Index

Abat i Ninet, A. 305, 309, 310, 311
Abourahme, N. 309
absolute rights and relative rights, distinction between 232–8
Ackerman, B. 94, 246, 306, 327–8, 378, 414, 427, 449–50
Ackermann, L. 167, 176, 183
advertising, constitutional status of
commercial 469–70
Agné, H. 304
Ahdieh, R. 114
Ahmed, F. 165
Al-Ali, Z. 49, 309
Albanesse, A. 161
Albert, R. 92, 376
Albi, A. 108
Aleinikoff, A. 113, 114, 181, 231
Alexander, L. 21, 23, 96
Alexy, R. 158, 182, 222, 223–4, 230, 232, 242
Allan, J. 178, 183
Allan, T. 406
Allen, T. 82
Alter, K. 105, 115
Amar, A. 300, 306, 309, 395
amendment, constitutional
and constitutional change 444–6
flexible amendment rules suggestion 220–21
and judicial supremacy 24, 29, 32–3, 38–9
and replacement, distinction between 356–7, 359–60
see also constitutional change
amendment theory and constituent power 317–33
‘basic structure’ doctrine 331–2
constitutions as objects of reverence 324
conventions’ role 323–4
cost concerns 325
delegated constituent power 326, 327–8
evidentiary tests 327–8
judicial interpretation 325, 327–8, 330–31
necessity for an amendment procedure 319–20
people’s right to reform 320, 321, 322–3, 324, 329–30
public confidence concerns 324
referenda and qualified majority 327
replacement of Constitution 321–2, 325, 327
small and large alterations, distinction between 326, 328–9
social disorder 319, 325
substantive limits and two-step approach 330–32
time restrictions 320–21, 324
unconstitutional amendments, possibility of 329–33
unsatisfactory provisions, working around 323, 324, 325
see also constituent power
anti-fascism, and constitutional exceptionalism 472–5
Arato, A. 299, 302, 313, 416
Arendt, H. 298, 391, 399
Argentina 278, 364, 365, 369
Aristotle 7, 69, 356, 397
Arnaiz, A. 262
Arnot, D. 80
Arnull, A. 104
Aroney, N. 47, 48, 51
assisted suicide of terminally ill persons 244–5
see also proportionality principle
atextualism 249–50, 251, 255–6, 266
see also text and textualism
Augenstein, D. 341
Austin, G. 346
Australia
Australian Capital Territory (ACT) Human Rights Act 123, 129, 134–5, 136, 137, 140
Capital Territory’s Human Rights Act 129
case law use, South African Constitutional Court 285–91
Commonwealth v. Kreglinger & Fernau 403
constitutional “overperformance” 483
federal system origins 47, 48
judicial remedial powers 128, 129, 134–7, 142
legislative decision-making, lack of domination by judicial norms 138, 139–40
parliamentary supremacy principle 129, 134–5, 140
same-sex marriage 36
separation of powers 71, 80
statutory reporting obligation 127
unwritten constitution 411
Victoria Charter of Rights and Responsibilities Act 123, 129, 134–6, 140
Williams v. Commonwealth 80
Austria 48, 445
Avineri, S. 374

Bachoff, O. 161
Backer, L. 480, 490
Baczko, B. 296
Bagaric, M. 178, 183
Baghehot, W. 9, 82
Balkin, J. 97, 190, 196, 300, 463
Balme, S. 488, 489
Banks, A. 436
Banks, M. 16
Banting, K. 440
Barak, A. 181, 229, 230, 231–2, 239, 242
Baranger, D. 72, 78, 83, 306
Barber, B. 447
Barber, N. 71, 77, 80
Barber, S. 451, 452, 453, 454
Barendt, E. 91
Barnett, R. 463
Barshack, L. 296, 307, 308, 310
‘basic structure’ doctrine 331–2
Bassok, O. 196
Beatty, D. 232
Beaud, O. 300, 315, 359
Beaumont, E. 439, 451
Belgium 49, 440
Bell, J. 500
Bellamy, R. 82
Bentham, J. 178, 401, 404, 409
Berkowitz, R. 185
Bermoe, N. 98
Bermuda, Minister of Home Affairs v. Fisher 181, 288–9
Bernal-Pulido, C. 378, 388
Besselink, L. 103, 433
Bickel, A. 11, 12, 86, 190, 377
Bieber, R. 339
Bilchitz, D. 144
Billias, G. 8, 459
bills of rights see parliamentary bills of rights
Bingham, Lord 82
birth control rights 470–71
see also US constitutional exceptionalism
Blackstone, W. 69, 77–8, 404
Blake, R. 285
Blanchard, B. 499
Blokker, P. 376
Blount, J. 311, 447, 451
Bobbit, P. 234, 248, 251
Böckenförde, E.-W. 310
Bogdanor, V. 358
Bohle, D. 374
Bohman, J. 158
Bolivia 363, 364, 365, 370, 428, 440
Botha, H. 313
Boyron, S. 79, 83
Bradley, C. 325
Brandt, M. 436
Brazil 35, 38, 361, 365, 366, 368, 444
Brettschneider, C. 426
Brink, D. 180
Brown, R. 189
Browne, A. 98
Brüggemeier, G. 163
Brunkhorst, H. 341
Brunner, G. 382
Buchanan, J. 145
Buckley, E. 36
Bugarič, B. 378, 431
Burchard, C. 312
Burdeau, G. 297
Burgess, M. 45, 48, 50–51, 53, 54
Burke, E. 6, 91
Burley, A.-M. 105
Burns, J. 399, 400
Bushnell, A. 89
Bustos, R. 104, 113
Butler, D. 311
Byk, C. 185

Cahiill, M. 296, 339, 344
Cai, D. 489
Calabresi, G. 234
Calabresi, S. 444, 477
Caldeira, G. 195
Caldwell, E. 75, 490
Caldwell, P. 148
Cameron, J. 89
Canada
age discrimination 283
Index

anti-fascism 474

case law use, South African Constitutional Court 285–91
constitutional amendments 29, 444
constitutional identity 287–8
decisional supremacy 26–7
dialogue theory 89–91
federal system 47–8, 49, 57, 64
judicial remedial powers 128, 130–31, 138, 140–41, 142
judicial review 86–7, 89–92, 94–5, 98–9
legislative decision-making, lack of domination by judicial norms 139
prisoners’ voting rights 28, 42
referenda 446
rights protection 203, 204
same-sex marriage 35
separation of powers 80
statutory reporting obligation 127
unwritten constitution 411
Canada, cases
B.C.G.E.U. v. British Columbia 183
Blencoe v. British Columbia 167, 183
Committee for Commonwealth of Canada v. Canada 291
Dunsmuir v. New Brunswick 170
Hansen v. Vernon 403
Hill v. Church of Scientology of Toronto 167, 183
Hunter v. Southam 181
Irwin Toy v. Quebec 290
R. v. Chaulk 290
R. v. Morgentaler 98–9
R. v. Oakes 183, 289–90
Sauvé v. Canada 28
Schmidt v. The Attorney General of Canada 130
Canavan, F. 6
capital punishment 287, 289–90, 458, 460, 463, 471, 498
Capoccia, G. 94, 415
Cappelletti, M. 116, 120, 183
Cardinal, P. 506–7
Carlson, B. 496
Carozza, P. 185
Carré de Malberg, R. 298–9, 300
Cartabia, M. 104, 105
Cavanaugh, K. 425
Celep, Ö. 423
Central and Eastern Europe
constitutional transition 374–6, 378–91
see also individual countries
Chalmers, D. 122
Chan, J. 507
Chang, W.-C. 15, 378, 476–513
Chase, O. 460, 461
Chaskalson, A. 167, 176, 183, 185
Chávez, H. 428
Chemerynski, E. 199–200
Chen, A. 489
Cherry, S. 211, 212, 213
Chile 36, 361, 365, 366, 367
China, Qi Yuling v. Chen Xiaoqi 502
China, constitutional dissonance 476–513
Administrative Litigation Law 497–8, 503
authoritarian constitutionalism 490–91, 494, 504–5, 508–11
capital punishment 498
Civil Servant Law 497
constitutional enforcement mechanisms, lack of 488–90, 495, 502
constitutional revision 486–7, 492, 495–9, 503, 504
constitutionalism definitions 479–85
constitutions as constructive irritants 507–11
court-centred versus politics centred constitutionalism 500–503
Criminal Procedure Law 498
Election Law 498
government accountability legislation 497–8, 501
human rights discourse 501, 504–7
ideology role 492–3
individuals able to pursue grievances against government 497, 501
judicial review, lack of 488–90, 495, 502
judicial role 31, 498, 501–3
Legislation Law 497, 501
national versus transnational constitutionalism 504–7
oath of obedience to constitution for officeholders 498–9
pluralizing constitutionalism concept 481–2
political and economic reforms 486–8, 495
political system and constitutional interpretation and enforcement 493–4, 495–6, 500–503
quasi-constitutional statutes 494–9
regime goals, characteristics, and performance 482–5
rule of law development 489–90
socialist ideology and market-based
economy, tensions between 75, 487–8
special administrative regions of Hong
Kong and Macau 506–7
statutory law 493, 497, 503
“thick” and “thin” definitional approaches
480–81
unofficial ban on seven words of a
costitutional nature 496
Choudhry, S. 272, 274, 279
Christodoulidis, E. 308, 356
Chryssogonos, K. 313, 314
citizenship
and civic constitutionalism see inclusive
costitution-making, citizenship and
costitutionalism
and federal people 62–3
civil liberties 164–5, 215, 216
Claes, M. 113, 119, 340
Clarke, P. 146
Cleves, G. 355
Cloots, E. 108
Cmiel, K. 504
Coan, A. 7
Coban, A. 310–11, 314
Coddou, A. 361
Cohen, J. 254
Collier, R. and D. 94
Colombia 35–6, 37–8, 329, 331, 355, 359–60,
364, 365, 369
Colón-Ríos, J. 13–14, 296, 303, 310, 312,
354–71
common law, and unwritten constitutions
398–400, 402–3, 405–7
Congo, The 440
Conrad, D. 313, 336
conscientious objectors 254
Constituent Assembly approach, Latin
America 363–4, 365, 369–70
constituent power 295–316
and amending power, distinction between
357–8
constituent and constituted powers contrast
297–8, 302
and democratic power 307–8, 309, 310–13
external versus internal 297–300
immanent understanding of people’s
constituent power 305–6, 308, 310
institutional form and post-sovereign
constituent power making 313–15
and legislative power distinction 298–9
political will of people, mythical/reality
divide 303–9
and referenda 302, 303, 306, 308, 311–12
representation versus direct 301–3
and revolutions 298–9, 305, 309
society and transcendent power 306–8, 310
and sovereignty 301, 302–3, 307–8, 310
see also amendment theory and constituent
power;
constituted legislature and constituent people,
distinction between 358–9, 366–70
constitutional change
China, constitutional dissonance 486–7,
492, 495–9, 503, 504
disharmony as catalyst for 281–2
and dynamics of federal polity 63–4
Latin America see Latin America, formal
constitutional change
and proportionality principle 235
see also amendment headings
constitutional dialogue, and judicial
supremacy see judicial supremacy and
constitutional dialogue
constitutional endurance 451–2, 453
constitutional failures 452–3
constitutional identity 282–4, 287–9, 335,
336, 337–52, 375
constitutional patriotism 374
constitutional replacement 321–2, 325, 327
constitutional revolution imperatives 334–53
basic structure doctrine 345–6, 347–50
constituent power and revolutions 298–9,
305, 309
constitutional change cannot destroy what it
modifies theory 336
constitutional change types 340–41
constitutional identity 336, 337–52
constitutional identity modification 339–40,
342–3
constitutional identity through experience
335
embeddedness argument and subversive
constitutional projects 347
incremental evolution 341–2, 346–7
judicial power 350
sovereignty issues 340–41, 342
transfer of powers considerations 338–40
constitutions as objects of reverence 324
consumer warning labels on products 223–4
Cornell, D. 167, 183
Corrias, L. 427
Costa Rica 363, 364, 365, 366, 369
counter-majoritarian thesis 189–207
and constitutions 192–4, 201–3
definition 189, 196
evidentiary problems 194–8
and federalism 200
judges as technical experts 195, 197, 198, 199
judicial review assessment 199–200
and legal realism 190–91, 194, 195–8, 199
legal restrictions imposed by creation of
new precedents 197
motivation assumption 197–8
outside US, attitude towards 192–4, 197–8
popular trust in courts and other institutions
195, 196–7, 206
US constitutional problems 203–7
US constitutional problems, interpretation, need for 206–7
US constitutional problems, need for tests when judging rights 204–6
US constitutional problems, rights protection 203–4
US and loss of belief in law 198–201
and US Supreme Court 190–92, 193–4, 195–6, 197, 200–203
and US Supreme Court, judicial candidates and policy goals 201–3
and US Supreme Court, lack of retirement age 201
court assessment issues, militant democracy 421–2, 429
court packing plan 93–4
court-centred versus politics centred constitutionalism, China 500–503
Couso, J. 361
Cover, R. 113, 114
Craig, P. 389
Creemers, R. 489
criminal sanction concerns 380
Cristi, R. 298, 302
Cronin, T. 443
Crosby, M. 341
cross-national jurisprudence 269–91
and comparative constitutional law 271–7
constitutional disharmony as catalyst for change 281–2
constitutional history and traditions 282–3
constitutional identity 282–4, 287–9
constitutional text tensions 281
federalism and cooperative governance 274–5, 281
international law role 277
judicial interpretation issues 272, 277, 279–80
migration of constitutional ideas 272–4, 276–7, 278, 280–81
self-definition and constitutional identity 280–82
self-understanding of political community, need for awareness of 279–80
separation of powers between executive, legislature and judiciary 275
social order and constitution contestation 281
socio-economic rights 275–6
US Supreme Court debates 271–2
cross-national jurisprudence, South African Constitutional Court 284–91
constitutional identity 287–9
foreign jurisprudence use 284–9
legal positivism 288–9
preemption doctrine 286
provincial and national government conflicts 285–7
United States, Canada and Australia case law use 285–91
Cuba 362, 365, 367–8
Currie, D. 276
Czech Republic 343, 380, 381–2, 388–9, 446
Dahl, R. 30, 88, 190
Daniels, N. 155, 161
Dan–Cohen, M. 175
Darby, B. 304
Dauer, F. 334
Davis, D. 67
Dawson, J. 374
De Boer, N. 112
De la Mare, T. 105, 111, 118
De Maistre, J. 301
De Vergottini, G. 104
De Witte, B. 102, 117, 120
Dehousse, R. 118, 121
Delaney, E. 21
delegated constituent power 326, 327–8
Della Salla, V. 453
democracy
consolidation of constitutional, and transitional justice 373–4, 376, 378
deliberative 156–9
democratic dysfunction and legal pragmatism 220
democratic power and constituent power 307–8, 309, 310–13
dictatorships versus 96–7
 Comparative constitutional theory

militant see militant democracy and constitutional identity
Deutsch, D. 169–70
devolved models of government 52–3 see also federalism
Dewey, J. 210
dialogue
constitutional, and judicial supremacy see judicial supremacy and constitutional dialogue
judicial, and fundamental rights see judicial dialogue and fundamental rights in EU
Diamond, L. 373, 374
dictatorships versus democracies 96–7
difference principle, social rights 153–4, 161
discourse ethics and deliberative democracy 156–9
dispute resolution 49, 96, 181–2, 233–4, 244, 260
distributive justice, social rights 152–3
Dominican Republic 362, 365, 366, 367–8
Dowdle, M. 484, 488, 493, 501
Dryzek, J. 110, 115, 156
Dupré, C. 179, 182, 185–6
Dürig, G. 167, 176, 183
Dworkin, R. 2–3, 174–5, 176, 216, 217, 218, 233
Dyevre, A. 115
Dyzenhaus, D. 296, 316, 405
Eberhard, H. 372
economic reforms, China 486–8, 495
Ecuador 363, 364–5, 370, 428
Edward, A. 76
Egypt 305, 309
Eidenmüller, H. 163
Eisgruber, C. 445
El Salvador 361, 365, 366, 368
Elazar, D. 48, 51, 52, 54, 58
Elkin, S. 448
Ella, D. 499
Elliott, M. 82
embeddedness argument and subversive constitutional projects 347
empty vessel readings 250–51, 253, 255–6, 264, 266
Epstein, L. 89
Erdos, D. 95
Eritrea 440, 442
Eskridge, W. 495, 497
Espejo, P. 305
Espejo, P. 119
Esping-Andersen, G. 146
eternity clauses 330, 342, 357, 360, 362, 366, 368, 369, 417, 420, 444, 445
Ethiopia 49
EU
Charter of Fundamental Rights of the European Union 230
Council of Europe, Venice Commission 314, 421, 429, 431
Data Protection Directive 109
Data Retention Directive 111
European arrest warrant (EAW) 108–9, 111–12, 119, 120–21
federalism 48, 50
Fundamental Rights Agency 432
human dignity and supranational institutions 179, 185
judicial dialogue and fundamental rights see judicial dialogue and fundamental rights in EU
and militant democracy 431–3
separation of powers in medieval times 69 see also individual countries
EU, Court of Justice of the European Union (CJEU)
Abrahamsson and Anderson v. Fogelqvist 120
Advocaten voor de Wereld VZW v. Leden van de Ministerraad 108, 119
Alokpa and Moudoulou 121
Aranyosi and Caldararu 108–9, 121
Association belge des Consommateurs Test-Achats ASBL 119
Atlanta Fracht Handelsgesellschaft 120
Aziz v. Caixa d’Estalvis de Catalunya 117, 120
Badeck 120
Dereci v. Bundesministerium für Inneres 121
Digital Rights Ireland and Landesregierung 111, 119
Dynamic Medien Vertriebs 113
Federal Republic of Germany v. Council of the European Communities 120
Google Spain 109
I.B. v. Conseil des Ministres 119
Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien 113
Index 521

Everling, U. 120
evidentiary issues 194–8, 327–8
exceptionalism see US constitutional
exceptionalism
extremism constraint, and federalism 48
Fabbrini, F. 79
Fabre, C. 149, 150
fair trial right 111–12
Fallon, R. 3
Farber, D. 210, 211, 212, 213
Farr, J. 250
Fearon, J. 107, 110, 117
federal supremacy, and judicial supremacy 33,
36–7, 39–40, 42
federalism
and cooperative governance, cross-national
jurisprudence 274–5, 281
and counter-majoritarian thesis 200
and separation of powers 68
federalism and constitutional theory 45–65
citizenship and federal people 62–3
constitution-building 48
constitutional change and dynamics of
federal polity 63–4
constitutional origins 59–60
constitutional purposes 60–63
constitutional theory and political theory
distinctions 46–7, 55
constitutionalisation of political authority
56–7
and decolonisation 48–9
definition challenges 49–53
devolved models of government 52–3
factionalism and extremism constraint 48
federalism and federation distinction 51–2
federalism proliferation 47–50, 53–4
institutional forms 55–6, 63
and liberalism 45–6, 53–5, 61
normative dimension 54–6, 62
plurinational federations 64
political theory approach concerns 54, 55,
63, 64
protracted territorial and ethnic disputes,
effects of 49
quasi-federal system 53
shared-rule and self-rule 52
sovereignty concept 58, 64
and sub-state nationalism 49
territorial community value 54–5, 62
unitary and territorial polity distinction
56–9, 60–61
Feeley, M. 50

Gary Jacobsohn and Miguel Schor - 9781784719135
Downloaded from Elgar Online at 02/09/2019 10:00:17PM
via free access
Comparative constitutional theory

Feldman, D. 82
Fenna, A. 45, 48
Ferejohn, J. 445, 495, 497
Ferraz, O. 225, 226
Ferrer, V. 12, 104, 229–47
Finn, J. 14–15, 436–55
Fiss, O. 106
Flanagan, T. 99
Flümann, G. 418
Fontana, D. 226
Forbath, W. 155–6
Forsythe, M. 496
Fournier, P. 448, 449
France
  constitutionalism 193, 319–24, 400–401, 444, 475
  covered faces (burka) ban 241, 422–3, 424
  Declaration of Rights 238
  presidential elections 306
  referenda 446
  same-sex marriage 36
  secularism 422–3
  separation of powers 70, 72, 73, 74, 78–80, 82–3
  social rights 148
  sovereignty 68, 78–9, 83
Franck, T. 430, 449
Frank, J. 299
Frankenberg, G. 282, 425, 440
Fredman, S. 144
free speech issues 461, 462, 467–70, 472, 474, 475
  proportionality principle 237–8, 239, 240
Friedman, B. 21, 81, 88, 89, 93, 191
Friedman, T. 373
Friedrich, C. 185, 300, 311
Fritz, C. 300
Frosini, J. 492
Frothingham, L. 302
Fu, H. 490, 491
Fuller, L. 180, 390, 397
Fuller, S. 167, 183
fundamental rights and judicial dialogue see judicial dialogue and fundamental rights in EU
Fusaro, C. 345, 444
Galanter, M. 221
Galligan, D. 301, 304
Gambetta, D. 116, 117
Gamper, A. 51
Garrett, G. 105
Gauchet, M. 306–7
Gearty, C. 144
Gee, G. 409
Gelter, M. 223
gender discrimination 245–6
  see also proportionality principle
Gerhardt, M. 202
Germain, C. 79
Germany
  anti-fascism 473
  Border Protections Law 381
  civil law disputes between private parties 162–3
  constitutional amendments 330, 331, 444, 445
  constitutional identity 336, 337–44, 350, 433
  constitutional interpretation 206–7
  and counter-majoritarianism 192–3
eternity clauses 330, 342, 417, 444
European integration 337–44
  federal system 47, 48, 68
human dignity 172–3, 206–7, 330, 380
  international law considerations 273
Lisbon Treaty Case 338–44
  material justice principle 381
  militant democracy 421, 422, 424, 432
Pharmacy Case 462
  proportionality principle 229
  referenda 446
rights protection 203–4
  rule of law 145, 192–3
  separation of powers 72, 73
social rights 147–8, 162–3, 165, 275–6
  social state principle 160–61
Streeletz 381
  transitional justice 380–81, 388–9, 390
  Weimar Constitution 4, 147–8, 418
Gewirth, A. 236–7
Gibson, J. 195, 196–7
Gillens, M. 467
Gillman, H. 93
Gisbert, R. 103
Godinho, J. 506–7
<table>
<thead>
<tr>
<th>Author</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goldoni, M.</td>
<td>307, 314</td>
</tr>
<tr>
<td>Goldstein, L.</td>
<td>99</td>
</tr>
<tr>
<td>Goldsworthy, J.</td>
<td>81, 124, 278, 405</td>
</tr>
<tr>
<td>Goss, K.</td>
<td>451</td>
</tr>
<tr>
<td>government accountability legislation, China</td>
<td>497–8, 501</td>
</tr>
<tr>
<td>Gözler, K.</td>
<td>315</td>
</tr>
<tr>
<td>Graber, M.</td>
<td>15, 356, 456–75</td>
</tr>
<tr>
<td>grassroots constitutionalism</td>
<td>439–42</td>
</tr>
<tr>
<td>Grechenig, K.</td>
<td>223</td>
</tr>
<tr>
<td>Greece</td>
<td>380</td>
</tr>
<tr>
<td>Greenberg, J.</td>
<td>398, 399</td>
</tr>
<tr>
<td>Greene, J.</td>
<td>377</td>
</tr>
<tr>
<td>Greskovits, B.</td>
<td>374</td>
</tr>
<tr>
<td>Grey, T.</td>
<td>170, 209, 211, 212, 214</td>
</tr>
<tr>
<td>Griffin, S.</td>
<td>299–300</td>
</tr>
<tr>
<td>Griffith, J.</td>
<td>89, 409</td>
</tr>
<tr>
<td>Grosser, A.</td>
<td>338</td>
</tr>
<tr>
<td>Groussot, X.</td>
<td>112</td>
</tr>
<tr>
<td>Gu, W.</td>
<td>501, 502</td>
</tr>
<tr>
<td>Guatemala</td>
<td>364, 365, 369–70</td>
</tr>
<tr>
<td>Guha, S.</td>
<td>313</td>
</tr>
<tr>
<td>Gunther, G.</td>
<td>462</td>
</tr>
<tr>
<td>Gutman, A.</td>
<td>157</td>
</tr>
<tr>
<td>Györfi, T.</td>
<td>27</td>
</tr>
<tr>
<td>Häberle, P.</td>
<td>158</td>
</tr>
<tr>
<td>Habermas, J.</td>
<td>50, 106, 107, 110, 115, 156–9, 163, 165, 181, 374</td>
</tr>
<tr>
<td>Hailbronner, M.</td>
<td>192, 220, 223, 227, 338, 473</td>
</tr>
<tr>
<td>Haines, C.</td>
<td>88, 93</td>
</tr>
<tr>
<td>Haiti</td>
<td>361–2, 365, 366, 368</td>
</tr>
<tr>
<td>Halberstam, D.</td>
<td>102</td>
</tr>
<tr>
<td>Hall, K.</td>
<td>467</td>
</tr>
<tr>
<td>Halmai, G.</td>
<td>13–14, 372–92</td>
</tr>
<tr>
<td>Halperin, J.-L.</td>
<td>341</td>
</tr>
<tr>
<td>Halperin, M.</td>
<td>430</td>
</tr>
<tr>
<td>Hamilton, A.</td>
<td>1–2, 400–401, 402</td>
</tr>
<tr>
<td>Hand, K.</td>
<td>489, 497, 501, 510</td>
</tr>
<tr>
<td>Hanley, S.</td>
<td>374</td>
</tr>
<tr>
<td>Hannum, H.</td>
<td>261</td>
</tr>
<tr>
<td>Hansford, T.</td>
<td>197</td>
</tr>
<tr>
<td>Hao, T.-C.</td>
<td>511</td>
</tr>
<tr>
<td>Harris, B.</td>
<td>78</td>
</tr>
<tr>
<td>Harris, W.</td>
<td>316</td>
</tr>
<tr>
<td>Hart, H.</td>
<td>149, 150, 194, 390</td>
</tr>
<tr>
<td>Hart, V.</td>
<td>448–9</td>
</tr>
<tr>
<td>Hartog, F.</td>
<td>309</td>
</tr>
<tr>
<td>Hartz, L.</td>
<td>456, 459</td>
</tr>
<tr>
<td>Hasebe, Y.</td>
<td>508, 509</td>
</tr>
<tr>
<td>Hayek, F.</td>
<td>145</td>
</tr>
<tr>
<td>Haysom, N.</td>
<td>274–5</td>
</tr>
<tr>
<td>He, X.</td>
<td>489, 500–501</td>
</tr>
<tr>
<td>Heining, H.</td>
<td>147</td>
</tr>
<tr>
<td>Heiss, C.</td>
<td>361</td>
</tr>
<tr>
<td>Helfer, L.</td>
<td>110</td>
</tr>
<tr>
<td>Helgerson, R.</td>
<td>398</td>
</tr>
<tr>
<td>Heller, H.</td>
<td>147</td>
</tr>
<tr>
<td>Hennigar, M.</td>
<td>139</td>
</tr>
<tr>
<td>Hiebert, J.</td>
<td>11, 90, 92, 98, 123–43, 453</td>
</tr>
<tr>
<td>Hirschl, R.</td>
<td>7, 32, 86, 95, 123, 272, 283, 395–6, 414, 418, 433, 458, 476, 477, 485, 491, 494</td>
</tr>
<tr>
<td>Hoffer, P.</td>
<td>98</td>
</tr>
<tr>
<td>Hoffmann, T.</td>
<td>385</td>
</tr>
<tr>
<td>Hogg, P.</td>
<td>89</td>
</tr>
<tr>
<td>Holmes, S.</td>
<td>311, 479</td>
</tr>
<tr>
<td>Honduras</td>
<td>361, 365, 366, 368</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>36, 37–8</td>
</tr>
<tr>
<td>W v. Registrar of Marriages</td>
<td>36</td>
</tr>
<tr>
<td>Hope, S.</td>
<td>150</td>
</tr>
<tr>
<td>Hoyos, R.</td>
<td>306</td>
</tr>
<tr>
<td>Huang, C.-Y.</td>
<td>503</td>
</tr>
<tr>
<td>Hueglin, T.</td>
<td>45, 47, 48</td>
</tr>
<tr>
<td>Hughes, E.</td>
<td>425</td>
</tr>
<tr>
<td>Hull, N.</td>
<td>98</td>
</tr>
<tr>
<td>human dignity</td>
<td>167–86</td>
</tr>
<tr>
<td>appeals to</td>
<td>168–71</td>
</tr>
<tr>
<td>balancing against a competitive objective</td>
<td>181</td>
</tr>
<tr>
<td>and contingent disputes</td>
<td>181–2</td>
</tr>
<tr>
<td>definition concerns</td>
<td>178–83</td>
</tr>
<tr>
<td>equality of human beings</td>
<td>171–2, 173–4</td>
</tr>
<tr>
<td>and EU supranational institutions</td>
<td>179, 185</td>
</tr>
<tr>
<td>foundations</td>
<td>183–5</td>
</tr>
<tr>
<td>freedom of human beings</td>
<td>172, 181</td>
</tr>
<tr>
<td>as illiberal</td>
<td>172–4</td>
</tr>
<tr>
<td>and judicial authority</td>
<td>179, 181</td>
</tr>
<tr>
<td>justification</td>
<td>184–5</td>
</tr>
<tr>
<td>liberalism</td>
<td>171–7</td>
</tr>
<tr>
<td>philosophic and religious commitments</td>
<td>168–9, 172, 184</td>
</tr>
<tr>
<td>as product of social convention</td>
<td>175–6</td>
</tr>
<tr>
<td>and proportionality principle</td>
<td>181–2</td>
</tr>
<tr>
<td>protection, judicial dialogue</td>
<td>112–13</td>
</tr>
<tr>
<td>and rule of law</td>
<td>180</td>
</tr>
<tr>
<td>self-respect principles and authenticity</td>
<td>174–5, 176</td>
</tr>
<tr>
<td>state treatment and merit</td>
<td>168, 172, 174, 176–7, 182, 184</td>
</tr>
<tr>
<td>as universal principle</td>
<td>169, 171</td>
</tr>
<tr>
<td>utility principle and moral assessment</td>
<td>180</td>
</tr>
<tr>
<td>human rights</td>
<td>501, 504–7</td>
</tr>
</tbody>
</table>

**Index** 523
universal, and US constitutional exceptionalism 461, 462, 463 violations 380 Hungary
Ip, E. 477, 492, 498, 503
Iraq 49, 441
Ireland 36, 38–9, 275–6, 281–2, 440
Islamic head coverings 241, 258, 422–3, 424
Israel 283, 405, 407, 438, 446

United Mizrahi Bank v. Migdal Cooperative Village 407
Issacharoff, S. 220, 224, 226, 415, 419
István, B. 375
Italy 36, 148, 161, 193, 260, 444, 446
Ivison, D. 303
Iyer, V. 351

Jackson, V. 222, 231, 272, 273–4, 277, 279, 280, 441, 442, 447, 454, 504
Jacobs, F. 104, 117
Jacobson, A. 4
Jakab, A. 248, 250, 251, 253, 256
Japan 25, 32, 444, 482, 508, 509
Jaremba, U. 116
Jaume, L. 297
Jeffries, S. 174
Jennings, W. 405
Jessup, D. 89
Jia, M. 481, 511
Johnson, J. 158
Jones, B. 413
Jowell, J. 406
judges as technical experts 195, 197, 198, 199
judicial authority, and human dignity 179, 181
judicial censure concerns, parliamentary bills of rights 125, 127, 129–30, 132, 133–4, 138, 139, 140, 142
judicial competence, legal pragmatism 216, 217, 218–19
judicial dialogue and fundamental rights in EU 102–22
better-reasoned interpretive outcomes 107–12
common identity building 112–13
constitutional courts and preliminary references 118–20
Data Protection Directive 109
Data Retention Directive 111
descriptive dialogue 104
diverse approaches 104–6
domestic courts and CJEU interaction 105–7, 109, 110, 111–13, 117–21
European arrest warrant (EAW) and fundamental rights 108–9, 111–12, 119, 120–21
explanatory dialogue 104–5
human dignity protection 112–13
incentives to collaborate 114, 120
information about views and concerns of participants 107
innovation, exchange of arguments resulting in 107, 109
interpretation justification and response 108–9
interpretive process participation 110–12
judicial impartiality 116–17
legitimating potential of dialogue 105–6, 106–7, 110–11, 116
mutual recognition principle 109
national and supranational norms overlap 102
normative dialogue 105, 106–14
objections to judicial dialogue 114–21
pluralist framework 102–3, 113–14
political science studies 105
preliminary reference, questioning 117–21
proportionality principle 111
right to a fair trial 111–12
strategic versus dialogic action 115–17
subsequent references 120–21
judicial incrementalism, and social rights 159
judicial interpretation
amendment theory and constituent power 325, 327–8, 330–31
cross-national jurisprudence 272, 277, 279–80
judicial norms, parliamentary bills of rights see under parliamentary bills of rights
judicial power
China 31, 501–3
constitutional revolution imperatives 350
separation of 72–3, 75–80, 81–3
transitional justice 377
judicial review
counter-majoritarian thesis 199–200
inclusive constitution-making, citizenship and civic constitutionalism 443, 445–6
judicial supremacy and constitutional dialogue 86–7, 89–92, 94–5, 96, 98–9
lack of, China 488–90, 495, 502
Latin America 358
proportionality principle 246–7
strong form/weak-form 2, 27, 38, 41, 42
unwritten constitutions 405–6
US, “programmatic” approach 25
judicial supremacy 21–44
abortion cases 98–9
attitudinal supremacy 24–5
and constitutional amendments 24, 29, 32–3, 38–9
constitutional right to same-sex marriage 28, 34–9
constitutional supremacy 33, 34–9
coordinate construction 23
decisional supremacy 26–9, 33, 36, 39, 41–2
departmentalism 23, 39–40
decisional supremacy 43
executive supremacy 43
federal supremacy 33, 36–7, 39–40, 42
interpretive supremacy 22–4, 37, 38, 39, 40–41
judicial activism 41
judicial penultimacy 29
legislative supremacy 29, 33, 34, 39, 42, 43
“living tree” approach 25
“monologic” approach 25
political supremacy 30–34, 37–8, 39, 42–3
prisoners’ voting rights 28, 42
“programmatic” approach to judicial review 25
public referenda and constitutional amendments 38–9
strong form/weak-form judicial review 2, 27, 38, 41, 42
judicial supremacy and constitutional dialogue 86–101
appointments and norm contestation 88–9
court packing plan 93–4
“desirability of constitutional dialogue 96–9
dialogue theory 88–91, 96
dictatorships versus democracies 96–7
dispute settlement 96
emergence of 91–5
informal constitutional norms 91
judicial interpretive exclusivity and social harmony 96
judicial review 86–7, 89–92, 94–5, 96, 98–9
judicialization of politics 95
and legal realism 93
political contestation 91, 92, 93–5, 96–9
and professional business networks, influence of 93–4
Judt, T. 391
justice, transitional see transitional justice and constitutionalism and constitutional culture Kahn, P. 106, 107, 307–8, 315
Kalven, H. 469
Kalyvas, A. 302, 310, 313, 315
Kanner, I. 499
Kant, I. 170, 177, 178, 179, 186
Kantorowicz, E. 306
Karst, K. 117
Kateb, G. 177, 181
Kavanagh, A. 27, 41, 193
Kay, R. 296, 299, 303, 304, 311, 314
Kelemen, R. 94
Kellogg, T. 488, 489, 496, 502, 511
Kelly, J. 92, 95, 124, 127, 128, 130, 131, 132, 134, 137, 138, 139, 141
Kelsen, H. 73, 79, 342–3, 419, 422
Khaitan, T. 165
Khosla, M. 345
Kilpatrick, C. 118, 120
King, D. 466
King, J. 11, 144–66
King, P. 51, 53
Kirschcheimer, O. 147
Kirshner, A. 420
Kis, J. 316
Klare, K. 219
Klarman, M. 467
Klatt, M. 243
Klein, C. 295, 438, 440, 441, 445, 446, 447
Klug, H. 12, 269–91
Knight, J. 89, 158
Knopf, R. 91, 95
Koh, H. 304
Kok, R. 379
Kokott, J. 342
Kollbert, E. 389
Kommers, D. 167, 176, 183, 273
Kornhauser, L. 115–16
Kotowsi, C. 342
Kotzur, M. 338
Kramer, L. 23, 201, 306, 426, 453
Kraus, J. 374
Kraynak, R. 177
Krisch, N. 34, 103
Krisnaswamy, S. 330
Kritzer, H. 197
Krygier, M. 378
Kumm, M. 31, 34, 102, 162, 163, 230, 231, 243, 247
Kutroff, A. 258
Kymlicka, W. 154
Lagrange, M. 73, 79
Lain, C. 88, 196
Lambert, E. 145
Landemore, H. 440
Lane, M. 397
Laski, H. 146
Latin America, formal constitutional change 354–71
amendment and replacement, distinction between 356–7, 359–60
bottom-up approaches 363, 365, 368–9
Constituent Assembly approach 363–4, 365, 369–70
cellular power and amending power, distinction between 357–8
constituted legislature and constituent people, distinction between 358–9, 366–70
eternity clauses 357, 360, 362, 366, 368, 369
fundamental and non-fundamental, distinction between 360
judicial review of legislation 358
legislative super-majorities approach 361–2, 365, 366–7
legislative super-majorities supplemented by referenda 362, 363, 365, 367–9
modern constitutional theory 354, 355–60
‘people’ concept 355, 356
popular ratification as pre-condition 362–3, 365, 368
postmodern and pre-modern constitutional theories 356
and sovereignty 358–9
tiered-amendment rule 362
typology 360–66
see also individual countries
Law, D. 5, 8, 15, 25, 144, 476–513
Leckey, R. 37, 41
Lee, D. 295
legal positivism, South African Constitutional Court 288–9
legal pragmatism 208–28
anti-formal approach 209–11, 217
blind spots 225–7
case selection issues 226–7
and civil liberties 215, 216
comparative perspective 218–21
conservatism 216–17
consumer warning labels on products 223–4
critiques 214–18
definition 209–14
and democratic dysfunction 220
eclectic and contextual approaches 211–13, 215, 216–17
flexible amendment rules suggestion 220–21
history and experience reliance 212, 216
illegitimacy critique 217–18
integration with comparative constitutional law 221–7
judicial competence 216, 217, 218
judicial creativity 218–19
law as instrument meant to achieve certain goals 213–14
logical consistency importance 214
political context considerations 224, 225
and proportionality principle 222–4, 225, 230–31
remedies, design and implementation 225–6
resolution of legal cases as contextual 212–13
and socioeconomic rights 224, 225–6
terrorism cases 212–13, 215, 216
transformative constitutionalism 219–20
and transparency 215–16
vagueness claim 215–16
value formalism 223
legal realism 93, 190–91, 194, 195–8, 199
legislation, and parliamentary bills of rights
see parliamentary bills of rights
legalistic and executive separation of powers 70–71, 72–3, 75–80, 81–3
legislative power distinction, and constituent power 298–9
legislative super-majorities approach, Latin America 361–2, 363, 365, 366–9
legislative supremacy, judicial supremacy 29, 33, 34, 39, 42, 43
Leiter, B. 209, 210
Lemieux, S. 30, 31, 32, 43
Lenowitz, R. 311
Letas, G. 103
Leuchtenberg, W. 93
Levinson, D. 96
Levinson, S. 1, 88, 97, 300, 325, 372, 395, 411, 492
Levitsky, S. 416
Lewis, A. 467
 científicas 429–31
liberal democracy 429–31
liberalism, human dignity 171–7
liberalism and socialism, social rights between 145–8, 153
Liebenberg, S. 144, 163–4
Lieber, F. 250
Comparative constitutional theory

Liebman, B. 489, 502
Lijphart, A. 97
Lin, Y. 493, 497
Lindahl, H. 303–5, 309, 356
Lintott, A. 69
Linz, J. 373
Lipkin, R. 210, 217, 218
Lipset, S. 456, 459
Llewellyn, K. 91
Lo, V. 490
Locke, J. 69, 74, 76, 81
Loweinstein, K. 415, 419, 447, 480
Lomasney, K. 430
Loughlin, M. 6, 68, 91, 295, 296, 300, 301, 303, 305, 306, 316, 401, 408, 409, 413, 427
Lovecy, J. 458
Lovell, G. 30, 31, 32, 43
Luban, D. 209
Luks, S. 99
Lutz, D. 219
Lutz, E. 387
Lyotard, J.-F. 356
McCargo, D. 387
McConnell, M. 307
McCorkindale, C. 314
McCruden, C. 168, 169, 170–71, 179
McIlwain, C. 398, 400, 401, 480, 481
McLean, J. 14, 395–415
MacCormick, N. 102, 149, 437
Macklem, P. 422
Macklin, R. 172, 179
MacLennan, C. 94
Madison, J. 2, 16, 22, 48, 68, 70, 74, 75, 80
Madisen, D. 459
Maduro, M. 102, 103, 105–6, 111
Maher, S. 131
Mahlmann, M. 178, 186
Maldonado, D. 219
Manfredi, C. 90, 95
Mansbridge, J. 447
Mantouvalou, V. 144
margin of appreciation doctrine 256, 258, 260–61, 263, 264, 267, 423–5
Marin, A. 299
market regulation and social minimum 151–2
market-based economy and socialist ideology, tensions between, China 75, 487–8
Marshall, G. 70
Marshall, T. 146
Martinico, G. 103, 118
Marx, K. 146, 161
Massot, J. 73
Mathews, J. 205, 229, 230, 247
Matsui, S. 25
Mattli, W. 105, 115
Mazie, S. 202
Meister, M. 243
Mendelbaum, M. 373
Merkel, W. 416
Merry, S. 273, 280–81
Metzger, G. 405
Meuwese, A. 88
Mexico 361, 365, 366, 367
Meyerson, D. 173
Michelman, F. 154, 155, 158, 162, 165, 304
migration of constitutional ideas 272–4, 276–7, 278, 280–81
see also cross-national jurisprudence
militant democracy and constitutional identity 415–35
agent of credible legal-political judgement, suggestion for 432–3
and authoritarian regimes 416–17, 429–30
aversive constitutionalism and distancing from a negative past 425
court assessment issues 421–2, 429
democracy defence and damage 418–19
disenfranchisement consideration 420–21
impartial institutions’ involvement 421–2
liberal democracy 429–31
margin of appreciation doctrine 423–5
paradoxes 418–19
political and constitutional theory 418–22
and populism 416, 420, 426–30
rights restrictions 420, 421
rights restrictions in response to religion 422–6
secularism 422–3
self-protection argument 419–20
supranational protection of democracy 429–33
Miller, R. 167, 176, 183
Minzner, C. 478, 489
Mitsilegas, V. 108, 121
Mo, J. 506
Müller, K. 232, 233, 243
Monaghan, H. 304
Money, J. 145
Montenegro 441
Montesquieu, Baron de 17, 69, 74, 76, 80, 81, 83, 296
Moore, M. 395
Morel, L. 441, 443, 446, 447
Morgan, E. 304
Index 529

Morris, R. 502
Morris, S. 97
Morton, F. 91, 95
Moyn, S. 391, 423
Murken, J. 339
Murphy, T. 313
Murphy, W. 7
Murray, C. 72
mutual recognition principle, judicial dialogue 109

national versus transnational constitutionalism, China 504–7
nationalism, sub-state 49
see also federalism
Navia, P. 361
Negri, A. 297–8, 302, 310
 Nelkin, D. 279
neoliberal public law, rejection of, and social rights 160–62
Neumann, F. 147
neutrality principle, European Court of Human Rights and religious establishment 257–8, 263, 264–6

New Zealand
Re Bennett 28
Bill of Rights Act (NZBORA) 26, 128–9, 133–4
decisional supremacy 26, 27
government interregnum, dealing with 411–12
judicial remedial powers 128–9, 133–4, 136
judicial review and constitutional rights protection 405
legislative decision-making, lack of domination by judicial norms 138, 139–40
Mixed Member plurality (MMP) electoral system 134, 138
parliamentary supremacy principle 129, 134–5, 140
prisoners’ voting rights 28, 42
Quilter v. Attorney-General 36
R v. Pora 413
referenda 446
same-sex marriage 36, 38
statutory reporting obligation 127
Taylor v. Attorney-General 28, 129
unwritten constitution 411, 413
Nicaragua 364, 365, 369
Niesen, P. 424–5
Nino, C. 107, 117
Nipperdey, H. 161, 162, 163
normative commitments, unwritten constitution 409–10
normative dialogue, judicial dialogue 105, 106–14
normative dimension, federalism 54–6, 62
Norton, A. 302
notwithstanding clause, parliamentary bills of rights 128
Nourse, V. 250
Oakeshott, M. 168
O’Donnell, G. 97
Okin, S. 164
Oklopcic, Z. 303–4, 315
Oliver, D. 345, 444
Oliver, P. 46
Olsson, I. 112
O’Neill, O. 149
originalist interpretation 250, 251, 253
see also text and textualism
Osiatynski, W. 277
Oudot, J. 295, 296–7
Oxman, E. 305
Pagden, A. 34
Paine, T. 8, 400, 401–2
Palmer, L. 497
Palmer, M. 407, 409, 493, 499
Palmer, R. 300
Panama 364, 365, 369
Pangle, T. 76
Paraguay 363, 364, 365, 369
parliamentary bills of rights 123–43
constituent norms 125
“creative” responses to prior negative judicial ruling 139
institutional factors 126–9
integration of judicial norms into legislative decisions 125–6, 127
judicial censure concerns 125, 127, 129–30, 132, 133–4, 138, 139, 140, 142
judicial norms and legislative behaviour, relationship between 129–37, 140–42
jurisdictions combining stronger judicial remedial powers with high expectations of compliance 130–33
jurisdictions combining weaker judicial remedial powers with lower expectations of compliance 133–7
legislative decision-making, lack of domination by judicial norms 137–40
530 Comparative constitutional theory

normative model of rights protection and constitutional engineering 126
notwithstanding clause 128
and parliamentary supremacy principle 129, 134–5, 140
proportionality principle 139
statutory reporting obligation on legislation inconsistent with protected rights 127–8
weak-form systems 126, 131, 133–7, 139–40
Westminster characteristics 126–7, 138, 141
parliamentary systems, separation of powers 71–2
participatory constitutionalism 376, 441–2
Partlett, W. 298, 299, 492
Pateman, C. 447
Patton, M. 486
Paunio, E. 103, 105
Payne, R. 108
Payne, S. 78
Peabody, B. 125
Peerenboom, R. 489, 495
Pelsser, J. 468
‘people’ concept, Latin America 355, 356
people power see under constituent power
people’s right to reform 320, 321, 322–3, 324, 329–30
see also amendment theory and constituent power
Peretti, T. 470
Perju, V. 272, 278
Perrince, I. 103, 337, 339
Perry, M. 29
Peru 362–3, 365, 366
Peters, A. 480
Philippines 278
Pickerell, J. 95, 125
Pildes, R. 196, 240
Pin, A. 258
Pinker, S. 172
plurinational federations 64
Pocock, J. 401
Pogge, T. 155
Poland 343, 430–31, 433, 473
political context
constitution-making as political act 438
constitutional theory and political theory distinctions 46–7, 55
court-centred versus politics centred constitutionalism, China 500–503
federalism see federalism
legal pragmatism 224, 225
militant democracy and constitutional identity 418–22
participation of religious authorities in political affairs, US 252–3
political contestation and judicial supremacy 91, 92, 93–5, 96–9
political and economic reforms, China, constitutional dissonance 486–8, 495
political liberty protection and separation of powers 75
political science studies and judicial dialogue 105
political supremacy and judicial supremacy 30–34, 37–8, 39, 42–3
political will of people, and constituent power 303–9
self-understanding of political community, need for awareness of 279–80
and social rights 155, 156, 157
unwritten constitutions 409–10
Polzin, M. 420, 433
Ponthoreau, M.-C. 83
popular ratification as pre-condition, Latin America, formal constitutional change 362–3, 365, 368
popular trust in courts and other institutions 195, 196–7, 206
populism, and militant democracy 416, 420, 426–30
Porat, I. 229, 231
Portugal 36, 193
Posner, R. 209, 210, 211, 212, 214, 215, 216, 218, 219, 249, 267
Post, R. 81, 89, 375
postmodern and pre-modern constitutional theories, Latin America 356
poverty 150–51
see also social rights
preliminary reference, questioning, and judicial dialogue 117–21
presidential and parliamentary systems comparison 71–2
see also separation of powers
Preuss, U. 301, 303, 374, 375, 376
Priban, J. 382, 387
prisoners’ voting rights, UK 28, 42
privacy, constitutional right to 98
private law, materialisation of private and labour law 162–4
private parties
civil law disputes between 162–3
and proportionality principle 245–6
professional business networks, influence of 93–4
proportionality principle 229–47
absolute rights and relative rights, distinction between 232–8
abstract weights, balancing 241–3
assisted suicide of terminally ill persons 244–5
conflict resolution 233–4, 244
constitutional clause and specific exception 236–7
constitutional exceptionalism 461–2, 463–4, 468, 471–2
constitutional revision process 235
freedom of speech 237–8, 239, 240
and fundamental rights 238–9
gender discrimination 245–6
and human dignity 181–2
institutional consequences 246–7
judicial dialogue and fundamental rights in EU 111
judicial review 246–7
and legal pragmatism 222–4, 225, 230–31
legitimate ends, identification of 238–41
parliamentary bills of rights 139
and private actors 245–6
and public interests 239–40, 241
qualitative distinctions 243–5
right of presumption of innocence 238
right to assembly 242–3
right to liberty 243, 244
gender discrimination 245–6
right to life 244
right to religious freedom 241, 244
right to vote 235, 240
three-step structure 231
transgender recognition 247
Prudhomme, L., 298
public choice theory, social rights 145
public confidence concerns, amendment theory and constituent power 324
public endorsement for religious displays 252–3
public interests, and proportionality principle 239–40, 241
Puerto Rico 362, 363, 365, 368
quasi-federal system 53
see also federalism
Quint, P., 381, 460
racial equality 465–72
see also US constitutional exceptionalism
Rakove, J., 16
Ramsey, M., 279
Ranney, A., 311
Rao, N., 181
Ratzinger, J., 374
Rawls, J., 2, 50, 146, 152, 153–5, 161–2, 164, 165, 375, 381
Ray, B., 144, 226
Raz, J., 66, 149, 150
Reddy, S., 346
referenda
and constituent power 302, 303, 306, 308, 311–12
inclusive constitution-making, citizenship and civic constitutionalism 441, 446–7
and judicial supremacy 38–9
Latin America 362, 363, 365, 367–9
and qualified majority 327
Rehg, W., 156, 157
Reich, C., 164, 165
Reiger, C., 387
religion
as constitutional issue see text and textualism, US Supreme Court
militant democracy, rights restrictions in response to religion 422–6
philosophic and religious commitments, and human dignity 168–9, 172, 184
right to religious freedom 241, 244
religious establishment, European Court of Human Rights see text and textualism, European Court of Human Rights and religious establishment
replacement of Constitution 321–2, 325, 327
see also amendment theory and constituent power
representation versus direct constituent power 301–3
republicanism, and unwritten constitution 408–14
revolutions
and constituent power 298–9, 305, 309
constitutional see constitutional revolution imperatives
Richards, M., 197
Richter, J., 508, 509
rights restrictions, militant democracy 420, 421, 422–6
Ripstein, A., 184
Rishworth, P., 124
Risse, T., 116

Downloaded from Elgar Online at 02/09/2019 10:00:17PM via free access
532 Comparative constitutional theory

Roach, K. 95
Roberts, O. 248–9
Robertson, D. 8, 11–12, 86, 95, 189–207, 388
Robinson, N. 346, 352
Roche, J. 2
Rodgers, D. 304
Rodrígues de Santiago, J. 148
Rodríguez, P. 112
Romania 195, 430, 445
Romeu, F. 116
Rorty, R. 217, 218
Ross, W. 93
Russell, P. 87
Russian Federation 49
Ryan, A. 69, 75, 147
Sadurski, W. 376, 378, 431
Safirin, S. 458
Sager, L. 445
Said, E. 291
Saint-Prix, F. 315
Sajo, A. 4, 347, 377, 379, 438, 440, 441, 445, 446, 447
Salomone, M. 99
same-sex marriage 28, 34–9
see also judicial supremacy
Samhat, N. 108
Sangiorgianni, A. 183, 184
Sarmiento, D. 108
Sartori, G. 16, 334–5, 396, 397, 480
Sathe, S. 348
Saudi Arabia 482
Saunders, C. 10, 66–85, 439, 440
Sauvé, J.-M. 73
Schacht, O. 178, 179
Schapiro, R. 113
Scharpf, F. 145
Schattschneider, E. 344
Schauer, F. 21, 23, 96, 239, 243, 461
Scheffe, K. 219, 425, 430, 433, 461, 473–4
Scheuerman, W. 298, 302
Scheunen, U. 161
Schil, S. 102, 112, 340
Schinder, C. 120
Schlink, B. 4
Schmitt, C. 4–5, 145, 301–2, 308, 311–12, 314, 422, 427, 438
Schneiderman, D. 87, 90
Schonberger, C. 338
Schor, M. 1–17, 86–101, 103, 472, 491, 510
Schwartzberg, M. 310, 315
Schweber, H. 12, 248–68
Scott, K. 50
secularism 250, 255, 332–3, 348, 422–3
Sedley, S. 72, 401, 410
Seidman, L. 470, 510
Seitzer, J. 4, 5
Selassie, B. 442
self-definition and constitutional identity 280–82
self-governance, citizens’ capacity for 447–8
self-protection argument, militant democracy 419–20
self-respect principle 174–5, 176
see also human dignity
self-understanding of political community, need for awareness of 279–80
separation of powers 66–85
adjudication of boundaries between powers 81–2
common law and civil law legal system comparison 72–3
configuration of powers, theories associated with 75–80
counter-majoritarian difficulty 81
cross-national jurisprudence 275
degree of 80–83
and federalism 68
forms of 69–74
legislative and executive power separation 70–71, 72–3, 75–80, 81–3
parliamentary systems 71–2
political liberty protection 75
presidential and parliamentary systems comparison 71–2
separation of judicial power within separation of powers framework 72–3, 75–80, 81–3
and sovereignty 68, 77–9, 82, 83
theory variations 68, 74–83
Shachar, A. 436
Shaffer, G. 250
Shaman, J. 205
Shapiro, M. 116, 510, 512
Sheehan, C. 448
Sheppele, K. 272
Shesol, J. 93, 94
Siegel, N. 325
Siegel, R. 89, 446
Sieyès, E. 295–6, 297, 300, 301, 302, 303, 360
Silverstein, G. 98, 491
Simeon, R. 440, 445
Simitis, S. 118
Simpser, A., 478, 482, 510, 511
Skapska, G. 437, 442
Skinner, Q. 399
Slaughter, A.-M. 104, 105, 110, 115
Smith, G. 448
Smith, J. 94
Smith, R. 456, 458, 466
Snel, M. 88
Soboul, A. 301
social convention, human dignity as product of 175–6
social disorder, amendment theory and constituent power 319, 325
social function and religious doctrine, distinction between 262–3
see also text and textualism
social mobilization, and inclusive constitution-making 450–51
social order and constitution contestation 281
see also cross-national jurisprudence
social rights 144–66
benefit levels and social minimum thresholds 151
civil liberties, social reading of 164–5
claims content 150–52
constitutional status and enforceability of social minimum 155
constitutionalisation of private law 163
constitutionalism and theories of justice 152–9
constitutions, indirect protection in 159–65
difference principle 153–4, 161
discourse ethics and deliberative democracy 156–9
distributive justice 152–3
duty-bearers 148–9, 150, 152
enforceable individual rights 161
fair value of political liberties 155, 161
interest theory of rights 149–51
and judicial incrementalism 159
liberalism and socialism, social rights between 145–8, 153
market regulation and social minimum 151–2
materialisation of private and labour law 162–4
neoliberal public law, rejection of 160–62
political legitimacy 155, 156, 157
and political will-formation 157–8
poverty, subjective perceptions and social minimum 150–51
public choice theory 145
right to equal freedom 149
social benefits as property 164–5
social contract and justice as fairness 153–5, 161–2, 164
social inequality 146
social minimum and justice as fairness 153–4
welfare-capitalism and private law 162
will (choice) theory 148–9
socialist ideology and market-based economy, tensions between, China 75, 487–8
society and transcendent power 306–8, 310
see also constituent power
civil rights 222, 225–6, 275–6
Soltan, K. 313
Solum, L. 209, 210
Sólyom, L. 382
Somek, A. 296, 301, 303, 313
Sonenscher, M. 78
South Africa
anti-fascism 474–5
Bill of Rights 273, 276
capital punishment 287, 289–90
constitutional transition 380
constitutionalism 193
cross-national jurisprudence see cross-national jurisprudence, South African Constitutional Court
and federalism 49
human dignity 173
inclusive constitution-making 440, 442
international law considerations and cooperative government 273, 274–5, 277
National Education Policy Bill 285–6
prisoners’ voting rights 28, 42
referenda 446
rights protection 204–5

Index 533
same-sex marriage 35, 37–8
social rights 163–4
socioeconomic rights 226
South Africa, cases
Dawood v. Minister of Home Affairs 167, 183
Du Plessis v. De Klerk 276
Glenister v. President of the Republic of S. Afr. 224
Minister of Home Affairs v. Fourie 35
Minister of Home Affairs v. National Institute for Crime Prevention (NICRO) 28
President of the RSA v. Hugo 291
S. v. Coetsee 291
S. v. Jordan 173
S. v. Makwanyane 167, 183, 287, 289–90
S. v. Zuma 288, 289
South Sudan 441
sovereignty issues
and constituent power 301, 302–3, 307–8, 310
constitutional revolution imperatives 340–41, 342
federalism and constitutional theory 58, 64
Latin America 358
and separation of powers 68, 77–9, 82, 83
unwritten constitutions 404–5
Spång, M. 296, 299
Spigelman, J. 75
Spriggs, J. 197
state constitutions, US constitutional exceptionism 464–5
state orders as constitutional orders, unwritten constitution 396–7
state treatment and merit, human dignity 168, 172, 174, 176–7, 182, 184
Steiker, C. 458, 460, 463, 471, 474
Steiker, J. 471
Stein, E. 104
Stepan, A. 50, 373
Sternberger, D. 374
Stjernquist, N. 482
Stone, A. 461
Stone, M. 170
Stone Sweet, A. 104, 116, 125, 126, 140, 205, 229, 230, 247, 443, 480, 481, 485, 488
Stoner, J. 395
Strang, L. 307
Strauss, D. 2, 3, 304, 406
Strauss, P. 75, 82
strong-form systems 2, 27, 38, 41, 42
parliamentary bills of rights 130–33
see also weak-form systems
Strum, P. 461, 474
sub-state constitutional matters 440
see also inclusive constitution-making, citizenship and civic constitutionalism
sub-state nationalism 49
see also federalism
Sullivan, B. 98
Sullivan, K. 451
Sullivan, M. 215, 217
Sunstein, C. 156, 226, 247, 445, 460
supranational protection of democracy, militant democracy 429–33
supremacy, judicial see judicial supremacy
Suteu, S. 436, 440, 441
Sweden 482
Switzerland 445–6
Tan, K. 493
Tasioulas, J. 149
Tavares, R. 432
Taylor, C. 344
Teitel, R. 372, 376, 377, 378, 379, 381, 453, 454
territorial community value 54–5, 62
see also federalism
terrorism cases 212–13, 215, 216
text and textualism 248–68
atextualism 249–50, 251, 255–6, 266
content by reference to established jurisprudence 250–51
empty vessel readings 250–51, 253, 255–6, 264, 266
and formalism 249, 251
originalist interpretation 250, 251, 253
plain meaning textualism 249, 251, 263
and rule of law 249
special relationship to written text 248–9
textual hermeneutics 250, 253, 260, 263
US Equal Protection doctrines 251
US XIth Amendment’s guarantee of State sovereign immunity 249–50
text and textualism, European Court of Human Rights and religious establishment 256–67
anti-establishment doctrine promotion 264–6
displays of religious symbols 260
dispute resolution 260
freedom of thought, conscience and religion 257, 258, 262–3
Islamic head coverings in public schools 258
margin of appreciation doctrine 256, 258, 260–61, 263, 264, 267
neutral educational environment 260–62
neutrality principle 257–8, 263, 264–6
recognised religion, state authority to decide 253–4, 258–9, 264–6
religious principles as threat to democracy 259
social function and religious doctrine, distinction between 262–3
text and textualism, US Supreme Court treatment of religion as constitutional issues 252–6
conscientious objectors 254
displays of religious symbols 260
equal standing in political community 255
Free Exercise Clause and Establishment Clause 252–3, 254–6, 263, 265
funding issues 254–5
government neutrality issues 254
participation of religious authorities in political affairs 252–3
public endorsement for religious displays 252–3
recognised religion, state authority to decide 253–4, 259, 265
right to subsidies and a right to equal treatment 265
Thio, L.-A. 32, 490
Thompson, D. 157
Thornhill, C. 4, 5, 296
Tierney, S. 1–2, 8, 10, 45–65, 311, 437, 441, 443, 446, 447, 449
time restrictions, amendment theory and constituent power 320–21, 324
Tocqueville, A. de 31, 459
Tomkins, A. 396, 407, 408, 411
Torres Pérez, A. 9–10, 86, 102–22
transfer of powers considerations, constitutional revolution imperatives 338–40
transformative constitutionalism 219–20
see also legal pragmatism
transgender recognition 247
see also proportionality principle
transitional justice and constitutionalism and constitutional culture 372–92
consolidation of constitutional democracy 373–4, 376, 378
constitutional identity 375
constitutional patriotism 374
criminal sanction concerns 380
human rights violations 380
and international law reliance 383–5
judicial powers 377
material justice pursuit 380–82, 388–9
participatory constitutionalism 376
retroactivity and rule of law 379–87, 388
rule of law as legal continuity 382–7, 389–90
transitional constitutionalism and constitutional culture 373–7
transitional justice approaches 377–9
transparency, and legal pragmatism 215–16
Tribe, L. 395, 403
Trispiotis, I. 424
Troper, M. 307
Trubek, D. 221
Tsai, L. 477
Tsakyrakis, S. 181
Tsebelis, G. 145
Tulkens, F. 257
Tully, J. 55, 280
Tullock, G. 145
Tundawala, M. 313
Turkey 262–3, 421, 423, 425, 432
Uitz, R. 417, 427
UK
Brexit 194, 475
cosmopolitanism 328
decisional supremacy 26, 27
decentralism 49, 53
decisional perspective 26, 27
decentralism 49, 53
decentralisation and federalism 49, 53, 64
decisional perspective 26, 27
decentralism 49, 53
government interregnum, dealing with 411–12
government term and majority support 411
House of Lords influence 132, 133, 138
Human Rights Act (HRA) 26, 128, 131, 132–3, 406
judicial remedial powers 128, 131–3, 140, 141, 142
judicial review 89, 405
legislative decision-making, lack of domination by judicial norms
nudity prohibition in public
parliamentarianism, England
parliamentary sovereignty
political constitutionalism
popular trust in courts and other institutions
prisoners’ voting rights
republicanism history
rule of law
same-sex marriage
separation of powers
social rights
statutory reporting obligation
sub-state constitutional matters
unwritten constitution
Westminster characteristics, parliamentary
UK, cases
HM Treasury v. Ahmed
R (Al-Jedda) v. Sec’y of State for Defence
R (Factorlane Ltd.) v. Sec’y of State for Transport
R (HS2 Action Alliance Ltd) v. Sec’y of State for Transp.
R (Miller) v. Sec’y of State for Exiting the European Union
R (New College Ltd.) v. Sec’y of State for the Home Dep’t
UN Human Rights Commission, Wackenheim v. France
unconstitutional amendments, possibility of
see also amendment theory and constituent power
Unger, R.
Universal Declaration of Human Rights
universal principle, human dignity as
unsatisfactory provisions, working around
see also amendment theory and constituent power
unwritten constitution
ancient and modern constitution differences
changing ingredients of written and unwritten
and codification
and common law
constitution definition
interpretative techniques
interregnum, dealing with judicial review of administrative action
as metaphor
mixing written and unwritten
normative commitments
political constitution beginnings
and republicanism
sovereignty issues
state orders as constitutional orders
unwritten in unwritten constitution
unwritten in written constitution
Urofsky, M.
Uruguay
US
appointments and norm contestation
birthright citizenship
case law use, South African Constitutional Court
constituent power and US Revolution
constitutional amendments
constitutional history
constitutional norms
counter-majoritarian thesis see under
counter-majoritarian thesis
decisional supremacy
dialogue theory
Equal Protection doctrines
federal system
interregnum powers of President
judicial review
judicial supremacy
judicial review powers of President
judicial supremacy
judicial supremacy and court packing
plan
legal pragmatism see legal pragmatism
legal realism
liberalism and New Deal
Poletti Report
political supremacy
popular trust in courts and other institutions
“programmatic” approach to judicial review 25
proportionality principle 230–31
Religious Freedom Restoration Act 33, 200–201
rule of law 145
same-sex marriage 28, 35, 36–7, 38
separation of powers 70–71, 74, 76–7, 79–80, 81, 82
sexual orientation discrimination 40
socio-economic rights 158, 164–5, 275–6
State sovereign immunity 249–50
Supreme Court debates, cross-national jurisprudence 271–2
terrorism cases 212–13
treatment of religion see text and textualism, US Supreme Court
treatment of religion as constitutional issues
War Powers Resolution 39
US, cases
44 Liquormart v. Rhode Island 470
Abington Sch. Dist. v. Schempp 252
Adarand v. Pena 251
Adderley v. Florida 469
Alden v. Maine 250
Barenblatt v. United States 468
Bond v. Floyd 469
Brandenburg v. Ohio 461, 469
Brown v. Allen 470
Brown v. Board of Education 3, 30, 466, 468
Buckley v. Valeo 161
Burwell v. Hobby Lobby 33
Bush v. Gore 214
Calder v. Bull 248
Chaplin v. United States 468
Citizens United v. FEC 461
City of Boerne v. Flores 25, 201
Commonwealth v. Blackington 403
Cooper v. Aaron 23, 40, 468
County of Allegheny v. ACLU 255
Craig v. Boren 464
Craig v. Boren 464
Dandridge v. Williams 460
District of Columbia v. Heller 249
Dred Scott v. Sanford 377, 466
Edwards v. South Carolina 469
Engel v. Vitale 252, 253
Everson v. Bd. of Educ. of Township of Ewing 252
Fisher v. Univ. of Tex. at Austin 464
Furman v. Georgia 470

Gibbons v. Ogden 466
Goldberg v. Kelly 164
Good News Club v. Milford Sch. Dist. 254, 255
Grutter v. Bollinger 464
Hamdi v. Rumsfeld 213
Heart of Atlanta Motel v. United States 470
Katzenbach v. Morgan 470
Larkin v. Grendel’s Den 252–3
Larson v. Valente 259
Lawrence v. Texas 35, 271, 279
Lee v. Weisman 252, 255
Lemon v. Kurtzman 253
Lynch v. Donnelly 252
Marbury v. Madison 76, 248, 372, 488
Miller v. Johnson 462
Mitchell v. Helms 254
Morgan v. Virginia 470
NAACP v. Alabama 469
NAACP v. Button 469
New York v. United States 287
N.L.R.B. v. Canning 14
Obergefell v. Hodges 28, 35, 36–7, 38, 40
Planned Parenthood of Se. Pa. v. Casey 464
Plessy v. Ferguson 377
Printz v. United States 271
Railway Express Agency v. New York 97
Reynolds v. Sims 470
Roe v. Wade 98, 99
Romer v. Evans 40
Roper v. Simmons 271
Rosenberger v. Rectors of Univ. of Va. 254
San Antonio Indep. Sch. Dist. v. Rodriguez 464
Santa Fe Indep. Sch. Dist. v. Doe 255
Seminole Tribe v. Florida 250, 255
Shelly v. Kramer 276
Slaughter-House Cases 466
Sorrell v. IMS Health 461
Texas v. Johnson 40
United States v. Butler 248
United States v. Seeger 254
Van Orden v. Perry 260
Comparative constitutional theory

Welsh v. United States 254, 256
West Coast Hotel v. Parrish 462
West Virginia State Bd. of Educ. v. Barnette 24
Williamson v. Lee Optical of Oklahoma 462
Yates v. United States 468
Youngstown Sheet & Tube Co. v. Sawyer 77, 325
Zelman v. Simmons-Harris 254

US constitutional exceptionalism 456–75
birth control rights 470–71
capital punishment 458, 460, 463, 471
constitutional democracies in not-United-States category and anti-fascism 472–5
constitutional democracy 457–9, 460–61, 465
constitutional status of commercial advertising 469–70
criticism of 463–5
divergence from constitutional law of other constitutional democracies 460–61, 462–4
dormant commerce clause 470
exceptionalism, continued case for 460–63
exceptionalism history 457–60
false statements and free speech 461, 467–8
free speech issues 461, 462, 467–70, 472, 474, 475
positive welfare rights 471
proportionality review and categorization 461–2, 463–4, 468, 471–2
racial equality 465–72
state constitutions 464–5
universal human rights 461, 462, 463
voting rights 470

Versteeg, M. 8, 133, 311, 441, 447, 460, 461, 463, 464–5, 478, 482, 483, 491, 492, 495, 499, 507, 508, 509, 510
Vickers, L. 258
Vile, M. 69, 74
Vishniak, M. 296
Voigt, S. 453
Volcansek, M. 105
Von Bogdandy, A. 102, 103, 112, 340
voting rights 28, 42, 235, 240, 470

Waldhoff, C. 68
Walker, G. 490–91
Walker, N. 102, 105, 270–71, 278–9, 356
Wall, I. 298, 309, 310
Wallis, J. 436
Walters, M. 400, 403, 404
Walzer, M. 246, 346
Watts, R. 51–2
Way, L. 416
weak-form systems
judicial review 2, 27, 38, 41, 42
parliamentary bills of rights 126, 131, 133–7, 139–40

see also strong-form systems
Webber, G. 181, 409
Webster, N. 15–17
Webster, T. 505
Weiler, J. 105, 110, 258, 259, 266, 268, 337, 413
Weiner, A. 453
Weinrib, J. 11, 167–86, 222
Weinrib, L. 278, 456, 460, 462, 463, 473
Weisberg, R. 217
Weiss, K. 108
Weiss, M. 163
welfare-capitalism and private law 162
see also social rights
Wenar, L. 148
Wenman, M. 296
Wheare, K. 52, 53
White, S. 150
Whitt, M. 29
Whittington, K. 21, 32, 88, 92, 93, 377
Widner, J. 93, 440
will (choice) theory, social rights 148–9
Wills, J. 405
Wilson, J. 299
Winkler, A. 464
Wintgens, L. 301
Wolin, S. 306, 310

Van De Putte, A. 303
Van der Schyff, G. 433
Van der Tang, G. 301
Van der Walt, J. 163
Van Maarseveen, H. 301
Vatter, M. 303
Vedel, G. 357, 358
Venezuela 314, 363, 364, 365, 370, 428
Venter, F. 484
Verdugo, S. 367
Vermeule, A. 249, 328, 410, 411

Gary Jacobsohn and Miguel Schor - 9781784719135
Downloaded from Elgar Online at 02/09/2019 10:00:17PM
via free access
Index

Wood, G. 16, 74, 76, 81
Woolman, S. 167, 183
Wouters, J. 384
Wright, J. 69
Xing, L. 498
Yack, B. 307
Yap, P. 32
Yardley, J. 477
Yeh, J.-R. 378, 504, 513

Young, E. 82
Young, K. 144, 226, 227

Zackin, E. 460, 461, 463, 464–5
Zhang, Q. 486, 487, 489, 497, 500, 501, 502, 512
Zoller, E. 68, 78, 79, 80, 83
Zumbansen, P. 454
Zweig, E. 296
Zylberman, A. 175