

INDEX

- Accelerated Managed Land Settlement Programme, 243
- Access to justice, 18–19, 305
- Achmat, Zackie, 144–45
- Ackerman, Bruce, 46–47
- on extraordinary mobilization, 41–49
 - on popular sovereignty, 46–47
- adjudication
- Dworkin on, 34
 - socio-economic rights, 235–36
- Advertising Standards Association of South Africa, 270–71
- affirmative action, 115–19, 152–53
- African National Congress (ANC), 1–2, 28–29, 70–71, 98–99, 277–78, 352–53, 355
- amendment powers of, 113–15
 - Bill of Rights, 111–12, 158–59
 - compromises made by, 108–9
 - Constitutional Guidelines, 100
 - on death penalty, 7–8
 - Declaration of Intent, 100
 - on democracy, 192, 203, 228
 - on education, 116–17
 - on floor-crossing, 217, 220–23, 231–32
 - on identification documents, 57–58, 71
 - institutional thinking and, 99–110
 - Mandela and, 92, 273–74
 - party discipline in, 231–32
 - political slack of, 117–18, 339–40, 346–47, 353
 - on property rights, 112–15
 - on public participation, 190–92
 - Women's League, 158–59
- Afrikaans language, 115–16, 120–21
- Afrikaner Eenheidsbeweging, 229
- Aids Law Project, 145–46
- ANC. *See* African National Congress
- anger, 134–35
- animal rights, 45–46, 140–41, 301–2
- apartheid, 99–100, 169, 346–47
- Dworkin on, 43–44
 - judging under, 122–23
 - as legislative agenda, 105
 - moral philosophy and, 44–45
- artificial insemination, 178
- ARVs (Antiretrovirals)
- HIV/AIDS and, 283–85
 - Mbeki on, 270–75
- attitudinalism, 36–37
- barcoded documents. *See* identification documents
- Bickel, Alexander, 38–41, 137, 324–25
- on Constitutional Court, 39
 - on decision-making, 39–40
 - on democracy, 39–40
 - Gunther on, 38–39
 - on principled adjudication, 38–39
 - on public status, 140–41
 - on realism, 38–39, 41
- Bill of Rights, 96–97, 100, 111–12, 115–16
- ANC, 111–12, 158–59
 - proposals for, 101–2
 - South African Law Commission on, 109
- Botha, P.W., 105–6
- Brown v. Board of Education*, 135–37

- Cameron, Edwin, 43–44, 144–45, 160–61
 on Mbeki, 277–78
- Canons, 25, 216, 301, 355
- certification process, 11, 97, 108, 120–21, 218–20, 222–23, 237
- Chaskalson Court, 35–36, 91–92
- Civil Unions Act, 172–73, 178–79 307
- CODESA talks, 100–1
- Colombia, 347
- common law systems, 36–37
- Concerned South Africans Group (COSAG), 107–8
- Congress of the People (COPE), 231–32
- consequentialism, 31–32
- Conservative Party, 107–8
- Constitution of 1983, 105–6
- Constitution of 1993, interim, 101–2, 127–28, 160–61, 219, 243–44
- Constitution of 1996, 2–3, 353–54
 access to electricity in, 249–50
 on Electoral Commission, 153
 floor-crossing in, 218–20
 intentions of drafters, 96–99
 public status and, 142
 purposive text in, 153
 redistribution and, 113–15
 referendum on, 32–33
 s 1, 150–51
 s 7(2), 235–36, 311–12, 322–23
 s 12(1)(c), 235–36
 s 26(3), 246–48, 322–23, 331–33
 s 43, 153
 s 74(1), 150
 s 160(8), 209–10
 s 165(2), 150
 s 172(1)(a), 149, 153
 s 172(1)(b), 148–50
 s 181(3), 153
 s 190, 153
 socio-economic rights and, 241, 244
 ss 8(2), 148–50
 ss 39(2), 148–50
- Constitutional Assembly, 101–2, 115–16, 220
- Constitutional Committee, ANC, 111–12
- Constitutional Committee, President's Council 105–6, 109
- Constitutional Court, 1–2, 25, 28–29, 48–49, 274–75
 appointments, 104–5
 as body outside politics, 109
 bridge-building and, 126–28
 judicious avoidance of, 19–21
 legal culture and, 29–30
 Mandela on, 69–70, 92
 role of, 30, 95–96, 126–27, 129–30, 146–47
 ANC on, 101–3
 socio-economic rights and, 241–91
 constitutionalism, 2–3, 5–6, 140–41
 ANC and, 2–3, 108–9
 celebration of, 352–53
 Dworkin on, 42
 expansive, 125–26
 experimental, 26–27, 45–46, 342
 German, 109
 post-Apartheid, 12, 121–22, 189
 public participation and, 349
 public status and, 139
 reality of practice and, 36–37
 results-driven, 150–55
 transformative, 126, 234–35, 354
 conceptual edges of, 121–26
 post-apartheid judging and, 122–23
 value-tied model of, 109
- constitution-building account, 4, 14–15, 129–30, 189, 312, 322, 343–44
 as constitutional argument, 147–50
 Constitutional Court and, 4, 29–30
 construction of, 91–92
 engagement and, 325–40
 infrastructure and, 133–38
 judicial role in, 29–30, 147–48
 newness and, 131–33
 socio-economic rights and, 241
 constitution-building court, 4, 154–55, 349
 decision-making in, 30–33
 interpretative activity of, 32
 role of, 30–33
- COPE. *See* Congress of the People

- Corder, Hugh, 162
 COSAG. *See* Concerned South Africans Group
 Council of Traditional Leaders, 342
 counter-majoritarian powers, 14–16, 18–19, 91–92, 140
 Critical Legal Studies, 26–27
 culture of justification, 41–42
- DA. *See* Democratic Alliance
 De Klerk, F. W., 109
 on federalism, 106–7
 on race, 106–7
 de Lange, Johnny, 7–8
 de Villiers, Dawie, 218–20
 death penalty, 9, 13, 97, 173–74
 ANC on, 7–8
 constitutionality of, 15–16, 97–98
 NP on, 7–8
 democracy, 23–24, 175–76, 225–26
 Bickel on, 39–40
 Ely on, 67
 floor-crossing and, 232
 minimalism and, 19–21
 participatory, 194, 200–1, 339–40
 promotion of, 208–16
 representative, 196, 203, 206
 transition to, 89–90
 trust and, 66–74
 Democratic Alliance (DA), 220–21
 Democratic Party (DP), 51–52, 104–5, 107–8
 on floor-crossing, 220–21
 on identification documents, 75–76
 on LGBTI equality, 160–61
 Department of Health, 280
 Department of Home Affairs, 51, 59–60, 74–75
 dialogue theory, 342
 discrimination, 140–41
 ANC on, 158
 gender, 316
 HIV/AIDS, 142–47, 270–74
 newness in, 189
 Dlamini-Zuma, Nkosasana, 272–74
 documents. *See* identification documents
 DP. *See* Democratic Party
 Dugard, John, 43–44
 Dworkin, Ronald, 41–49, 324–25, 342
 empirical evidence, 152–53
 on adjudication, 34
 on affirmative action, 152–53
 on apartheid, 43–44
 chain novel, 29–30
 on common law, 45–46
 on constitutionalism, 42
 on interpretative activity, 34–35, 43
 on judging, 34
 moral philosophy of, 42, 44–45
- Eastern Cape, 56–57
 education
 ANC on, 116–17
 engagement in the context of, 340–41
 single-medium schools and, 115–16
 Eglin, Colin, 218–20
 Electoral Act, 52–53, 61–62
 Electoral Commission, 51–52, 63–64, 263–64, 342
 authority of, 69–70
 Constitution of 1996 on, 153
 on identification documents, 75–76
 independence of, 137
 voting rights and, 82–85
 Electoral Institute of South Africa, 71
 electoral legitimacy, 134–35
 electricity, access to, 249–50
 elites, 112–13
 Ely, John Hart, 52–53, 215–16
 on processes, 66–67
 Employment Equity Act, 146–47
 engagement, 301–3, 328–29, 335–38, 346–48
 constitution-building account and, 325–40
 eviction and, 331–33, 339–48
 facets of, 329
 Epp, Charles, 142
 equality, 24–25, 85–86, 301–3
 socio-economic rights and, 236–37
 eviction, 301–3
 engagement and, 331–33, 339–48
 Expanded Social Package, 290–91

- family law, 178–87
 Federal Alliance, 229
 federalism, 89–90
 De Klerk on, 106–7
 floor-crossing, 216–27, 229–31
 ANC on, 217, 220–23, 231–32
 in Constitution of 1996, 218–20
 democracy and, 232
 DP on, 220–21
 prohibition of, 218–20
 Free Basic Water Policy, 289–92
 Freedom Charter, 99–100, 156–58,
 173–74
 insufficiency of, 111–12
- Gauteng, 56–57, 272–74
 gender discrimination, 316
 Ginwala, Frene, 158
 GNU. *See* Government of National
 Unity
 Govender, Pregs, 272–74
 Government of National Unity (GNU),
 104–5
 Grové, Gerrit, 161–62
- Habermas, Jürgen, 45–46, 342
 Harare Declaration, 100–1
 Hartzenberg, Ferdi, 107–8
 HIV/AIDS
 ARVs and, 271–72, 283–85
 as disability, 276
 discrimination, 142–47, 270–71
 Mbeki on, 272–74
 Shilowa on, 277–78
 homelessness, 248
 horizontal application, 102–3
 Sachs on, 103
 Housing Code, 244–45, 266, 341–42
 housing policy, 265
 HSRC. *See* Human Sciences Research
 Council
 human dignity, 151, 170, 175–76, 236,
 316, 329
 Human Sciences Research Council
 (HSRC), 56–57, 59–60,
 73–74
 on identification documents,
 75–76
 on voter turnout, 76–77
 on voting rights, 74–75
- identification documents, 51–56, 62–63
 ANC on, 57–58, 71
 DP on, 75–76
 Electoral Commission on, 75–76
 HSRC on, 75–76
 Mandela on, 71
 of prisoners, 80–81
 voter exclusion and, 78–79
 IFP. *See* Inkatha Freedom Party
 immigration law, 163–67
 Independent Electoral Commission. *See*
 Electoral Commission
 India, 347
 infrastructure, 17–18
 constitution-building account and,
 133–38
 engagement and, 332
 newness in, 133
 interpretative activity and, 134–39,
 181, 326–27
 newness and, 133, 245
 public status and, 138–39
 temporary, 134–35, 281
 trust and, 135–37
 Inkatha Freedom Party (IFP), 56–57,
 107–8, 160–61
 interim Constitution. *See* Constitution
 of 1993, interim
 interpretative activity, 28–29
 attitudinalism in, 36–37
 Dworkin on, 34–35, 43
 infrastructure and, 134–39
 judging and, 33–34
 legitimate, 38–39
 political activity and, 41–49
 realism and, 90–91
 society and, 47–48
 interpretivist accounts, 23–24
 realist accounts compared with,
 21–23
- Jim Crow, 169
 Johannesburg, 326–27, 333–34,
 341–42
 Jordan, Pallo, 111–12

- judges and judging
 apartheid and, 55–56, 62–63, 122–23
 constitution-building account and,
 29–30, 33, 147–48
 Dworkin on, 34
 flexibility and, 124–25
 post-apartheid, 121–26, 254–55
 strategy and, 125–26
 transformative constitutionalism
 and, 122–23
 judicial review, 33, 52–75, 85, 149–50,
 189, 246, 353
 ANC, 100, 108–9
- Kaiser Foundation, 272–74
 Kriegler, Johann, 64–66
 resignation of, 71
 KwaZulu Legislative Assembly, 160–61
 KwaZulu-Natal, 56–57, 107–8, 216,
 223–24, 228
- Labour Court, 145–46
 land reform, 115
 Langa, Pius, 63–65, 86–87, 354
 on reconciliation, 140–41
 law. *See also* specific laws
 autonomy of, 23–24, 35–36
 judiciaries and, 30
 realism and, 33–38
 Law Commission, 102–3
 legal decision-making, 35–36
 legal legitimacy, 38–41
 legal realism, 37–38
 Lekota, Mosiuoa, 156–58
 on LGBTI equality, 177
 LGBTI equality, 6, 138, 144–45, 156,
 189, 214–15, 237–38, 303–4,
 306, 310, 323–24, 329–30
 ANC on, 161
 Chauke on, 176–77
 DP on, 160–61
 Lekota on, 177
 litigation campaign for, 164–65
 Mbeki on, 158
 public status of, 156–63
 trust and, 186
 liquor sales, 315
 Llewellyn, Karl, 33–40
 on appellate judging, 37–38
 on contract law, 37–38
 on realism, 37–38
 Local Government: Municipal
 Structures Act, 209–11
- Madala, Tholie 252–53
 Madlala-Routledge, Nozizwe, 281–82
 Maduna, Penuell, 277–78
 Mandela, Nelson, 12–13, 71, 93,
 153–54, 273
 ANC and, 92
 on Constitutional Court, 69–70, 92,
 280
 on identification documents, 71
Marbury v. Madison, 88–89, 95–96
 marijuana, 343–44
 Marriage Act, 172–73
 Masondo, Amos, 209
 Mbeki, Thabo, 12–13, 71, 112–13,
 277–78, 282–83
 on ARVs, 270–75
 Cameron on, 277–78
 on HIV/AIDS, 272–74
 on LGBTI equality, 158
 on NP, 111–12
 Medicines Control Council, 270–71
 minimalism, 21–23, 48–49, 251, 258,
 303
 Minister of Health, 280–81
 minority parties, 103–10, 209–10,
 218–20
 Mohamed, Ishmail, 144–45
 Mokgoro, Yvonne, 310–11, 313–14
 Mompoti, Ruth, 156–59
 moral philosophy, 16–17
 apartheid and, 44–45
 Dworkin, 42, 44–45
 Moseneke, Dikgang, 241
 Mureinik, Etienne, 41–44
- Napier, Wilfred, 171–72
 National AIDS Co-ordinating
 Committee of South Africa
 (NACOSA), 144–45
 National Assembly, 229–31
 National Building Regulations and
 Building Standards Act, 329–30

- National Coalition for Gay and Lesbian Equality, 156–58, 161–63, 319–20
- National Council of Provinces (NCOP), 194–95, 199–201
- National Economic Development and Labour Council (NEDLAC), 270–71
- National Executive Committee, ANC, 158–59, 272–74
- National Party (NP), 88, 103–10
 ANC and, 97, 111–12
 on death penalty, 7–8
 Declaration of Intent, 100
 institutional thinking and, 104
 on property rights, 111–15
 South African Law Commission on, 105–6
- National Union of South African Students (NUSAS), 156–58
- NCOP. *See* National Council of Provinces
- NEDLAC. 270–71 *See* National Economic Development and Labour Council
- neo-liberalism, 239, 326–27
- Netshitenze, Joel, 272–74
- Nevirapine, 271–78, 281–85
- New National Party
 ANC and, 92–93
 apartheid and, 51–52
 Constitutional Court and, 64
- newness, 30–31
 Constitutional Court and, 324–25, 346–47
 constitution-building account and, 131–33
 defining, 131
 in discrimination cases, 189, 324–25
 of HIV/AIDS, 285–87
 infrastructure and, 133
 shifts in, 132
 socio-economic rights and, 233–41
 unilateral confrontation, 132
- Ngcobo, Sandile, 309–10
- Nkandla, 215–16
- Nkoli, Simon, 144–45, 156–58, 161, 177
- non-interpretivist accounts, 19
 non-intervention decisions, 252–70
- NP. *See* National Party
- NNP. *See* New National Party
- NUSAS. *See* National Union of South African Students
- OAU. *See* Organization of African Unity
- OLGA. *See* Organization for Gay and Lesbian Activists
- Olivier, Johan, 74–75
- Omar, Dullah, 7–8, 164–65
- O'Regan, Kate, 52–55, 57–58, 61–62, 68–69, 76–77, 87–88, 170–71, 189–210, 225–26, 258–59, 310–11, 316, 324–25
- Organization for Gay and Lesbian Activists (OLGA), 158–61
- Organization of African Unity (OAU), 100–1
- participatory democracy. *See* democracy, participatory
- patronage politics, 353
- People's Assembly, 190–94
- PIE. *See* Prevention of Illegal Eviction Act
- Pitje, Godfrey, 168–69
- pleadings, 202–3, 249, 290, 342–43
- politics
 judging and, 28–29
 patronage, 353
 in South Africa, 355
 voting rights and, 50–51
- populism, 353
- post-apartheid judging, 121–26
 strategy and, 125–26
 transformative constitutionalism and, 122–23
- prepaid water meters, 292–94, 299
- Prevention of Illegal Eviction Act (PIE), 246–48, 333
- principled adjudication, 38–39
- prisoners 17–18
 identification documents of, 80–81
 voting rights of, 58–59, 80–81
- property rights, 110–11
 ANC on, 112–15

- property rights (cont.)
 NP on, 111–15
- proportionality analysis, 54–55,
 63, 78
- protest, 134–35, 197–98, 203, 287–88
- public participation, 195–96, 336–37
 ANC on, 190–92
 cases, 197–208
 constitutionalism and, 349
- public status, 14, 138–42, 319–20,
 353–54
 ANC on, 139–40
 Constitution of 1996 and, 142
 constitutionalism and, 139
 infrastructure and, 138–39
 of LGBTI equality, 156–63
 of socio-economic rights, 238–39
- purposive text, 150–55
 Bill of Rights and, 153
 in Constitution of 1996, 153
 rights and, 153
- queue-jumping, 263–64
- race, De Klerk on, 106–7
- racism, 140–41. *See also* apartheid
- rape, 316–17
 definition of, 303
 gender-neutral, 304–5
- Rastafarianism, 342–45
- rationality
 in equality analysis, 143, 164
 socio-economic rights and, 253–54
 voting rights and, 53–54, 61
- Rawls, John, 42
- realism
 Bickel on, 38–39, 41
 Dworkin on, 42
 interpretivism and, 90–91
 law and, 33–38
 Llewellyn on, 37–38
 trust and, 69
- realist accounts, 19
 interpretivist accounts compared
 with, 21–23
- reasonableness, 235–36, 323–24
 public participation cases and, 190,
 196–97, 210–11, 245–46
- socio-economic rights and,
 235–36, 253–54, 265, 274–75,
 288–89
 voting rights and, 53–54, 61
- reconciliation, 140–41
- redistribution, 119–20
 Constitution of 1996 and, 113–15
 taxation and, 237
- re-engagement, 199–202
- regionalism, 106–7
- religious rights, 313–14
- results-driven constitutionalism,
 150–55
- right to life, 7, 14–15, 98–99
- rights. *See also* socio-economic rights;
 voting rights
 animal, 45–46, 140–41
 defense of, 55–56
 human, 13, 15–16
 purposive text and, 153
- ripeness, 39–40, 165–66
- Rivonia Trial, 13
- rule of law, 119–20, 151, 279–80
- Sachs, Albie, 102–3, 152–53, 164–65,
 169–70, 200–3, 205–6, 252–53,
 310–11, 313–14, 316, 345
 on theory of when, 48–49
 on horizontal application, 103
 on socio-economic rights, 243–44
- same-sex marriage, 140–41, 168–78,
 319–20
- SANCO. *See* South African National
 Civics Organization
- Second World Conference of Speakers
 of Parliaments, 190–94
- separation of powers, 30, 63–64, 89,
 119–20, 183, 196–97, 244–45,
 254, 275–76, 305
- sex work, 316, 319–20, 322
 decriminalizing, 316–17
- Shilowa, Mbhazima, 272–74
 on HIV/AIDS, 277–78
- single-medium schools, 98–99, 115–16
- Social and Economic Rights
 Commission, 244
- social democrats, 111–12, 239
- social movements, 142

- socio-economic rights, 24–25, 233,
 255–56, 269–70, 280, 287–300
 adjudication, 235–36
 ANC on, 101, 112
 Constitution of 1996 and, 241, 244
 court-centric biases in, 269
 equality and, 236–37
 maximalism and, 242–51
 minimum core conception of, 266
 Moseneke on, 241
 newness and, 233–41
 public status of, 238–39
 reasonableness and, 235–36, 253–54,
 265, 274–75, 288–89
 Sachs on, 243–44
 scholarship on, 234–35
 skepticism towards, 236–37, 260–61,
 266, 296
- sodomy, 156
- Sólyom, László, 95–96
- South Africa. *See also* Constitution of
 1996
 adjudication in, 28–29
 democracy in, 1–2
 diversity in, 36–37
 politics in, 355
- South African Human Rights
 Commission, 242, 268
- South African Law Commission, 101–2,
 144–45
 on Bill of Rights, 109
 on NP, 105–6
- South African Law Reform
 Commission, 144–45
- South African National Civics
 Organization (SANCO), 204–5
- Special Pensions Act 69 of 1996,
 163–67
- Statusdenkschrift, 95–96
- strategy
 legal legitimacy and, 38–41
 post-apartheid judging and, 125–26
- Sunstein, Cass, 19–21
 minimalism of, 21–23, 48–49
- Tambo, Oliver, 99–101, 111–12, 159
 leadership of, 191–92
- Tatchell, Peter, 156–58
- taxation, redistribution and, 237
- textual status, 14, 319–20
- Traditional Courts Bill, 206–7
- transformative constitutionalism,
 121–26, 234–35, 354
 conceptual edges of, 121–22
 post-apartheid judging and, 122–23
- Treatment Action Campaign, 134–37,
 270–71, 281, 284–85
- trust, 186, 214–15
 of ANC, 117–18
 democracy and, 66–74
 infrastructure and, 135–37
 LGBTI equality and, 186
 as social capital, 69–70
 voting rights and, 50–51
- Tshabalala-Msimang, Manto, 281–85
- Tutu, Desmond, 161–62
- UDF. *See* United Democratic Front
- UDM. *See* United Democratic
 Movement
- Umkhonto we Sizwe, 163
- UN. *See* United Nations
- United Democratic Front (UDF),
 158–59
- United Democratic Movement (UDM),
 75–76, 216–27
- United Nations (UN), 99–100
- United States constitutionalism, 4–5
- unmarried couples, 178–87, 306
- utilitarianism, 151–52
- vagueness, 41
- Van der Westhuizen, Johann, 197
- vote counting, 79–80
- voter turnout, 76–77
- voting registration, 74–75, 80
 overseas, 82–84
- voting rights, 24–25, 52–53, 81–88, 91
 ANC and, 56–57
 citizenship and, 67–68
 in Constitution of 1996, 151
 Electoral Commission and, 85
 identification documents and,
 78–79
 politics and, 50–51
 of prisoners, 80–81, 85

392

voting rights (cont.)

rationality and, 53–54

trust and, 50–51

Vryheidsfront, 229

Waldron, Jeremy, 70–71

Water Services Act, 292–94

Western Cape, 56–57, 88, 92–93,
229–31, 322–23

INDEX

ANC and, 228

Women's League, ANC, 158–59

World Health Organization, 276

Yacoob, Zak, 53–54, 58–60, 65–66, 191,
309–10

Zuma, Jacob, 206, 215–16