality 152–6
dual nationality, differential rights for 156–7
government policing 39
Israeli constitutional text 147–8
naturalization rights 150–51, 152
non-citizen categories 157–8
responsibilities 490
and text of national constitutions 144–8
US constitutional text 146–7, 158, 159–60
civil law 247–8, 268–9, 577–80
Clark, D. 2
Clarke, R. 537
Clay, K. 119
Clayton, C. 3
Clayton, R. 565
coalitions see under legislative-executive relations
Cohen, F. 171
Cohen, J. 63
Cohen-Eliya, M. 391
Cole, D. 352, 353, 534
Cole, P. 162–3, 169
Coleman, C. 31
Colker, R. 457
Collier, P. 378
Collins, H. 474–5
Colombia 115, 431, 632
common law 242–7, 509–10, 575–7
Commonwealth Human Rights Initiative 40–41
comparative perspective see constitutional interpretation in comparative perspective
Congleton, R. 105, 108, 121
Connell, R. 192
constitutional amendment rules 96–111
amendment functions 97–102
and amendment irrelevancy 101
and amendment substitutes 100–101
and basic constitutional rules 97–8
cautionsary approach 102–4
citizen involvement 98, 103, 107
comparative difficulty of 104–8
and constitutional age and length 106
and democratic pressure 98–9
and democratic self-government 102
evidentiary value 98–9
and exceptional forms of law-making 96–7
future research 107–8
interpretation of 99–100
and judicial interpretation 98–101, 105, 108
and minority rights protection 103
path dependency difficulty 106
and political competition 102, 106, 107
power to remove cases 100
ratification process and legislative approval 103–4, 105–6
and scale of state legislature 106
and sovereignty, popular 98
constitutional boundaries see citizenship and constitutional boundaries
constitutional drafting and external influence 77–95
Afghanistan case study 80–82, 84, 85, 88, 91
Bosnia case study 82–4, 85, 87, 91
and democratic governance rights 85
and differences of opinion 88
Index

disagreement categories 86–8
double standards, perceived 90
and fundamental rights 84
and gross violations of fundamental rights 86–7
interaction patterns 84–8
international best practice disagreements 87–8
and international monetary system 85, 87–8
Iraq case study 78–80, 84, 85, 87–8, 91
and judicial independence 85, 87
normative values, influence of 88–91
presidential system 81–2, 88
reach and limitations of 84–5
sovereignty and principle of non-interference 89–90
and threats to peace 90–91
veto powers of ethnic groups 82–4
and women’s rights 78–9, 81, 86
constitutional endurance 112–25
case studies 120–22
and citizen coordination 116
consequences of 114–16
constitution-specific institutions 113
and design features 118
and financial shocks 117
future research 120
history of 115, 117–18, 120–22
observed patterns 117–20
and public policy language 118–19
reasons for 112–14
and regime type 115, 119–20
regional effects 118
and rent-seeking 114, 116–17
and self-enforcement theory 116–17
and social and environmental change 113, 118
and stability 113–14
and subnational units 119
theories 116–17
and written constitution 119–20
constitutional experimentation and bills of rights
functionality 298–320
and bicameralism 310
and compatibility requirements 306–7, 312
consequences of failing to comply 309
future research 308, 310
intra- and inter-institutional reflection on justification of legislation 312
judicial power, effectiveness of limits on 312
and judicial review 300–301, 303–5, 311–13
legislation invalidation costs 309
legislation scope or effects, altering interpretation of 311
legislative and judicial judgment, relationship between 311–13
legislatures in rights judgment, role of 305–11
and notwithstanding clause 300–303, 309
parliamentary committees, specialized, argument for 310–11, 312
parliamentary rights model 299–303, 304–10, 311–12
reconsideration of bill of rights functionality 303–5
and risk assessment 307
constitutional identities, formation of 129–42
and bounded fluidity 132–3
concept of constitutional identity 129–31
and constitutional disharmony 130, 131–40
and constitutional text 131–2
and cross-national similarities 130
dissonance dynamics 133–7
and experience 129–30
and extra-territorial intervention 136–7
historical reference points 131–3, 135, 137, 139
internal and external disharmonies, balance of 137–40
and political balance 133–4
and secularism 133–4, 136, 138–40
constitutional interpretation in comparative perspective 599–623
amendments, positivism and suprapositive constitutionalism 606–7
Australia 601–2, 605, 606, 610–11
Canada 601, 605, 606, 611–12
defereence, majoritarianism and autonomous legal values 605–6
fixed meaning approach 601–2
France 605, 607, 612–14
functionalism, flexibility and standards 605
Germany 605, 606–8, 615–16
and human dignity 607–8
interpretive approaches 600–607
living tree approach 601, 611
and national courts 607–14
originalism, textualism and purposivism 602–4, 607
proportionality analysis 603–4, 607
and reference to precedent 609
rule-bound formalism 605
single-valenced vs. multi-valenced interpretation 604–5, 610
and substantive outcome 614–16
US 601, 602, 604, 605, 606, 609, 614–15
constitutional and ordinary jurisdiction, interplay of 278–97
acoustic separation, ideal and allure of 279–82
acoustic separation under full-scale transformative constitutionalism 284–9
Canada 292–4
compromised regimes, examples of 289–94 and constitutional supreme tribunals (CSTs) 279, 280, 281–2, 284–5, 288–9
and constitutional types 282–3
detached reviews of statutes 287–9
doctrinal control and adjudication 281, 288–9
functional and methodological differences 280
Germany 289–90
judicial ministries and need for differing talents and skills 280–81, 288–9
and political resistance 281–2
private-law integrity and parallel legal systems 285–7
and real effect demand 283
separation, standard case for 280–82
South Africa 286–7, 290–92
substantive constitutional effect, competing demand for 282–4
substantive constitutional norms, concrete effectuation of 283–4
and substantive guarantees 279, 284–5
constitutional rights, structure and scope of 387–405
first and second generation rights 400
and fixed tiers of review (US) 391
future research 396
indirect horizontal effect 394–5, 397
internal and external limits 388–90
and judicial review, weak-form 401
liberal, vertical position 392
limits, conceptions of 388–91
negative and positive rights, differences between 396–402
and principle of proportionality 390–91
private individuals, effects on 392–3, 394–5
and property rights 400
protective rights 397, 398, 399
and public-private division 392
scope and substantive content, connections between 395–6
social and economic rights 396–401
vertical and horizontal effect 391–6
welfare rights 397, 398, 401
constitutional supreme tribunals (CSTs) 279, 280, 281–2, 284–5, 288–9
Conway, D. 366
Coper, M. 620
Cornell, D. 60
Corral, B. 593
Corwin, E. 351
Costa Rica 29, 632
Cotler, I. 352–3, 543
Cotta, M. 230
Cotterell, R. 586
Cottrell, J. 50, 52, 80
European Court of Human Rights see European Court of Human Rights and national constitutional interpretation 607–14
role of, same-sex partnerships 558–60
specialized see specialized constitutional courts, rise of and terrorism law, challenges of 532–3, 534–8
see also judicial headings
Cowen, S. 494
Cowley, M. 235
Cram, I. 415
Crane, B. 639
Craven, M. 401
Crawford, B. 367
Crawford, J. 59
Creighton, D. 351
Cretney, S. 566
Crock, M. 164
Croissant, A. 229
Cross, F. 250, 358, 360, 401, 521
Cruz Villalón, P. 266, 270
Currie, D. 242, 246, 249, 263, 289, 400–401
Currie, I. 406, 409, 499
Cusack, T. 40
Czech Republic 259, 485
Dahl, R. 35, 100, 116
Dahlrup, D. 29
Daintith, T. 400, 402, 504
Dan-Cohen, M. 294
Dana, D. 195, 202
Daniels, R. 360
Dann, P. 89
Dargent, E. 641
Dargent, E. 641
Dauvergne, C. 168
Davis, Dennis M. 283, 401, 494, 519–31
Dawood, Y. 415
De Lamothe, O. 618, 622
De Mello, L. 93
De Mello, S. 94
De Raadt, J. 213
De Waal, J. 406, 409
Deakin, S. 361
Deheza, G. 222
democracy
deliberative, and participation in constitutional design 40–41
De Swaan, A. 213
De Vries, G. 222
and freedom of expression 414
governance rights, and constitutional drafting 85
inclusive, and secession 370
militant, and transitional justice 58
pressure, and constitutional amendment rules 98–9
self-government, and constitutional amendment rules 102
and specialized constitutional courts, rise of 270–71
Democratic Republic of the Congo (DRC) 49
Denning, B. 96, 97, 98, 100, 101
Dershowitz, A. 534
design see participation in constitutional design
devolution see federalism, devolution and
secession
DeVotta, N. 369
Dezalay, Y. 192, 197
Dezso, M. 43
Diamond, L. 92
Dillon, J. 195
DiMaggio, P. 3
discrimination see equality
Dixon, O. 617
Dixon, Rosalind 1–15, 34, 96–111, 313, 332, 389, 401, 593, 595
Dobrowolsky, A. 23, 31
docket control and success of constitutional
courts 624–41
clash of absolutes 628, 633
and court support structure 632
dangers of docket control 634–6
declining to hear cases 633–4, 635–6
and discretionary jurisdiction 626–7
and fairness 632
imperfect alternatives 633–4
institutional practice, common 626–7
and institutional variations 626
and judge appointments 635
and judicial review 627–30
legitimacy timing 629–33
and operational age of court 630
and political enemies 631–2
and political involvement 633, 634
power of docket control 627–33
quantity of constitutional review 630–33
scholarship view 625–7
and support, diffuse and specific 629
Dolzer, R. 195, 199–200
Donohue, D. 94
Donohue, L. 532, 545, 547
Dorsen, N. 57, 165
Dotan, Y. 637–8, 640
Douglas, Z. 198
Draeger, T. 509
drafting see constitutional drafting and external
influence
Dreier, R. 592
Driedger, E. 304
Dumont, F. 350
Dunn, F. 199
Dunoff, J. 76, 191
Dupré, C. 461, 467, 571, 580, 581, 593, 595, 596
Durr, R. 639
Duverger, M. 218
Dworkin, R. 414, 416, 455, 475, 565, 602, 617
Dyzenhaus, D. 533, 534, 536, 545, 548, 592
East Timor 43, 89
Easton, D. 639
Eberle, E. 290
Ebrahim, H. 48
economic rights see socio-economic rights
Ecuador 53, 194
Edwards, R. 488
Egypt 436–7, 546
Eisenmann, C. 268
Eisgruber, C. 102, 103
Ejima, A. 573
Elazar, D. 357, 358, 359
Elgie, R. 217
Elia, J. 67
Elkin, S. 202
Elkins, Z. 12, 38, 46, 51, 52, 96, 102, 106, 112, 114, 116–19, 202, 262, 530
Ellingwood, K. 236
Elliott, M. 312
Elster, J. 3, 41, 42, 44, 45, 51–2, 53, 98, 102, 103, 193
emergency regimes 334–55
and augmented extraordinary powers 341
authority to declare emergency 339–40
checks and balances 342–3
counter-emergency measures and targeting
outsiders 343
declaration ratification 340
dispersed emergency regulation 347
disruptions, definition of 336–9
emergency classification 338–9
emergency provisions in constitutional
documents 335–44
enforcement duration 340
and entrenchment of emergency powers 346–7
and executive branch of government, role of
343, 344, 345, 346–7
and federalism 341
inherent emergency powers 343–4
and institutional power sharing 339–40
and judicial review 341–2, 347
and legislature 341, 342–3, 345–7
models of accommodation, abuse of 348
normalcy and emergency, distinctions between 349
and public reassurance 345–6
Roman dictatorship as prototype 334–6
state of emergency, effects of declaring 340–42
state of emergency, and suspension of rights and freedoms 340–41
and suspension of constitutional provisions 341–2
Emerson, T. 414, 415
Emiliou, N. 391
Epp, C. 315, 532, 538
Epstein, H. 93
Epstein, L. 352, 626, 637, 640
Epstein, R. 508–9
equality 473–503
affirmative action programmes 475
and appropriate comparators 479–81
balancing model and compensation 513–15
Canada 475, 476–81, 488, 493
citizens and private associations, responsibility of 490
comparability of takings laws 515–16
comparability test 477–8, 486–7
conception of 473–6
core-penumbra test 487
discrimination not on listed ground 493–4
differential treatment discrimination 478, 482–8
and differentiation 474
discriminatory impact of division 474–5
European Court of Human Rights, Article 14 483–9
and family law 494–5
and human dignity 464, 478–9, 494
and individuals, focus on 474
and inequality, entrenchment of 474
inequality and group disadvantage 475–6, 492
and internal relevance test 477
non-citizen rights and terrorism law 535
problems with principle of 474
proportionality analysis 494
and same-sex partnerships, legal protection of 553, 557
and separation of powers 481
and social security schemes 480–81, 484, 487–8, 495
South Africa 489–96
and subsidiarity principle 491
UK 482–9, 557
and unfair discrimination 492–3
see also gender as imperative of design
Erdel, A. 468
Erdos, D. 300, 315
Erk, J. 365
Eskridge, W. 99, 100, 560, 561, 563, 564, 566
Estrada, M. 235, 236
Esty, D. 360
Ethiopia 84, 362, 423
see also indigenous peoples
Europe
constitutional identity and international governance 137
constitutional influence in Bosnia 82–3, 89
Eastern 50, 368
emergency provisions 337
militant democracy 58
reconciliation and accession processes 70–71
rights-based legislation, challenges to 308–9
transitional justice and transformation of constitutionalism 68–72
see also individual countries
European Court of Human Rights
abortion rights 442, 443–4
Article 14 and equality 483–9
constitutional rights and principle of proportionality 390–91
equality and discrimination 483–9
formation of 482–3
freedom of expression 409, 463
human dignity concept 459, 462, 463, 464
legislation along ethnic lines 70–71, 72, 93
and political party bans 260–61
property rights 505, 507, 509, 510, 511, 514
Protocol 12, ratification of 484
religious freedom 424, 428–9
same-sex partnerships 489, 554–6, 560, 561
Sejdic and Finci v Bosnia and Herzegovina 70–71, 72, 93
special advocate regime 547
as specialized court 275
terrorism law 535, 536, 547
European Court of Justice 243, 482
as supranational court 275, 276
and terrorism 533, 540, 541, 542
Evans, C. and S. 303, 310
Ewing, K. 300, 310, 315, 532, 533, 535, 536, 537
executive powers see legislative and executive powers, separation of; legislative–executive relations
experimentation and bills of rights see constitutional experimentation and bills of rights functionality.
expression, freedom of see freedom of expression
external influence see constitutional drafting and external influence
Ezer, T. 459, 462
Fabre, C. 311, 519
Fachiri, A. 199
Fagan, A. 494
Falconer, Lord 306
Fallon, R. 391, 604, 616
Farber, D. 352, 361
Farganis, D. 639
Favoreu, L. 278, 281, 294
Fearon, J. 378, 380
federalism, devolution and secession 356–84
and autonomy 360
basic assumptions 363–4
central institution design and future research 376
classical federalism 357–63
comparative studies 361
and confederations, differences between 358
and consociationalism 374–5
constitutional court design 376
court role 361–3
criticism of 360–61
definition of federalism 357–9
democracies, inclusive, and secession 370
devolution and decentralization, differences between 358
and emergency regimes 341
and ethnic groups and minority nationalism 356–7, 363–7, 372–5
executive president role 375
future research 370, 372–80
and gender as imperative of design 25–8
and judicial references to foreign law 362
local government in post-conflict situations, and future research 377–8
natural resources and post-conflict settings, and future research 378–80
and new global constitutional order 191
parliamentary and presidential government, choice between 375–6
post-conflict federalism 363–80
power-sharing at the centre and future research 374–6
quasi-federalism 358–9
reasons for federalism 359–61
referendums on regional autonomy and natural resources 379–80
regional borders and future research 372–4
and regional political identities, shaping 367–8, 371–2, 377
secession, argument on likelihood of 370–71, 374
secessionist sentiment, claimed dampening of 365–7, 371, 376
self-government and secession, likelihood of 369–70
and terrorism law 538–9
and unitary state, advantages over 360
federalism, post-conflict
and constitutional structure 373, 374
evidence 368–72
failure of 368
success of 368–9
theoretical debate 364–8
Fedtke, J. 591, 594
Feeley, M. 358, 360
Feldman, D. 455, 467, 486
Feldman, N. 90
Ferejohn, J. 98–103, 105, 106, 109, 267, 270, 274, 639
Ferrerres Comella, Victor 265–77, 278, 279, 281, 282, 284, 288, 289, 290, 294, 331, 352, 593, 618, 619
Figueiredo, A. 226, 228, 230
Figueiredo, R. 361
Fiji 119
Fine, S. 202
Finer, S. 189
Finkel, J. 315
Finkel, S. 39
Finland 218
Finn, J. 350
Fischel, W. 202, 508
Fisher, L. 301, 317
Fishkin, J. 41, 46
Fiss, O. 392, 412
Flaherty, M. 248
Flinkstein, N. 189
Fontana, David 2, 624–41
Foot, R. 540
Forbath, W. 98, 108
Forcese, C. 533, 539
Forman, J. 546
Forsey, E. 505
Fox, G. 93
Fox, R. 35
France
assertive secularism 423
constitutional amendments 98, 605, 607, 612–14
constitutional endurance 119
constitutional policy making 224
court docket control 630, 631
human dignity in constitutional adjudication 460, 461, 464–5
legislative and executive powers, separation of 247–8
legislative review 267
parliamentary supremacy 332
property rights 509
referendum defeats and women’s interests 22–3
semi-presidential system 218, 219
Franck, T. 93, 94, 352
Frankenburg, G. 198
Franklin, D. 3
Frantz, L. 410
Friedman, S. 473, 474, 475, 484, 488
freedom of expression 406–21
categories and balancing 410–11
comparative conceptions 413–19
and constitutional text 406–7
coverage and protection 407–10
and criminal expression 408–9
and democracy 414
and expressive conduct 408
flag desecration laws 409
guarantees, application of 411–13
horizontal and vertical application 412–13
judicial comparative analysis 415–17
limitations on expression 409–10
and mistrust of government 414
philosophical foundations 413–14, 415, 416–17
and political expression 414
and pornography 416, 417
positive and negative application 411–12
proportionality test 410, 411
speech, concept of 407–9
structure of freedom of expression principle 407–11
and terrorism law 539, 543, 544–5, 547
values in constitutional systems 415–18
Freidenvall, L. 29
Friedman, B. 100, 270, 317, 360, 571, 606, 639
Friedman, L. 118, 448, 508
Friedman, Nick 473–503
Fritz, N. 351
Fromont, M. 265, 267
Fromuth, P. 542
Frosini, J. 265
Frug, G. 195, 202
Fudge, J. 25
Fukasaku, K. 93
Fuller, L. 137
Furley, O. 42
future research
constitutional amendment rules 107–8
constitutional experimentation and bills of
rights functionality 308, 310
constitutional rights, structure and scope of 396
federalism and central institution design 376
federalism, devolution and secession 370, 372–80
local government in post-conflict situations 377–8
natural resources and post-conflict settings, and future research 378–80
power-sharing at the centre and federalism 374–6
regional borders, and federalism 372–4
specialized constitutional courts, rise of 272–3
terrorism law, challenges of 539
Fyfe, R. 460, 464
Galadima, H. 378
Galbraith, J. 94
Galbraith, P. 372
Gallagher, M. 50
Galli, G. 40, 42, 43, 44
Galloway, D. 146, 150, 165, 166, 167
Gamper, A. 574, 591
Ganev, V. 349
Garlicki, L. 273, 279, 282, 284, 290, 294, 295, 639
Garran, R. 26
Garth, B. 192, 197
Gathii, J. 49
Gavison, R. 162, 169
Gawron, T. 265
Gearty, C. 566
Geiringer, C. 177
gender as imperative of design 19–37
and comparativism 33
and entrenchment 32
equality rights 23–5
and executive promotions 32
and federalism 25–8
and gender quotas 28–9
history of 20–26
and hortatory asymmetry 24
and international norms 27–8
and jurisprudence 20
participatory factors 23
political cooperation and federal relations 27
and recalibrated symmetry 24
and reproductive rights 29–31
sexual equality and human dignity, 464
supremacy clauses and federalism 28
whole-constitution approaches 31–3
see also equality; same-sex partnerships, legal protection of
Genevos, B. 619
George, R. 460
Germany
abortion rights 448–51, 466, 615–16
Classroom Crucifix 428
collection and political parties 254, 255, 256–9
constitutional amendments 104, 338
constitutional interpretation 605, 606–8, 615–16
constitutional and ordinary jurisdiction, separation of 289–90
constitutional rights, internal limits 389
court docket control 627, 629–30
electoral thresholds 259
emergency provisions 337–8, 341, 348
flag desecration laws 409
freedom of expression 408, 409, 412, 415, 417, 418
gender-constitutional analysis 22
human dignity in constitutional adjudication 460, 461, 462, 463, 465, 466, 615
internal parliamentary rights of minor parties and independent officetowers 258–9
judicial engagement with comparative law 573, 574, 578, 585, 588
legislative review 267
Ludin 429–30
Lüth 289–90, 393, 394, 412
party autonomy rights 261
political party bans 260
private individuals, effects on 393, 394, 395
property rights 506, 509, 511, 514
proportionality analysis 604
protective rights 398, 399
religious freedom 428, 429–30
reproductive rights 29–30
socio-economic rights 520
Getches, D. 185
Ghai, Y. 3, 40, 41, 43, 44, 45, 50, 52, 80, 366
Gibbs, W. 92
Gibson, J. 639
Giersch, J. 50, 52
Gill, S. 192–3
Gillespie, C. 230
Gillman, H. 3, 196
Ginsburg, R. 447, 457
Glanz, J. 92
Glendon, M. 454
Glenn, H. 139, 575, 585
globalization see new global constitutional order
Goldblatt, B. 494
Golden, A. 350
Goldfarb, S. 27
Goldsmith, J. 352
Goldsworthy, J. 84, 299, 300, 617, 618, 620
Goldwin, R. 22
Gonzalez, L. 230
Gordon, B. 22
Goretti, M. 228–9
Gouldman, M. 157, 167
Gover, K. 181
government
benefits as property 507
and cabinet control 225
executive branch of, and emergency regimes 343, 344, 345, 346–7
freedom limitation by 464–5
mistrust of, and freedom of expression 414
policing by citizens 39
and political parties see political parties and constitutionalism
state action and accountability 57–8
state responsibilities, and transitional justice 64–8
see also parliamentary systems
Gözler, K. 332
Grady, M. 235
Granger, M. 622
Grant, E. 464
Grant, T. 85
Gray, D. 617
Greenawalt, K. 407, 408, 409, 415, 416, 438, 621
Greenberg, K. 544
Greene, Jamal 599–623
Gretschner, D. 478
Grey, T. 509
Griffin, M. 85, 87, 90
Griffin, S. 97, 98, 107
Griffiths, A. 359
Grimm, D. 280, 289, 290, 410, 412, 417, 617
Grindle, M. 358
Grodin, J. 96
Grofman, B. 230
Groppi, T. 265, 267, 591
Gross, E. 545
Gross, Oren 334–55, 532, 534, 545
Grosz, S. 485, 487
Grzegorczyk, C. 593
Guarnieri, C. 271
Gudridge, P. 353
Guerra, L. 574
human dignity in constitutional adjudication 459–72
and abortion 461, 465, 466, 615–16
aircraft security 607–8
and assisted suicide 461
community poverty and vulnerability 463
and constitutional interpretation 607–8
and equality 464, 478–9, 494
and foreign court decisions 466–7
and freedom limitation by governments 464–5
fundamental rights, protection of 466–7
multiple meanings 460–65
multiple uses 466–7
prison detention and punishment 462–3
and sexuality 464
and social status and social roles, value of 463
sources of term 462, 464
warnings over use of 467–8
Hume, Nathan 356–84
Hungary
constitutional elite-level negotiations 42–3
court docket control 627, 633
human dignity in constitutional adjudication 460, 461, 463–7
judicial engagement with comparative law 574, 580, 581
Hunt, M. 396
Huntington, S. 40, 53
Huscroft, G. 304, 308, 313
Hussain, N. 353
Hwang, W. 226
Hyre, J. 240
Iceland 218
Immergut, E. 121
India
constitutional amendments 103, 104, 122
constitutional endurance 118, 122
constitutional identity 132, 135, 137–40
court docket control 626, 629
federalism 358–9, 362, 369, 373
Fundamental Rights Case 525–6
Index

Golaknath v State of Punjab 104, 122
human dignity in constitutional adjudication 463, 464, 466
judicial engagement with comparative law 574, 588
judicial review 331
mid-day meal scheme (MDMS) 527
property rights 104, 122, 513
religious freedom 433–5
reproductive rights 29
same-sex partnerships 560
secularism 138–40
social and economic rights 398
socio-economic rights 520, 525–7
S.R. Bommai v Union of India 141–2
terrorism law 538
indigenous peoples 170–88
Canada 170–76, 182–5
and comparative constitutional scholarship 185–6
constitutional comparisons, fundamental 173–82
and future constitutional trends 184–5
and human rights norms 182–3
influences on 170–72
and international law 183–4
New Zealand 170–73, 176–9, 182–5
and settler population size and power 171
sovereignty and state acquisitions 172–3
US 170–73, 179–85
see also ethnic groups
Indonesia 537, 538, 545, 574, 580
institutional involvement 191, 312, 339–40, 376, 546, 626–7
Inter-American Court of Human Rights 62, 64–6
International Criminal Court, and transitional law 63, 64
international law
best practice disagreements 87–8
and indigenous peoples 183–4
and legislative and executive powers, separation of 243
and new global constitutional order 199–200
and transitional justice and transformation of constitutionalism 59
investment rules 193, 194–8
Ipp, D.A. 577
Iran 436
Iraq
constitutional drafting 78–80, 84, 85, 87–8, 91
election polarization 44
and federal powers 79–80
gender-constitutional analysis 34
and international monetary system 85, 87–8
judicial independence 87
natural resources and post-conflict federalism 379
protection of fundamental rights 84
referenda 80, 379–80
women’s rights 78–9, 86
Ireland
abortion rights 431, 442–5
constitutional identity 133, 135
constitutional rights, private individuals, effects on 392–3
court docket control 632
emergency provisions 342
freedom of expression 412
religious freedom 430–31
reproductive rights 29, 30, 442–5
social and economic rights 398
X Case 431, 442, 445–6
Irving, Helen 19–37, 149, 159, 166, 168
Ishiyama, J. 639
Israel
Bavli 435
birthright citizenship 152
citizenship rights 147–8, 160–62, 163, 168, 169
constitutional identity 135
constitutional rights and principle of proportionality 390
constitutional text and citizenship 147–8
court docket control 626, 628–9, 633–4
dual citizenship 155–6
dual nationals, restricted rights of 156–7
emergency provisions 338
freedom of expression 415
human dignity in constitutional adjudication 459, 463, 466
human dignity and corporal punishment 459, 462
immigration 147–8
judicial engagement with comparative law 573
judicial review 192
non-citizens 157–8
religious freedom 435
reproductive rights 30
terrorism 545
Issacharoff, S. 102, 263
al-Istrabadi, F. 34
Italy 267–8, 274, 399, 428–9, 631
Jackson, J. 190
Jackson, P. 377
Jackson, R. 352
Tom Ginsburg and Rosalind Dixon - 9780857931214
Downloaded from Elgar Online at 12/26/2018 02:58:37PM
via free access
judicial engagement with comparative law

571–98

and accountability 585

adversarial procedures and common law, reliance on 576–7

binding and persuasive authority, fine line between 581

cases considered 573

and categorisation 582–3

and character of national constitution 585–6

choice of comparators 587–8

and civil law 577–80

and common law 575–7

comparative law contribution 580–83

comparative method 586–9

comparative purpose 589

comparators identified as group 588

concerns derived from legal system 584–5

and constitutional amendment rules 98–101, 105, 108

and constitutional characteristics 576, 578

constitutional complications 585–6

context of adjudication, significance of 586–7

court experience and likelihood of engagement 583

diffuse review system and civil law 579

and freedom of expression 415–17

increase in 574–5

and information technology 577

interpretive method 586

judicial independence 85, 87

judicial power, effectiveness of limits on 312

and jurisprudence quality 588

and legal context 589

and legislative and executive powers, separation of 243–4

and legitimacy 583–6

and litigation process and civil law 579

manner of engagement 582–3

mode of reasoning and common law 575

patterns and trends 573–5

precedential value 580–82

and problem resolution 583

scope of argument 572

single judgments and civil law 578

and state similarities 588

study hypotheses 580

and substance and context 588–9

supra-national arrangements and civil law 578–9

talents and skills, need for differing 280–81, 288–9

and terrorism law 532–3, 535–9

use of 573–4

and written constitution 575–6, 578

judicial review

and constitutional experimentation 300–301, 303–5, 311–13

and docket control see docket control and success of constitutional courts

and emergency regimes 341–2, 347

references to foreign law, and federalism 362

and specialized constitutional courts, rise of 270–71

see also courts; legislation headings

judicial review, rise of weak-form 321–33

and constitutional rights, structure and scope of 401

development of weak-form review 327–30

future speculations 330–31

general limitations clause 328, 331

and incompatibility declaration 324, 329–30

interpretive mandate and statutory bills of rights 323–4, 330, 331

and judicial-legislative dialogue 326–7

and notwithstanding clause 325, 327–8, 330–31

and parliamentary and legislative sovereignty limitations 322–3

parliamentary supremacy and strong-form review 321–2, 326, 330

reasonable disagreement and amendment process 322–3

and responsibility of legislators 325–6

rights-vetting 322–3

rights-violations 324, 331

specialist knowledge 325

types of review 323–6

and written constitution 321

Kagan, R. 546
and judicial enforcement 243–4
parliamentary systems in civil law world
247–8
parliamentary systems in common law world
242–7
and risk of tyranny 239–40
US model of strict separation 237–42
US model of strict separation, original
understanding 239–40
legislative-executive relations 211–33
agenda power and decision-making process
224–6
and coalition formation 213–14
coalition government 222–4
coalitions and presidentialism 214–15, 216,
222–4
confidence vote and package vote, difference
between 225
earlier studies 212–19
and government and cabinet control 225
and legislative organization 221–2
minority governments, conflict and
presidentialism 215, 216, 224
minority governments in parliamentary
democracies 221–2, 224
parliamentary democracies 212–14, 215,
221–2, 224
and partisanship 226–7
and party discipline 225–6
presidential democracies 214–16, 217, 224
recent studies 220–29
and restrictive legislative procedures 224–5
semi-presidential democracies 216–19
standing committees 222
strong presidents and decree power 226–9
unilateral action and delegation theories
227–8
Legrand, P. 169
Leigh, I. 352, 423
Lemont, E. 49, 52, 53
Lenagh-Maguire, Niamh 143–69
Lenoir, N. 29
Le Roy, K. 3
Lessig, L. 96, 103
Lester, A. 483, 484
Levinson, S. 96, 97, 98, 101, 108, 116, 141, 352,
427, 640
Levit, J. 67, 75, 575
Levy, J. 361
Lewis, B. 136
Lewis, C. 279, 291, 292
L’Heureux-Dube, C. 249, 250
Liberia 115
Liebenberg, S. 494, 495, 530
Lijphart, A. 22, 366, 374, 375
Limongi, Fernando 115, 211–33
Linz, J. 214–16, 222, 223, 230, 234, 375,
626
Lipset, S. 52, 53
Lipson, C. 199
Livingstone, S. 484
Llorente, F. 399
Loewenstein, K. 350
Lombardi, C. 591
Londregan, J. 226, 229
Longaker, R. 353
Loomis, D. 350
Loughlin, M. 35, 200
Loveman, B. 350
Lucas, L. 25
Lukitz, L. 22
Lustgarten, L. 352
Lutz, D. 34, 35, 96, 97, 102, 105, 106
Luxembourg 115
Lynch, A. 547, 639
McAllister, M. 455, 461
McBride, J. 564
McCahery, J. 361
MacCormick, N. 592
McCormick, P. 618
McCrudden, C. 460, 466, 467
McGarry, J. 366, 379
McGinnis, J. 190
McHugh, M. 619, 620
McHugh, P. 171, 184, 185, 186
MacIntyre, A. 133
MacKinnon, C. 26, 457
Mackintosh, J. 315
Macklem, P. 504
Macklin, A. 546, 548
McLachlan, C. 197, 199
McLachlan, B. 473, 477, 479, 480
MacLennan, C. 316
Madison, J. 51, 102, 107, 239–40, 241, 250, 343,
360
Mahlmann, M. 466, 468, 595
Mahoney, R. 417
Maine, H. 2
Mainwaring, S. 214–15, 230
Majeed, A. 359
Malaysia 537–8, 545, 574
Mallat, C. 94
Manfredi, C. 97, 104, 105, 108, 313, 543, 621
Mann, F. 504
Manning, C. 378
Mansbridge, J. 39, 107
March, J. 3
Marcos, M. 1, 2
Marilley, S. 101
national constitution, and judicial engagement with comparative law 585–6
courts, and constitutional interpretation 607–14
systems, development of, and globalization 192–3
Navot, S. 148, 165, 406, 409, 573
Negretto, G. 112, 118
Nehru, J. 139
Nepal 43–4, 376
Netherlands 22–3, 115, 336, 398–9
Neuborne, B. 104, 621, 622
Neuman, G. 399, 455, 469, 619, 623
new global constitutional order 189–207
bilateral agreements and fair and equitable treatment 196, 199–200
constitutional critiques 192–5, 198
constitutionalist interpretation, arguments against 198–201
constitutionalist projects 190–92
dispute resolution and investment treaties 193–4, 198–9
domestic law and minimum standard treatment 199–200
and federated institutions 191
general international law and international investment law, relationship between 199–200
global administrative law and international investment law, relationship between 200
international investment law and national constitutional law, similarities between 194–5, 196–7
and international trading system 190
and interstate competition 197
investment rules regime 195–8
and investment treaties 193, 194–5
and national systems, development of 192–3
takings rule and investment 193, 195–8, 197–9
and thick constitutionalism 191
and thin constitutionalism 191
New Zealand
bill of rights 301–2, 306, 308, 309, 310
constitution endurance 115
constitutional change 172
constitutional rights, private individuals, effects on 393
expressive conduct 408
judicial power 312
judicial review 192, 304, 312, 328–9, 331
notwithstanding clause and bill of rights 301–2
terrorism law 542, 547
New Zealand, indigenous peoples
and constitutional law 170, 172, 176–9, 328
Index
and future constitutional trends 184–5
and human rights norms 182–3
and international law 183–4
and state acquisitions of sovereignty 172–3
Treaty of Waitangi 173–5, 177–8, 184–5, 328
Newton, N. 179
Newton, S. 191
Neyer, J. 189, 191
Ni Aoláin, F. 349, 352, 353, 545
Nicaragua 72
Nicholas, B. 622
Nicol, D. 310, 311, 543, 566
Nicolaïdis, K. 190, 358
Nigeria 372–3, 379, 433
Nijman, J. 574
Nikolenyi, C. 217
Nimmer, M. 389, 411
Niño, C. 75, 215
Niskanen, W. 116
Nohlen, N. 639
Nollkaemper, A. 574
Norchi, C. 94
Norman, W. 163, 164, 169
Norris, P. 35, 375
North, D. 3, 195
Norton, A. 112, 133, 136
Norway 88, 115, 428
notwithstanding clause 300–303, 309, 325, 327–8, 330–31
Nowak, J. 425, 427
Nowrot, K. 94
Russbaum, M. 29, 530
O’Brien, D. 93
O’Connell, R. 464
O’Donnell, G. 215
O’Leary, B. 366, 372, 379
Oliveira, A. 638, 639, 641
Oliver, D. 332
Olivetti, M. 265, 267
Olsen, J. 3
O’Mahoney, A. 118
Ordeshook, P. 116
ordinary jurisdiction see constitutional and
ordinary jurisdiction, interplay of
O’Regan, Kate 473–503
Osiatynski, W. 401
O’Sullivan, M. 494
Paine, T. 44
Palmer, G. 300, 306, 328
Palmer, M. 176, 177
Pardo, J. 3
Parikh, S. 361
parliamentary systems
in civil law world 247–8
committees, specialized 310–11, 312
in common law world 242–7
democracy see democracy
and legislative sovereignty limitations 322–3
presidential 214–16, 217, 224, 375–6
rights model, and constitutional
experimentation 299–303, 304–10, 311–12
supremacy and strong-form review 321–2, 326, 330
see also government; political parties and
constitutionalism
participation in constitutional design 38–56
autocratic referenda 50–51
‘better citizens’ claim 39
Cherokee Nation of Oklahoma 45–6, 48, 49
constituent assembly-based reform model
44–5
and decisive consultation 47–9
and deliberative democracy 40–41
election exceptions 42–3
elections 41–2
elite-level negotiations 42–3
and government policing by citizens 39
justification of 39
legislature-based reform model 44
and majoritarianism 43–4
negotiation and agreement problems 40
and polarization 44
political approach to consultation 46–7
and public consultation 46–9
and public oversight 51–2
and ratification 49–51
referenda 49, 50–51
reform model choice 44–5
and representation 41–6
and self-interest 40, 51–2
technical approach to consultation 46
and textual coherence 40
transparency, self-interest and arguing 51–2
uncertain benefits of 40
Pasquino, P. 267, 270, 274, 352
Pateman, C. 35, 39
Peabody, B. 307
Pederzoli, P. 271
Pegoraro, L. 265
Pelikan, J. 427
Pelletier, G. 350
Peppin, P. 350
Perea, J. 249
Pereira, C. 227–8
Perry, M. 131, 300, 311
Persson, T. 115
Pere 192
Index 661

Peters, A. 202, 592
Petersmann, E. 76, 190, 199
Petter, A. 313
Philippines 192, 197
Phillipson, G. 394
Pickerill, J. 307, 638
Pildes, Richard H. 254–64, 388, 391
Pillard, C. 305
Piovesan, F. 531
Pitkin, H. 130, 131
Poirier, J. 572, 574
Poirier, M. 198, 508, 509
Poland 44, 514, 630
political parties and constitutionalism 254–64
approach to consultation 46–7
ballot access and campaign financing 256–8
bans on political parties 259–62
and constitutional law 256–62
constitutional texts 255–6
and docket control 631–2, 633, 634
electoral thresholds 259
internal parliamentary rights of minor parties
and independent officeholders 258–9
and jurisdiction resistance 281–2
override of judicial decisions, same-sex partnerships 559
party autonomy rights 261–2
political balance, and constitutional identities 133–4
political competition 102, 106, 107, 256–9
regional variations 255–6
see also government; parliamentary systems
Ponthoreau, M. 591
Popper, K. 352
Porat, I. 391
Portugal 336
Posner, E. 10, 103, 104, 119, 273, 353, 504, 532, 534, 538, 546
Posner, R. 353, 532, 534, 547
Post, R. 12, 133, 416, 618
Postema, G. 592
Powell, C. 540
Powell, W. 3
presidential system 214–16, 217, 224, 375–6
Prince, P. 167
Pritchard, A. 98
property rights 504–18
balancing test 510
and common law jurisdictions 509–10
compulsory takings 510–11
constitutional property clauses, form and function 504–5
and constitutional rights, structure and scope of 400
government benefits as property 507
scope of property clause 505–7
takings cases, compensation in 512–15
takings of property and regulatory takings 507–11
takings, public interest/use in 511–12
and tenants’ interests 507
proportionality principle 390–91, 410, 411, 494, 603–4, 607
Pryles, M. 165
Przeworski, A. 116, 117, 637
public participation 46–9, 51–2, 345–6, 392
Quick, J. 26
Quint, P. 409, 415
Radin, M. 508, 509
Ramos, F. 265
Ramraj, V. 545, 548, 574
Rao, N. 460, 467
Rasch, B. 105, 108
Ratner, S. 193, 197, 198
Raunio, T. 218
Rawls, J. 98, 103
Raz, J. 112, 129, 135, 191
Reaume, D. 478
Redish, M. 237, 239, 240, 242, 248, 414
referenda 49, 50–51, 379–80
regional
effects, and constitutional endurance 118
institutions, and terrorism law 546
political identities, and federalism 367–8, 371–4, 377
variations, and political parties 255–63
variations, and specialized constitutional courts 267–8
Rehnquist, W. 352
Reich, C. 507
Reimann, M. 359
religion and comparative constitutional law 422–40
assertive secularism 423–4
atheist state 423
church–state separation, but denominational
pre-eminence 430–31
jurisdictional enclaves 433–5
multicultural accommodation 431–2
and public education 425–9
and reproductive freedoms 431
separation as state neutrality 424–7
state and religion relations, models of 422–37
strong religious establishment 435–7
and terrorism law, challenges of 543–4
weak religious establishment 427–30
Renderos, A. 236
Resnik, J. 26, 533, 546
sae-m-sex partnerships, legal protection of 551–67
and child custody 556
comparative and international institutional law arguments 560–61, 587, 609, 612
competing rights 561–2
and constitutional debate 553–7
courts and legislatures, roles of 558–60
and equality 553, 557
political override of judicial decisions 559
and sexual activity laws 560–61
and social consensus 556
substantive and institutional questions 552–3
see also gender as imperative of design
Samuels, K. 38, 39, 46, 51, 52
Sandrino, G. 196
Santos, B. 192, 197
Sartori, G. 218, 234
Sathe, S. 433
Saudi Arabia 437
Saunders, Cheryl 3, 396, 571–98, 619
Scafe, L. 40
Scanlon, T. 414
Schabacker, E. 94
Schauer, F. 303, 407, 408, 410, 411, 414, 416, 418, 581, 594, 605
Scheinin, M. 401
Scheppkele, K. S. 5, 13, 401, 532, 533, 540–41, 546, 571, 626, 637, 638, 639, 640
Schill, S. 200
Schmeiser, D. 350
Schneiderman, David 189–207
Schofield, N. 213, 230
Scholtz, C. 186
Schor, M. 616
Schuck, P. 164
Schumpeater, J. 102
Schwartz, B. 240, 250
Schwartz, S. 265, 639
Schwartzburg, M. 113
Scolnicov, A. 286, 287, 435
Scott, C. 74
Scott, Z. 377
Scully, T. 230
secession see federalism, devolution and
secularism 133, 4, 136, 138–40
Tom Ginsburg and Rosalind Dixon - 9780857931214
Downloaded from Elgar Online at 12/26/2018 02:58:37PM
via free access
Index

Seger, R. 545
Seidman, G. 22
Selassie, B. 22
Serbia 59, 72
sexuality see same-sex partnerships, legal protection of
Shachar, A. 30, 147–8, 151, 158, 165, 166, 167, 432
Shamir, R. 638, 640
Shany, Y. 66
Shapiro, D. 361
Shapiro, I. 74
Shapiro, M. 3, 295
Shaw, M. 199
Sheppard, C. 478
Shepsle, K. 222, 230
Shiffrin, S. 415, 416
Shue, H. 519
Shugart, M. 216, 218, 227
Siavelis, P. 226
Sidel, M. 533, 534
Siegel, R. 98, 457, 615, 618, 623
Simeon, R. 19, 52, 96, 104, 107, 366
Singapore 537–8, 545, 574, 575, 577, 585
Sitaraman, G. 583
Skach, C. 115, 120, 211, 215, 230, 375, 637
Skeet, C. 22–3
Skold, M. 240
Slaughter, A. 243, 276
Smiley, M. 61
Smith, A. 591
Smith, S. 639
social security schemes see welfare
socio-economic rights 519–31
Brazil 527–8
constitutional rights, structure and scope of 396–401
and domestic jurisprudence 520–21
due process, importance of 526
education 526
food rights 527
foundations 519–20
housing rights 522–3, 526
India 520, 525–7
minimum core approach 522–3
public health provisions 526, 528
second generation 520
social assistance access and permanent residency 523
South Africa 521–5
water charges 524–5
Solomon, P. 120
Solum, L. 166
Sommeregger, G. 395
Sornarajah, M. 199, 200, 515
Sottiaux, S. 532, 547, 618
South Africa
amnesty cases 61–3
citizenship definition 149
constitutional amendment rules, and power to remove cases 100
constitutional amendments 98, 103, 104, 107, 133
constitutional identity and international influences 137
constitutional and ordinary jurisdiction, separation of 286–7, 290–92
costitutional rights, limitations clause 389–90
costitutional rights and principle of proportionality 390–91
costitutional rights, private individuals, effects on 393
costultion process 47–9
court docket control 632
costmetic provisions 338, 340, 346
equality and discrimination 489–96
equality and family law 494–5
equality and social security schemes 495
expressive conduct 408
Grootboom 35, 74, 399, 401, 459, 463, 522–3
human dignity in constitutional adjudication 459, 463, 464, 465, 466, 467, 492, 494, 495–6
human dignity and corporal punishment 462
and international monetary system 85
Joe Slovo Community 512
judicial engagement with comparative law 573, 574, 584, 587, 588
judicial review 192
Khosa 459, 464, 495–6, 523
Khulumani 62
land rights 61
Mazibuko v City of Johannesburg 523–5
Modderklip 523
Promotion of National Unity and Reconciliation Act 60
property rights 61, 506, 512, 513–14
recalibrated gender symmetry 24
reproductive rights 30, 31
same-sex partnerships 469, 494, 553, 558, 561–2
social and economic rights 74, 399, 401, 521–5
transitional justice and transformation of constitutionalism 60–63
Treatment Action Campaign 399, 401
souverainty
limitations, and weak-form judicial review 322–3
popular, and constitutional amendment rules 98
and principle of non-interference 89–90
and state acquisitions, indigenous peoples 172–3
Soviet Union see Russia
Spain
constitutional design process 52
emergency provisions 338, 340
judicial engagement with comparative law 574, 580
same-sex partnerships 555
social and economic rights 398
specialized constitutional courts, rise of 265–77
activism of constitutional courts 271–3
and civil law 268–9
constitutional reading and legislature, gap between 272
definition 265
and democracy 270–71
and expertise 269–70
future research 272–3
and interpretive decisions 274
and judicial review 270–71
and legal certainty 268–9
and legislative review, centrality of 266–71
and mixed models of constitutional review 273
and ordinary courts, tensions between 273–4
possibility of specialization 266
post-authoritarian regimes and democracy 270
and regional variations, additional 267–8
and supranational developments 274–6
supranationalism and erosion of constitutional courts 275–6
see also courts
Spector, H. 579
speech, freedom of see freedom of expression
Spiewak, P. 44
Spiro, P. 150, 164, 166
Spitz, R. 291
Spolaore, E. 118
Stanhope, J. 304, 317
Starr, K. 639
Stasavage, D. 53
state of emergency see emergency regimes
Staton, J. 631, 640
Stepan, A. 115, 120, 211, 215, 230, 358, 359, 361, 366, 375, 637
Stewart, R. 361
Steytler, N. 377
Stith, C. 361
Stone, Adrienne 406–21, 592, 595, 619–20, 622
Stone, Alec 3, 247, 613, 616
Stone, G. 101
Stopford, J. 199
Strange, S. 199
Strauss, D. 96, 99, 100, 101, 604, 617
Strauss, P. 248
Straw, J. 316, 317
Strom, K. 221–2, 224, 225
Strossen, N. 417
structure and scope see constitutional rights, structure and scope of
Stuntz, W. 352
Suberu, R. 379
Sudan 88, 89, 379
Sullivan, K. 24, 97, 103, 106, 605
Summers, R. 242, 243, 244, 251, 592
Sunder, M. 86, 90
Sutter, D. 114, 116–17
Sweden 115, 121–2, 510, 511, 514
Switzerland 50, 115, 342, 398
Syria 546
Szente, Z. 574
Tabellini, G. 115
Taggart, M. 592
Taiwan 573, 579, 588
Takii, K. 2
takings rule
investment and globalization 193, 195–6, 197–8, 199
and property rights 507–15
Tani, K. 507
Tarnopolsky, W. 476
Tarr, G. 359
Tartter, J. 51
Taruffo, M. 593
Tate, N. 3
Taylor, G. 279, 286, 289, 290, 291, 292, 293
Teitel, Ruti 3, 57–76
Teivainen, T. 192
Tenofsky, E. 350
terrorism law, challenges of 532–50
and anti-constitutional ideas 532
and constitutional interpretation 533–4
control orders 536, 540–42
and counter-majoritarian difficulty 534–5
court/government dialogue 532–3, 534–8
Index

665

and criminal law 546–7
and deportation to torture 533, 537
and detention without trial 535, 536–7, 545, 546
equality rights of non-citizens 535
exceptional regimes, production of 546
federalism and rights protection, links between 538–9
and freedom of speech 539, 543, 544–5, 547
future directions 545–8
future research 539
Guantanamo Bay detention 536–7, 546
and immigration law 537
and international and regional institutions 546
and judicial activism, new 532–3, 535–8
judicial deference to state anti-terrorism efforts, continued 538–9
legislative and administrative interpretation of constitutions 543–5
listing of terrorists 533, 540, 541–2, 546
and racial and religious profiling 543–4
search powers 546–7
and secret intelligence 543, 544–5, 547
special advocate regimes 547
and torture 536–7, 544, 545
transnational counter-majoritarian difficulty, new 533, 539–42
Teubner, G. 191
Thailand 49
Tham, J. 532, 533, 536, 537, 539
Thayer, J. 305, 311
Thio, L. 596
Thiruvengadam, A. 566, 577
Tiebout, C. 360
Tilly, C. 165
Tocqueville, A. 194
Toft, M. 364
Tomkins, A. 482, 497
Tomlinson, H. 565
Torres Pérez, A. 276
Trachtman, J. 76, 191, 197, 202
transitional justice and transformation of constitutionalism 57–76
accountability of actors beyond the state 61
amnesty cases 61–3, 66, 67
and changing constitutional self 59–63
contemporary constitutionalism as law of peoples 70–72
Europe 68–70
and future legislation 72–3
and human rights 60–61, 64–8, 70–71
and inclusiveness and consociationalism 60–61
and international law 59
and militant democracy 58
and reconciliation and accession processes 70–71
self-amnesty law 66
self-determination and political equality 70–72
and state action and accountability 57–8
state responsibilities, evolving understandings of 64–8
tribunalization and state responsibility evolution 63–4, 67
Treator, W. 630, 639
Tribe, L. 58, 129, 146, 202, 353, 455, 638
Triga, V. 52
Tripathi, P. 574
Trochev, A. 639
Troper, M. 270, 593
Tsebelis, G. 40
Tullock, G. 3, 104
Tully, J. 34, 194
Turkey
constitutional identity 133–4, 136
political party bans 260–61
property rights 514
secularism 133–4, 136, 424
transitional justice and transformation of constitutionalism 69–70
Turpin, C. 482, 497
Uganda 42, 64
Uhr, J. 310–11
Uitz, R. 266, 279, 396
UK
bicameralism 310
Constitution, alleged lack of 482
court docket control 629
equality and discrimination 482–9, 557
equality and social security schemes 484, 487–8
and European Convention on Human Rights 482–7
European Court of Human Rights, Article 14 485–6, 488–9
expressive conduct 408
gender-constitutional analysis 22
human dignity in constitutional adjudication 461, 463, 464
judicial engagement with comparative law 577, 588
judicial power 312
judicial review 304, 312, 329–30, 331
legislation invalidation costs 309
legislative and executive powers, separation of, and judicial enforcement 243–4
notwithstanding clause and bill of rights 302
parliamentary systems in common law world 242–4
private individuals, effects on 393
property rights 505, 509–10, 511, 514
Protocol 12, non-ratification of 484
religious freedom 428, 430
same-sex partnerships 551, 556–7, 558–9, 560, 561
Shabina Begum 430
specialized parliamentary committees 310
Taff Vale 329
terrorism law 330, 534–6, 540–41, 542, 543, 545, 547
Ullrich, D. 455
UN
accreditation process 87
constitutional influence 79–80, 81, 89
International Covenant on Economic Social and Cultural Rights 519
sovereignty and principle of non-interference 89, 90
terrorism legislation 533, 539–42, 546
Underkuffler, L. 509
US
abortion rights 443, 445–8, 461
Afghanistan, constitutional influence in 82, 89
Afroyim v Rusk 155
Alien Tort Act 62
bilateral agreements and fair and equitable treatment 196
birthright citizenship 151
Black Codes 165
Bosnia, constitutional influence in 82–3
Cherokee Nation of Oklahoma constitutional design process 45–6, 48, 49, 179
citizenship definition 148–9, 163
citizenship rights 146–7, 155, 158, 159–60
conscription exemption and religious belief 426–7
Constitution of California revisions 96
citizenship and political parties 255
Constitutional amendment rules, and power to remove cases 100
Constitutional amendments 20–21, 98, 99, 100, 104, 105–6, 107
Constitutional amendments, and amendment substitutes 100–101
constitutional endurance 115, 119, 120–21
constitutional identity 136, 140–41
constitutional interpretation 601, 602, 604, 605, 606, 609, 614–15, 628
constitutional text and citizenship 146–7
constitutional rights, external limits, lack of 389, 396
constitutional rights and fixed tiers of review 391
court docket control 626, 628, 629, 630, 631, 632, 635
court support structure 632
criminal activity and freedom of expression 409
Dillon’s Rule 195
dual citizenship 154–5, 157
Due Process Clause 99, 100, 553, 554, 609
emergency provisions 341, 343–4, 347
Equal Protection Clause 99
Equal Rights Amendment 21, 23
equality 26, 474, 553
federal citizenship 146–7
federalism 26, 358, 362
fixed tiers of review 391
flag desecration laws 409
freedom of expression 407–8, 409–11, 412, 413, 414, 415, 416, 418, 539, 547
gender-constitutional analysis 20–21, 23–4, 26
Hamdi v Rumsfeld 160
Heller 614–15
human dignity in constitutional adjudication 459, 461, 462, 465
indigenous peoples and constitutional law 170–73, 179–85
investment treaties and takings rule 193, 195, 197–8, 508, 509
Iraq, constitutional influence in 79–80, 85
judicial engagement with comparative law 574, 575, 577, 579, 581, 584–5, 587, 588, 589
judicial review 270, 305, 307
Kelo 511–12, 515
Lawrence v Texas 459, 553, 558, 559, 560, 587, 601
legislative and executive powers, separation of 235, 237–42, 248–50
Myers v United States 250
non-citizens 158, 160
parliamentary sovereignty, limitations on 322–3
party autonomy rights 261–2
presidential democracy 214–16, 217
presidential democracy and decree power 228–9
property rights 198, 507, 508–9, 511–12, 515
religious freedom 424–7
reproductive rights 29, 30, 443, 444, 445–7
same-sex partnerships 553–4, 557, 558, 559, 560–61, 587, 609
Slaughterhouse Cases 99, 147, 160, 165
social and economic rights 400–402
standing committees 222
Sudan, constitutional influence in 88
tax exemptions and religious belief 427
United States v Morrison 26, 28, 35, 100
Vietnam War 628
Violence Against Women Act 26, 35
Webster v Reproductive Health Services 447
Wisconsin v Yoder 426

Valenzuela, A. 215, 230
Vallinder, T. 3
Van den Hauwe, L. 113–14
Van der Merwe, D. 286
Van der Walt, A. 189, 284, 491, 504, 506, 507, 511, 514
Van Dijk, P. 486
Van Harten, G. 194, 198, 200, 202
Van Hoof, G. 486
Van Roozendaal, P. 230
Vanberg, G. 272, 631, 639
Vargas, J. 196
Venkatachaliah, M. 142
Venter, F. 12
Vermeule, A. 101, 106, 273, 353, 504, 532, 534, 546
Vermeulen, E. 361
Verney, D. 121
Vickers, J. 27
Vile, J. 96, 97, 98, 100, 101
Vile, M. 240
Voigt, S. 3, 39, 40, 46, 51, 52, 115, 119–20
Volcansek, M. 3, 267
Volokh, E. 409
Von Staden, A. 200
Vrachnas, J. 164

Waaldijk, K. 563
Wade, W. 243
Wadham, J. 302
Wagner, R. 117
Wilde, T. 199, 202
Waldrep, C. 165

Waldron, J. 332, 416, 533, 543, 565, 582, 584–5, 595
Walker, N. 35, 190, 191, 192, 572
Walter, B. 364, 378
Walters, M. 172, 174
Warwick, P. 213
Watson, A. 473
Watts, R. 357, 358, 359, 360, 361, 364
Waxman, M. 545
weak-form judicial review see judicial review, rise of weak-form
Webber, J. 389
Weiler, J. 58, 70, 191, 197, 202, 275
Weiler, P. 301
Weiler, T. 245–6
Weill, P. 153, 166, 167
Weingast, B. 39, 116, 120–21, 222, 230, 360, 361
Weinrib, L. 189, 298, 417
Weiss, L. 194
Welchman, L. 546
welfare
rights 397, 398, 401
social security schemes and equality 480–81, 484, 487–8, 495
Wells, C. 352
Wennmann, A. 379, 380
Westen, P. 474, 475
Westin, A. 249
Wheare, K. 357, 358–9, 360, 361, 364
Wheeler, N. 94
Whitaker, B. 50, 52
Whitman, J. 417, 460, 463
Whittington, K. 135–6, 603, 633
Whitty, N. 29
Whyte, J. 301

Widner, J. 40, 41, 42, 43, 44, 47, 48, 50, 52, 53
Wild, P. 193, 197
Wildhaber, L. 485
Wilkinson, T. 236
Williams, G. 302, 306, 316, 415, 416, 532, 539
Williams, J. 193, 199
Williams, R. 119
Williams, S. 22, 24, 29, 31
Wills, G. 249, 252
Wimmer, A. 379
Wintemute, R. 473, 563
Winterton, G. 97
Wolff, S. 365
World Court, Bosnia v Serbia 59, 72
World Trade Organization, dispute settlement 190, 193–4
Wright, S. 618, 619, 622

Yeh, J. 573, 588
<table>
<thead>
<tr>
<th>Name</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yoo, J</td>
<td>352</td>
</tr>
<tr>
<td>Young, A</td>
<td>312, 565</td>
</tr>
<tr>
<td>Young, E</td>
<td>96, 604, 617</td>
</tr>
<tr>
<td>Young, I</td>
<td>33, 475</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>59, 64, 68–9, 75</td>
</tr>
<tr>
<td>Zagrebelsky, G</td>
<td>274</td>
</tr>
<tr>
<td>Zaum, D</td>
<td>90, 94</td>
</tr>
<tr>
<td>Zedner, L</td>
<td>546</td>
</tr>
<tr>
<td>Zeidler, W</td>
<td>285, 287, 289, 290</td>
</tr>
<tr>
<td>Zelaznik, J</td>
<td>222</td>
</tr>
<tr>
<td>Zimdahl, S</td>
<td>574</td>
</tr>
<tr>
<td>Zines, L</td>
<td>619</td>
</tr>
<tr>
<td>Zohar, N</td>
<td>96</td>
</tr>
<tr>
<td>Zoller, E</td>
<td>591, 595</td>
</tr>
<tr>
<td>Zumbansen, P</td>
<td>201</td>
</tr>
</tbody>
</table>