

More Information

INDEX

A. v Governor of Arbour Hill, 456, 457 Amod v Multilateral Motor Vehicle A v Secretary of State for the Home Accident Fund, 595 Department, 707 Amsterdam decision, 350 Aboriginal rights, 186 analogia iuris, 172 Aboriginals, 45 analogies, 53, 56-7, 138, 172, 214, Act Governing the Punishment of 260-1, 292, 371-2, 373, 407-8, Police Offences, 670 455-6, 485-6, 533-4, 577-8, 622, 623, 653, 695, 739. See also actio popularis review, 423, 431, 434 actiones populares, 242 arguments activism, 399-400 Ancien Régime, 323 Adalah Legal Centre for Arab Minority Appellate Jurisdiction Act 1876 Rights in Israel v. Minister of (United Kingdom), 682 Interior (2006), 488, 505, 506 Arbour, Louise, 190 Administrative Court (Austria), 80-1, arguments absent, 340-2 107 Administrative Law, 704 analogies. See analogies adversary system, 60 applicability of Constitution, Advocates General, 285-6 216-17, 371-2, 408, 486-7, Ahad-Ha'am, 510 531-3, 579-80, 621-2, 654-6, Air Caledonie International v 694–5, 738–9 Commonwealth (1988), 63 applicability of constitutional law, airlines travel, regulation of, 58 454 Alberta, Canada, anti-discrimination applicability of treaties, 292–3 statute, 164 based on structural values and principles, 459-61 Alexkor case, 584, 585, 593 *Al-Kateb v Godwin*, 56, 59, 62 case disposition, 737 Al-Khawaja and Tahery v. United chain structure (one-line conclusive Kingdom, 265 reasoning). See chain structure Allgemeine Auslegungslehre als (one-line conclusive Methodik (Betti), 668 arguments) Amalgamated Society of Engineers v combined, 420 Adelaide Steamship Company concept or principle not mentioned (Engineers' Case), 49–50, 57, in text, 376, 583, 742 65 concrete issue, 371 American Constitution (1789), 725 concurrences, 369-70 American Revolution, 723 deference, 706 amicus curiae, 165, 285, 571-2 dialogic, 651–2



822 INDEX

arguments (cont.) precedents, 220, 296-7, 375, 411, disposition, 370 455-6, 489-90, 538-9, 583, dissents, 369-70 624-5, 659-60, 698, 741-2 doctrinal analysis of legal concepts references to foreign law, 94-5, or principles, 220-1, 411-13, 225-7, 303-4, 378-9, 418-19, 490-1, 539-41, 625-6, 660-3, 498-9, 548-9, 586-7, 629, 699-700 668-9, 705-6, 745 domestic harmonising, 294–5, references to previous decisions, 581-2, 657, 739-40 344 - 5economic, 416-17, 497, 627-8, references to previous judgments, 665-7,702-4establishing/debating text of references to scholarly works, 225, Constitution, 214–16, 342–4, 303, 378, 417–18, 434, 462–3, 371, 408, 486, 529-31, 578-9, 498, 547-8, 585-6, 667-8, 653-4, 694 704-5, 744 formal approaches, 93-4 references to wording of Constitution, 373, 488 general topic, 370-1, 737-8 harmonising, 218-19, 263, 295-6, reliance on general principles, 373, 374–5, 410–11, 433, 488–9, international law and 535-8, 582, 623-4, 658-9, consensus, 261-2 695-8, 740-1 security considerations, 495-6 historical circumstances, 497 settled usage, 745 historical-intentional, 433-4 from silence. See arguments from implicit concepts and principles, silence 297-8 sociological, 416-17, 627-8, 665-7, incrementalism, 260–1 702 - 4individual rights, 461–2 structure of, 92-3, 132-7, 170, interpretive, 456–9 211-13, 259-60, 291-2, 334-9, legs of a chair (parallel conclusive), 368-9, 407, 432, 452-3, 484-5, 652 - 3529, 549-51, 576-7, 619-21, level of generality, 47-9 650-3, 692-4, 735-7 linguistic-logic formulae based on subsidiarity, 262-3 silence, 297-8, 413, 492 substantive approaches, 95–7 teleological/purposive referring to moral, 264, 416-17, 496-7, 627-8, 665-7,702-4purpose of Constitution-maker, non-legal, 224-5, 301-3, 377-8, 223-4, 298-301, 377, 415-16, 493-4, 544-6, 585, 664-5, 701-2 416–17, 434, 463, 494–7, 546–7, 585, 627–8, 665–7, 702–4, teleological/purposive referring to 744 purpose of text, 222-3, 376, one-line conclusive. See chain 413-15, 492-3, 542-4, 584, 627, structure (one-line conclusive 664,700-1textual interpretation, 263 arguments) transitory provisions, 432 ordinary meanings of words of Constitution, 217-18, 293-4, travaux préparatoires, 263 373, 409–10, 432–3, 488, 534–5, weight of, 97-8, 143-4, 185-7, 227, 580-1, 656-7, 695, 739 264-5, 304-6, 345-6, 380, 421, 463-4, 499-501, 588-9, 670-1, originalism, 745 parallel conclusive, 692–3 708-11, 745-6



arguments from silence	Australian Constitution and, 36-8
argumentum a contrario, 298	concurring opinions in, 63–4
Australian High Court, 55	constitutional issues in, framing of,
Brazilian Federal Supreme Court,	64
141	constitutional litigation, 38–9
in Czech Constitutional Court,	constitutional reasoning
221–2	arguments in, 45–59, 69: analogy,
European Court of Justice, 297–8	56–7; non-legal (moral,
German Federal Constitutional	sociological and economic),
Court, 376	57–9; precedents, 49–51, 52–6;
Hungarian Constitutional Court,	structural inference, 49–51,
413	52–6; textualism, 49–51; types
in Israeli Supreme Court, 492	of, 51–2
Italian Constitutional Court, 541–2	comparative perspective on,
South African Constitutional Court,	69–71
583-4	core methods, 49–51
Spanish Constitutional Court, 626–7	criticism of, 71–3
Supreme Court of the United States,	evaluation of, 71–3
742–3	fundamental values, 43-5
Taiwanese Constitutional Court,	legal scholarship and context for,
663–4	40–5
Arribas Anton v. Spain, 613	pathology of, 71–3
Assembly and Parade Act (Taiwan), 675	rule of law, 42–3
Association of Judges of Ireland (AJI),	dissenting opinions in, 63-4
442	40 leading cases, 73–4
association of states, 316, 317	glocal constitutionalism in, 791,
Aston Cantlow v Wallbank, 705, 716	794–7
asylum cases, 108	judges, 39–40, 774
Asylum Court (Austria), 107	salaries of, 42
attendus que, 307	judicial candour and rhetoric of,
Auriol, Vincent, 329	59–63
Ausstrahlungswirkung, 201	key concepts, 65–9
Australia, 16	democracy, 67–8
Australian Capital Television v	federalism, 65–6
Commonwealth (1992), 41, 43,	nation, 67
46–7	separation of powers, 66
Australian Communist Party v	oral arguments, 39
Commonwealth (1951), 63, 66	power of, 38–9
Australian Constitution	proceedings, 39
British model, 36–7	special leave applications, 39
drafting of, 36	structure of constitutional
High Court of Australia and, 36–8	arguments, 46–9
social role of, 44–5	
	level of generality, 47–9
as a statute of British Parliament, 70	one-line conclusive arguments,
US model, 37	46–7
Australian Electoral Commission, 42	Austrian Constitution
Australian High Court, 36–73, 764,	amendment of, 78
765, 784	Article 7, 106–7



Austrian Constitution (cont.)	length of, 99
Article 87, 107	target audience, 99
concept of human rights in, 79-80	criticism of, 112–13
court system and, 80	democratic principle in, 101
focus on liberal rights, 79	dialogue with foreign courts, 100
40 leading cases, 112–13	doctrine of "creeping total revision,"
fundamental principles of, 102	78
history of, 75–7	equality principle in, 101
key concepts in	evaluation of, 112–13
basic procedural rights, 107–8	framing of constitutional issues in,
democracy, 105	101–2
economic rights, 107–8	function of, 81
federalism, 104	German Constitutional Court,
government form, 104	compared with, 91–2
human dignity, 106–7	glocal constitutionalism in, 792
human rights, 105–6	judges, 85–7
principle of equality, 106–7	appointment of, 85
proportionality test, 105-6	diversity, 86
rule of law principle, 105	membership, 86
state form, 104	other occupations of, 86–7
Wesensgehalt, 105–6	qualifications of, 86
nation state concept in, 102–4	salaries, 88
as an open constitution, 80	judgments
secularism and, 102–4	concurring opinions, 100–1
sovereignty and, 102–4	dissenting opinions, 100–1
Austrian Constitutional Court, 75–112,	length of, 100–1
113, 767	judicial candour and rhetoric of,
academic debate, 100	98–100
change of approaches of, 90	legal scholarship and, 87–8
comparative perspective on, 109–12	media and, 85
implied presuppositions, 109–10	pathology of, 112–13
key concepts, 110	procedure of, 83–5
procedural aspects, 110–11	rapporteur, 99
competences, 82–3	review of statutes, 82–3
constitutional arguments	rule of law principle in, 101
structure of, 92–3	website, 85
types of, 93–7: formal approaches,	workload, 83
93–4; references, 94–5;	Austrian Constitutional Law, 89
substantive approaches, 95–7	Austrian Convention, 77
weight of, 97–8	Austrian court system, 80–1
constitutional litigation, 82–5	Austrian Legal Informatics System, 85
constitutional reasoning in, 75–81	Austrian Nazi, 76
arguments in, 88–109	Austro-fascism, 76
change of, 88–92	authority-based arguments, 171
constitutional context, 77–80	autonomous interpretation, 258
historical context of, 75–7	autonomy
human rights and, 90	Canada, 154, 158–9
iudicial activism and, 90–1	ECI approach to, 317, 319



INDEX 825

Bill of Rights (Czech Republic),

ECtHR approach to, 256, 262, 271 Hungarian Constitutional Court, 411 Hungary, 425 Ireland, 438, 460, 466 Italy, 554-5 personal, 256, 262, 271 Spain, 612–13, 625–6, 632–3, 637 Aviation Security Act, 368, 388-9 AXA General Insurance Ltd, Petitioners, 703, 716 AZAPO case, 579 Azerbaijan, 238 Azoulai, Loïc, 310 Baden-Württemberg, 359 Baker v. Carr (1962), 727 Balfour Declaration of 1926, 154, 438 Barak, Aharon, 480, 483, 488, 492, 498, Barber, 303 Bar-On v. Israel Knesset, 494 Barron v. Baltimore (1823), 738, 742, 748 Barzilai case, 504, 506, 509, 510 Basic Law (Germany), 9.3. See also German Federal Constitutional analogical reasoning and, 373 Article 1, 371 Article 2, 370, 383 Article 103, 389-90 Article 120, 371 Article 19, 388 Article 20, 385–6 Article 31, 386 Article 59, 374 Article 79, 386, 388 Article 93, 363 as an objective order of values, 360 prohibition of unconstitutional parties, 356 Bato Star Fishing case, 575, 579, 580, 584 Belgian Arbitration Court, 226 better placed argument, 257 Betti, Emilio, 668 Bill of Judicial Rights (Israel), 482

217-18, 223 Bill of Rights (South Africa), 594 binding summary, 123, 125 Bioethics (1994), 343 Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG, 701 black-letter law scholarship, 169 Böckenförde, Ernst-Wolfgang, 358 Bosman (1995), 302, 319 Brandeis, Louis D., 23 Brandeis brief, 23 Brandt, Willy, 360 Brazilian Federal Supreme Court, 31, 115-52, 779, 780, 782 activism of, 116, 117-18 caseload, 126-8 comparative perspective on, 147 constitutional arguments, 132-47 structure of, 132-7: cases, selecting, 133-4; classification of, 135-6; decisions, 134-5 types of, classifying and quantifying, 136-7 weight of, 143-4 constitutional litigation and, 120-8 constitutional reasoning argument types in, 137-43: analogies, 138; applicability of Constitution, 138; doctrinal analysis of legal concepts or principles, 141; economic arguments, 142; establishing/debating text of Constitution, 138; harmonising arguments, 139; linguistic-logic formulae based on silence, 141; moral arguments, 142; non-legal arguments, 142; ordinary meanings of words of Constitution, 139; precedents, 139-40; references to foreign (national) law, 142; references to scholarly work, 142; sociological arguments, 142; teleological/purposive arguments, 141-2



Burger Court, 750
Byrne v Ireland, 439
Cahier du Conseil constitutionel, 331
Cahill v. Sutton, 445
Calder v. Bull (1798), 733, 744, 753-4
Campbell, Kim, 162
Canada
constitutional history, 154-6
constitutional interpretation in,
159–60, 162
constitutional review in, 157-8
American model, 163
in concreto model, 164
reference mechanism, 164
constitutional tradition in, 156-7,
159
formation of, 154–6
Canada Act, 155
Canadian Charter of Rights and
Freedoms, 155, 160–1, 787
Canadian Supreme Court, 9, 154, 764,
780
cases, 166–7
comparative perspective, 193–5
constitutional arguments
structure of, 170
types of, 171–85
weight of, 185–7
constitutional litigation and, 163-7
decision rules, 165
permission to intervene, 165
rules of evidence, 165–6
statute of no force or effect,
declaration of, 163–4
constitutional norm in, applicable
establishment of, 171–5:
analogies, 171–2;
establishing/debating text of
Constitution, 172–3
constitutional reasoning
legal and political culture as
context for, 154–62
legal scholarship and, 169–70
decisions
concurring opinions, 189–90
dissenting opinions, 189–90
length of, 189–90



> INDEX 827

evaluation, pathology and criticism	French Constitution and, 344
of, 196–7	Charter of Rights and Freedoms, 190-1,
40 leading cases, 197–8	193
framing of constitutional issues in,	Chisholm v. Georgia (1793), 30, 733,
190–1	742, 744, 753–4, 816
glocal constitutionalism in, 791-4	Christian Democratic party
judges, 167–9	(Germany), 359
appointment of, 168	Cilfit (1982), 304
judicial candour and rhetoric of,	citizenship, 314
187–9	Cityview Press v ANCO, 468
key concepts, 191–3	Civil Code (France), 323
candour, judicial. See judicial candour	Civil Code (Spain), 608–9, 622
and rhetoric	Civil Law, 14–15
Carmichele case, 584	constitutional opinions, 769-70
Casagrande (1974), 293	mixed systems, 769
case disposition, 17	vs. Common Law, 768–82
case-based reasoning, 258–9	Civil Liberties and Human Rights in
caseload	England and Wales (Feldman),
Austrian Constitutional Court, 83	704
Brazilian Federal Supreme Court,	Civil Procedure Code (Austria), 83
126–8	Civil Service Tribunal, 278
European Court of Justice (ECJ),	Civil War, 723–4
282–3	claim of non-compliance with a
German Federal Constitutional	fundamental precept (CNFP),
Court, 363–5	122–3
South African Constitutional Court,	Clarke, Kenneth, 744
574	cluster analysis, 776–80
Supreme Court (House of Lords) of	Code of Hammurabi, 224
the United Kingdom, 689	Cole v Whitfield (1988), 51, 53, 63
Supreme Court of the United States,	Coleman v Power (2004), 41
729–30	Colliard, Jean-Claude, 329
Taiwanese Constitutional Court,	Commissionaires du government,
646–7	285
Certification of the Constitution case,	common good interpretation, 256
578, 584	Common Law, 14–15, 43–4
chain structure (one-line conclusive	classic, 769
arguments), 47, 48, 135, 212,	constitutional opinions, 769–70
338–9, 529, 650–1, 735, 783,	courts, 26
788, 802. See also arguments	jurisdiction, 9
Chamber (ECtHR)	mixed systems, 769
composition of, 253–4	vs. Civil Law, 768–82
judgments, 251	common law rights, 43–4
Charlottetown Accord (1992), 156, 162	Commonwealth of Australia
Charter of Fundamental Rights of the	Constitution Act 1900, 49
European Union, 100, 105–6,	Commonwealth Parliament
312, 320	(Australia), powers of, 56, 66
Article 47, 108	Communicable Disease Control Act,
asylum cases and, 108	653



828 INDEX

comparative constitutional reasoning, quasi-unitary state and, 180 descriptive theories, 13-25 s. 91, 174 comparative constitutional scholarship, s. 92, 182 empirical methods in, 3-10 ss. 55-57, 158 Comparative Constitutions Project, 10 Constitution Act of 1982 (Canada) competence, vertical distribution of, adaptation litigation, 162 293 constitutional norm in, applicable concurring opinions establishment of, applicability of Australian High Court, 63-4 Constitution in context, 173–5 Austrian Constitutional Court, interpretation of, 175-85: arguments based on absence of Brazilian Federal Supreme Court, textual references, 182; doctrinal analysis of legal Canadian Supreme Court, 189-90 concepts or principles, 181-2; in Constitutional Court of the Czech harmonising arguments, Republic, 230-1 177-80; moral arguments, 183-4; non-legal arguments, Czech Constitutional Court, 230-1 European Court of Human Rights, 183-4; precedents, 180-1; 268-9 references to foreign (national) European Court of Justice, 306–7 law, 184-5; references to French Constitutional Court, 347-9 scholarly work, 184; German Federal Constitutional sociological arguments, 183-4; Court, 381-2 teleological/purposive referring in High Court of Australia, 63-4 to purpose of Constitution-Hungarian Constitutional Court, maker, 183; teleological/ 422 - 3,431purposive referring to purpose Irish Supreme Court, 464-5 of text, 182-3; wording and Israeli Supreme Court, 506-7 ordinary meaning of words, Italian Constitutional Court, 552 175 - 7South African Constitutional Court, division of legislative powers and, 591 - 2Spanish Constitutional Court, 632–3 increased workload from adoption Supreme Court (House of Lords) of of, 189 the United Kingdom, 712-14 office of Prime Minister and, 157 Supreme Court of the United States, official languages, 170 748 - 9text of, 172-3 Taiwanese Constitutional Court, 674 Constitution of Brazil (1934), 124 Conseil constitutionnel (France), 226, Constitution of Brazil (1998), 117 amendments, 122 Conseil d'Etat, 325, 328, 330, 336, 337, anti-formalist movements and, 119 793 applicability of, 138 consensus interpretation, 256 article 108, 121 Constituent Assembly (Israel), 471-2 Constitution, 787 Constitution Act of 1867 (Canada) constitutional litigation and adoption of, 162 concentrated and abstract control, legislative power over trade and commerce, 176 diffuse and concrete control, 123, office of Prime Minister and, 157 124 - 6



INDEX 829

constitutional reasoning and, 118 establishing/debating text of, 138 historical evolution of, 121 ordinary meanings of words, 139 Constitution of Canada, 158-9 Constitution of France (1946) Article 1, 342 Preamble, 326, 333, 342-3, 346-7 Constitution of France (1958) Article 11, 339 Article 60, 339 Article 89, 339 40 leading cases, 340 Preamble, 324, 346-7 Constitution of Hungary (1949), 400, Constitution of Hungary (1989), 400, 401, 404 Constitution of Ireland (1922) enactment of, 438 fundamental rights provision in, judicial review in, 468-9 Constitution of Ireland (1937) adoption of, 438 Article 5, 459 Article 6, 459, 460 Article 15, 459 Article 26, 444 Article 29, 454, 459 Article 40, 451, 466-7 Article 45, 455 comparative perspective, 467 constitutional court in, 444 fundamental rights in, 439-40 judicial review in, 468–9 Constitution of Italy (1948) Article 134, 519 Article 135, 519 Article 136, 519 Article 137, 519 Article 51, 545 implementation of, 516 non-formalistic view of, 517-18 as a political agreement between anti-fascist parties, 518 Constitution of South Africa (1996),

Constitution of the Commonwealth of Australia, 49 constitutional arguments Austrian Constitutional Court, 93-7 Brazilian Federal Supreme Court, 132 - 47in Czech Constitutional Court, 213 - 27European Court of Human Rights, 259 - 73European Court of Justice, 292–303, 304 in French Constitutional Court, 334-7, 339, 340-5 German Federal Constitutional Court, 368-80 Hungarian Constitutional Court, 406-26 Irish Supreme Court, 452-63 Israeli Supreme Court, 485-99 Italian Constitutional Court, 528-9, 546-7 South African Constitutional Court, 576-89 Spanish Constitutional Court, 619 - 31Supreme Court (House of Lords) of the United Kingdom, 692-711 Supreme Court of the United States, 733 - 46Taiwanese Constitutional Court, 650 - 3Constitutional Council (France), 324, 325, 331, 344-5, 763 argumentative practices of, 336 glocal constitutionalism in, 793 opinions of, vs. French Supreme Court opinions, 337-8 pseudo-syllogism in, 336-7 constitutional court, 12 Constitutional Court Act (Austria), 83 Constitutional Court Complementary Act (South Africa), 565-6 Constitutional Court of Hungary. See Hungarian Constitutional Court (HCC) Constitutional Court of Italy. See Italian Constitutional Court



830 INDEX

Constitutional Court of South Africa (CCSA). See South African Constitutional Court Constitutional Court of Taiwan. See Taiwanese Constitutional Court Constitutional Court of the Czech Republic. See Czech Constitutional Court Constitutional Court Rules (CCR), 565-6, 572-3 constitutional democracy, 516 Constitutional Interpretation Procedure Act (Taiwan), 643-4, constitutional judges balancing tests, use of, 22-3 decisions, 17-18 language of rights, 21-2 opinion writing of, 18-20 public perception of, 20-1 Constitutional Law of Canada (Hogg), 170 constitutional laws global evolution with local particularities (glocal), 791-4 sources of, 32 constitutional pluralism, 316, 317 constitutional reasoning, 10-13 anti-formalist theory of, 21 common law vs. civil law, 768-82 comparative, 13-25 future research, 791, 794-7 generic, 782-91 global trends in, 782-91 in leading cases, 25–32 legal culture as context for, 199-201 legal scholarship and context for, patterns and variability of, 761-7 political culture as context for, 199-201 as a rhetorical exercise, 23 Constitutional Reform Act 2005 (United Kingdom), 685-6, constitutional review, American model of, 163 constitutional ruling, 24

Constitutional Service of the Federal Chancellery (Austria), 84 constitutional tribunal, 12 constitutionalism, 192 Contro Yuan (Taiwan), 642, 656, 664 Convention for Protection of Human Rights and Fundamental Freedoms, 489 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 658, 659 Convention on the Rights of Persons with Disability (CRPD), 658 Convention on the Rights of the Child (CRC), 658 Cooper v. Aaron (1958), 748 copy-paste quotations, 309-10 core rights, 272-3 Costa (1964), 318 Coty, René, 329 Council of Civil Service Unions v Minister for the Civil Service (1985), 681Council of Europe Committee of Ministers, 247 enlargement of, 239 Council of Grand Justices (Taiwan), 641, 643-4, 663 Country Reports Questionnaire, 798-807 arguments in constitutional reasoning, 801-6 framing of constitutional issues, judicial candour and rhetoric of, 804 key concepts, 805-6 length, dissenting and concurring opinions, 805 structure of constitutional arguments, 802 types of arguments in constitutional reasoning, 802-3 weight of arguments, 803-4 comparative perspective, 806-7 constitutional reasoning from a comparative perspective, 806-7



INDEX 831

evaluation, pathology and criticism, legal, political, institutional and academic context, 799-801 Court and constitutional litigation, 800-1 iudges, 801 legal and political culture as context for constitutional reasoning, 799-800 legal scholarship and constitutional reasoning, 801 Countryside Alliance case, 701 Cour de Cassation, 6, 325, 328, 331, 336, 337, 345, 793 Court of Appeal (Ireland), 446 Court of Constitutional Guarantees 1933-1936 (Spain), 606-39 Court of First Instance, 278 Court of Justice of the EU (CJEU), 95, Courts of Appeal (Canada), 164 Crime and Court Act 2013 (United Kingdom), 691 criminal charge, 263 Crotty v AG, 454 Crotty v An Taoiseach, 460 cumulative parallel structure, 135, 802 Czech Constitutional Court, 31, 188, 199-235, 764, 779, 780, 782 comparative perspective, 233 constitutional arguments in, 213-27 analogies, 214 applicability of Constitution, 216 - 17arguments from silence, 221-2 doctrinal analysis of legal concepts or principles, 220-1 establishing/debating text of Constitution, 214–16 harmonising arguments, 218–19 non-legal arguments, 224-5 ordinary meanings of words of Constitution, 217–18 precedents, 220 references to foreign law, 225-7 references to scholarly work, 225 structure of, 211-13

teleological/purposive referring to purpose of constitution-maker, teleological/purposive referring to purpose of text, 222-3 weight of, 227 constitutional complaints, 205 constitutional litigation and, 201–8 decision types, 207-8: admissibility, 208; judgments on merits in constitutional review of laws, 207; judgments on merits relating t constitutional complaints, 207 - 8decision-making in, 202-5 proceedings, 205-7: decisions based on merits, 207; panel, 205-6; paperwork, 206; petitioners, 206 constitutional reasoning arguments in, 200 legal culture as context for, 199-201 legal scholarship and, 210-11 political culture as context for, 199-201 criticism of, 233 development of Czech law and, 200 duty of law of courts, 201 evaluation of, 233 40 leading cases, 235-6 framing of constitutional issues in, 231 history of, 202 judges, 208-10 from academia, 209 appointment of, 208–9 composition of Court, 208 law clerks, 210 rightist and ant-communist, 209 - 10judicial candour and rhetoric of, 227 - 30key concepts in, 231–3 opinions concurring, 230-1 dissenting, 230-1



832 INDEX

Czech Constitutional Court (cont.)
length of, 230–1
pathology of, 233
powers of, 203–5
review of constitutional
complaints, 204–5
review of constitutionality of laws,
203–4
Czech Republic
Constitution, 787
Constitutional Court. See Czech
Constitutional Court
constitutional law, 215
development of law in, 200
law schools, 210
Data Retention Directive, 100

Day, Jonathan, 731 de Gaulle, Charles, 326, 339 De Lange case, 580, 584 Declaration of the Rights of Man (1789), 324, 342, 371Declaration on the European Identity of 1973, 312 declaratory action of constitutionality (DAC), 122 Defrenne (1976), 296, 302 Dehler, Thomas, 360 democracy, 22-3, 764, 776, 785, 786, 805-6 Australia, 67-8 Austria, 101, 105 Canada, 192 ECtHR and, 262, 270-1 Germany, 383-4 Hungary, 398, 424 Israel, 507-8 Italy, 554 South Africa, 595-6 Spain, 636 United Kingdom, 715

United Kingdom, 715 United States, 750–1 Der Hüter der Verfassung (Schmitt), 668 Derbyshire County Council v Times Newspapers Ltd, 696 devolution, 716 dialogical structure, 48, 136 Dicey, Albert Venn, 704 Die Parlamentarischen Regierungssysteme in Europa (von Beyme), 668 direct action of unconstitutionality (DAU), 122 diritto vivente doctrine, 403 dissenting opinions in Constitutional Court of the Czech Republic, 230-1 in High Court of Australia, 63-4 Dixon, Rosalind, 16 Doctors for Life case, 584 doctrinal analysis of legal concepts or principles, 141 doctrine of necessity, 174-5 doctrines, 18 generic constitutional, 32 domestic harmonising arguments, 54, 218, 816, 818 Dominion of Canada, 154-6 double jeopardy, 624 D.P.P. v O'Shea, 450 Dred Scott v. Sanford (1857), 738, 744 Drier, Horst, 366 due process, 554 dura lex sed lex principle, 302 duty of military service to non-citizens, Dworkin, Ronald, 749

(ECJ) economic arguments, 142, 416-17, 497, 627–8, 665–7, 702–4. See also non-legal arguments economic crisis, 547 economic rights, 102, 107-8 ECtHR. See European Court of Human Rights (ECtHR) effective remedies, 271-2 effectiveness principle, 256 Eighth Amendment, 740 Eisenberg v. Minister of Construction and Housing (1993), 485 El-Al Israel Airlines v. Danielowitz (1994), 496Eleventh Amendment, 734 Elfes case, 360, 370

ECJ. See European Court of Justice



emancipatory constitutional reasoning,	Protocol 11 and, 238
119	Protocol 14, 245
Empty Chair Crisis, 288	Protocol 15, 241, 257
equality, 22–3, 764, 785, 786	Protocol 16, 252–3
Austria, 106–7	Registry, 245
ECJ approach to, 316	Section 2(1), 458–9
France, 351	European Council, 277
Germany, 389	European Court of Human Rights
Israel, 508	(ECtHR), 8, 26, 80, 237–75,
Italy, 553	779, 782, 783, 784
principle of, 101	Austrian Constitutional Court and,
right to, 102	95, 100
South Africa, 596	cases, applications, 238
Spain, 635–6	Chamber, 249–50
United Kingdom, 718	comparative perspective, 273-5
United States, 754	constitutional arguments, 259-73
erga omnes, 123, 124, 125, 248	structure of, 259–60
Establishment Clause, 726, 752	types of, 260-4: analogical
EU Charter for Fundamental Rights, 80	reasoning, 260–1; harmonising
European Area, 318	arguments, 263;
European Arrest Warrant case, 212,	incrementalism, 260-1; moral
217–18, 219, 223, 231	arguments, 264; reference to
European Coal and Steel Community,	previous judgments, 260-1;
277	reliance on general principles,
European Commission of Human	international law and
Rights, 237, 238	consensus, 261-2; subsidiarity,
European Communities Act 1972,	262–3; textual interpretation,
684–5	263; travaux préparatoires, 263
European Convention on Human	weight of, 264–5
Rights (ECHR)	as a constitutional court, 239-40
Article 1, 240	constitutional litigation in, 242-4,
Article 5, 263	251
Article 6, 108, 263	admissibility, 242–3
Article 7, 263	competences, 247–8: declaratory
Article 8, 458–9	judgments, 247–8; force of
Article 10, 697	interpretation, 247–8;
Article 21, 252	suggestions, 247–8
Article 32, 248	discretionary power in case
Article 45, 249	selection, 244–6: filtering,
Article 6, 425	244–5; Grand Chamber, 245–6
Austrian Constitution and, 76, 80,	fact-finding missions, 243–4
90, 96	hearings, 243–4
Austrian constitution and, 101	individual applications, 242–3
ECtHR and, 237	judgments and decisions, 248-51:
European Union law and, 374	admissibility of decisions, 249;
Human Rights Act and, 684-5	importance of, 251; reasoning
as a living instrument, 255	and publication of, 249-50;
Protocol 9, 238	single judges, 248–9



ECtHR (cont.)	human dignity, 271
constitutional reasoning	personal autonomy, 271
arguments of, 259–73	pluralism, 270–1
basic principles of, 255-9:	procedural fairness, 271–2
autonomous interpretation,	proportionality, 272
258; better placed argument,	rule of law, 270–1
257; case-based reasoning and	secularism, 270-1
incrementalism, 258-9;	state neutrality, 270-1
common ground or consensus	opinions, 268–9
interpretation, 256; Convention	concurring, 268–9
as a living instrument, 255;	dissenting, 268–9
effectiveness principle, 256;	length of, 268–9
margin of appreciation	Strasbourg Court and, 91
doctrine, 257; meta-teleological	subsidiarity of supervisory system
interpretation, 256; primarity,	in, 240–1
257; subsidiarity, 257	European Court of Justice (ECJ), 3, 26,
composition of, 266	277–320, 783
legal culture as context for, 237–41	comparative analysis, 319–20
legal scholarship and, 254–9:	constitutional arguments
response to scholarly work,	structure of, 291–2
254–5	types of, 292–304: analogies, 292;
political culture as context for,	applicability of treaties, 292–3;
237–41	domestic harmonising
duality of, 239–40	arguments, 294–5; harmonising
40 leading cases, 275–6	with international law, 295–6;
framing of constitutional issues in,	implicit concepts and
269–70	principles, 297–8;
German Court and, 375	linguistic-logic formulae based
Human Rights Act and, 697	on silence, 297–8; non-legal
judges, 251–4	arguments, 301–3; ordinary
backgrounds of, 253	meaning of the words, 293–4;
composition of, 253–4	precedents, 296–7; references to
election of, 251–2	foreign law, 303–4; references to
impartiality of, 252–3	scholarly works, 303;
independence of, 252–3	teleological arguments referring
selection of, 253	to purpose of text, 298–300;
judicial candour and rhetoric of,	teleological arguments referring
265–8	to purpose of Treaty-maker,
audience, 267–8	300-1
composition of reasoning,	weight of, 304–6
266	as a constitutional court, 279, 289
dialogue, 265–6	constitutional issues in, framing of,
objective style, 266–7	310–14
key concepts, 270–3	as non-constitutional issues,
core rights, 272–3	311–14
democracy, 270–1	subject matter of judgments,
effective remedies, 271–2	310–11
fair balance, 272	constitutional litigation and, 277-83



constitutional reasoning in	Executive Yuan (Taiwan), 642
arguments in, 289–319	extraordinary appeal, 124
legal scholarship and, 286–8	
political culture as context for,	Factortame decision, 684–5
288–9	fair balance, 272
sensu lato, 290	fair trial, right to, 102
sensu stricto, 290	Favoreau, Louis, 331
evidence, 282–3	Federal Court of Appeal (Canada), 16-
40 leading cases, 320–2	federalism, 43, 786, 805–6
French influence on, 353	Australia, 65–6
heads of jurisdiction in, diversity of,	Austria, 104
278–9	Canada, 192
judges, 283–6	_
	Germany, 386
Advocates General, 285–6	Israel, 510
annual salary, 285	Italy, 554
appointment of, 283–6	South Africa, 595–6
judgments, 306–7	Spain, 637
concurring opinions, 306–7	United States, 752
copy-paste quotations, 309–10	Fedsure Life Assurance Ltd. case, 577,
dissenting opinions, 306–7	591
French model's influence on,	Feldman, David, 704
307–8	Fifth Amendment, 742
impersonality of, 308–10	Fifth Republic, 324, 326, 330
informatisation, 308–10	First Amendment, 726
length of, 306–7	First Knesset (Israel), 471
precedents, 308–10	Fletcher v. Peck (1810), 742, 816
subject matter of, 310–11	force of interpretation, 248
translation, 308–10	foreign law, references to, 5
judicial candor/rhetoric in, 306	Czech Constitutional Court, 225-7
key concepts, 315-19	European Court of Justice (ECJ),
fundamental rights, 316	303–4
principle of equality, 316	Italian Constitutional Court, 548-9
rule of law, 315–16	South African Constitutional Court
sovereignty, 317–18	586–7
preliminary rulings, 280–1	Spanish Constitutional Court, 629
rule of procedure, 282–3	Supreme Court (House of Lords) of
sui generis nature of, 277–82	the United Kingdom, 705–6
ultra vires, 224, 234	Taiwanese Constitutional Court,
workload, 282–3	668–9
European Economic Community	formal approaches, 93–4
(EEC), 315	formal constitution, 158
Eurosclerosis, 288	formalism, 14, 15, 20
Ex Parte Milligan (1866), 738,	40 leading cases, Codebook, 807–14
743	Foucault, Michel, 496, 772
Examination Yuan (Taiwan), 642	Fourteenth Amendment, 723–4, 734,
exceptionalism, 16	736, 743, 753
excise duty, 48	Fourth Republic, 329
executive branches, 19	Frankfurter Dokumente, 356
CACCULIVE DIGITCHES, 17	I INTERPOLICE DORUMENTE, JJO



836 INDEX

Free Exercise Clause, 752 concurring, 347-9 free speech, 786 dissenting, 347-9 Freedom of Association (1971), 324, length of, 347-9 327, 333, 342, 346 fundamental precept, 123 Fundamental Principles Recognized by freedom of expression, 805-6 France, 351 the Laws of the Republic Germany, 390 (FPRLR), 325, 327, 333, 347 Italy, 556 fundamental rights, 316, 390-1, 425, South Africa, 596 Furman v. Georgia (1972), 735, 740, Spain, 638 United Kingdom, 718 743, 754 United States, 755 Freedom of Expression Institute, 571–2 game theory, 8 French Constitutional Court, 323-54, gay rights, 109 GCHQ case, 716-17 comparative perspective, 351-4 General Court, 278 constitutional arguments, structure generic human rights provision, 10 of, Supreme Court opinions vs. Geneva Convention, 488 Constitutional Council Georgia, 238 opinions, 337-8 German Constitution, Article 21, 499 constitutional arguments in German Federal Constitutional Court, structure of, 334-7, 339: chain 9, 330, 356–92, 549, 780, 782 structure (one-line conclusive activist approach in, 234 reasoning), 338-9 case load and litigation, 363-5 types of, 340-5: absent arguments, comparative analysis of 340–2; establishing text of the Austrian Constitutional Court, Constitution, 342-4; references Hungarian Constitutional Court, to previous decisions, 344–5 weight of, 345-6 426 - 7constitutional litigation and, 326-8 comparative perspective, 391-2 constitutional reasoning constitutional arguments arguments in, 334-51 structure of, 368-9 types of, 369-80: analogies, legal culture as context for, 323-6 371-2, 373; applicability, legal scholarship and, 330-4 371-2; arguments from silence, political culture as context for, 323 - 6376; concept or principle not 40 leading cases, 354–5 mentioned in text, 376; framing of constitutional issues in, concrete issue, 371; concurrences, 369-70; 349-51 glocal constitutionalism in, 792, 793 disposition, 370; dissents, judges, 329-30 369-70; establishing or membres de droit, 329-30 discussing text, 371; general ordinary members, 329 topic, 370-1; harmonising judicial candour and rhetoric of, arguments - domestic law, 373; 346 - 7harmonising arguments international law, 374-5; key concepts, 351 non-legal arguments, 377-8; opinions American vs. French form, 334-5 ordinary meanings of words of



Constitution, 373; other	secularism, 385
methods/arguments, 379-80;	sovereignty, 384–5
precedents, 375; reference to	state form, 385
wording of Constitution, 373;	Wesensgehalt/core of a
references to foreign legal	constitutional right, 388
material, 378-9; references to	opinions
scholarly work, 378;	concurring, 381–2
teleological/purposive referring	dissenting, 381–2
to purpose of Constitution-	length of, 381–2
maker, 377; teleological/	oral arguments, 364
purposive referring to purpose	references to foreign law, 427
of text, 376	Geschäftsordnung, 361
weight of, 380	Ghaidan v Godin-Mendoza, 710
constitutional litigation and,	Gibbons v. Ogden (1824), 742
361–5	Giscard d'Estaing, Valery, 329
constitutional reasoning	globalisation, 15
arguments in, 367–91	glocal constitutionalism, 791–4
legal culture as context for,	gouvernement des juges, 324
356–61	Governing Body Foundation, 571–2
legal scholarship and, 366	government form, 805–6
political culture as context for,	Austria, 104
356–61	Germany, 385, 751
establishment of, 357	Israel, 509
40 leading cases, 392–3, 774	Italy, 555
framing of constitutional issues in,	Spain, 637
382–3	United Kingdom, 716
free speech and, 765	United States, 751
general statute, 361–2	Government of Wales Act 1998, 684–5
glocal constitutionalism in, 793-4	Grand Chamber, 244
influence of, 226	composition of, 253–4
judges, 365–6	constitutional role of, 245–6
judgments, 95	discretion of, 245–6
judicial candour and rhetoric of,	judgments, 251
380–1	publication of judgments and
jurisdiction, 362–3	decision, 249–50
key concepts, 383–91	Great Depression, 724
basic procedural rights, 389-90	Griffin, John, 683
democracy, 383–4	Griswold v. Connecticut (1965), 735,
equality, 389	738–9, 755
federalism, 386	Grogan (1991), 302
freedom of expression, 390	Grzelczyk, 314
fundamental rights, 390–1	Günther, Frieder, 359
government form, 385	Gyorfi, Tamas, 765
human dignity, 388–9	
nation, 385–6	habeas corpus, 124
privacy rights, 390–1	habeas data, 125
proportionality, 387	Häberle, Peter, 359
rule of law, 383	Hague Convention, 488



838 INDEX

harmonising arguments, 139, 218–19, 263, 294-5, 488-9, 535-8, 624, 695 - 8domestic, 54, 373, 410, 535-7, 581-2, 657, 739-40, 816, 818 international, 55, 374-5, 410-11, 537-8, 582, 658-9, 696, 740-1 Harrari Resolution, 471 Hartz IV, 372 Hassam case, 587 Havel, Václav, 204, 208, 216 HCC. See Hungarian Constitutional Court (HCC) hearsay evidence, 262 Heart of Atlanta Motel (1964), 754 herrschende Meinung, 28 Hesse, Konrad, 358 Heydon case, 700 High Court of Australia. See Australian High Court High Court of Justice (Israel), 471 constitutional litigation and, 474-7 as defender of democratic values, direct judicial review, 475-6 indirect judicial review, 476 historical arguments, 171 historical considerations, 546 Holländer, Pavel, 200, 211 homosexuality, 109 Honeywell decision, 374 Horev v. Minister of Transportation (1997), 503, 506, 510 House of Lords Appellate Committee, 685–6 judicial appeals in, 682 Select Committee on the Constitution, 681 Household Registration Act (Taiwan), Huang v Secretary of State for the Home Department (2007), 707 human dignity, 22-3, 765, 776, 785, 786, 805-6 Austria, 106-7 Canada, 192 ECtHR approach to, 262, 271 France, 351

Germany, 388-9 Hungary, 425 Israel, 508 Israeli, 508-9 Italy, 556 South Africa, 596 Spain, 637 United Kingdom, 717 United States, 754 Human Rights Act 1998 (United Kingdom), 684-5, 688, 692, 693, 694-5, 697, 710-11 Hungarian Constitutional Court (HCC), 30, 31, 394-434, 779 comparative analysis, 426-7 constitutional arguments, 406-26 structure of, 407, 432 transitory provisions, 432 types of, 407–21: analogies, 407–8; applicability of Constitution, 408; combined arguments, 420; doctrinal analysis of legal concepts or principles, 411-13; economic arguments, 416–17; establishing/debating text of Constitution, 408; harmonising arguments, 410-11, 433; historical-intentional arguments, 433-4; linguistic-logic formulae based on silence, 413; moral, 416–17; non-legal arguments, 416-17, 434; ordinary meanings of words of Constitution, 432-3; other methods/arguments, 419-20; precedents, 411; references to foreign national law, 418-19; references to scholarly works, 417-18, 434; sociological arguments, 416–17; teleological/purposive arguments referring to purpose of text, 413-15; teleological/ purposive referring to purpose of Constitution-maker, 415–16; wording and ordinary meaning of words, 409-10 weight of, 421



> 839 INDEX

constitutional interpretation in,	Imperial Conference (1926), 154
394–5	implied constitutional rights, 466-7
activism, 399-400	In re Article 26 and the Abortion
teleological interpretation, 396-7	Information Bill 1995, 444, 4
text-positivism, 394	incidental power, 69
constitutional litigation and, 401–5	incrementalism, 258–9
actio popularis review, 402, 405	indigenous societies, 43-4
ex ante examination of statutes,	individual rights, 461–2
403	Inter-American Commission on
jogegységi határozat, 403	Human Rights, 488
a limine rejected cases, 404	intergovernmental immunity, 65
living law doctrine, 403	International Convention on the
unconstitutional emission, 403-4	Elimination of All Forms of
constitutional reasoning in	Racial Discrimination, 107
arguments in, 406–26	International Covenant on Civil and
legal culture as context for, 400–1	Political Rights (ICCPR), 65
legal scholarship and, 406	658
political culture as context for,	International Covenant on Economic
400–1	Social and Cultural Rights
positive features of, 429	(ICESCR), 654, 658
problems with, 427–8	international harmonising argumen
criticisms of, 427–30	55
evaluation of, 427–30	Internationale Handelsgesellschaft
40 leading cases, 435–7	(1970), 303–4
framing of constitutional issues in,	interpretive methods, 32
423	interstate trade, 58
in general, 429–30	Ireland
judges, 405, 430	Free State system, 439
judicial candor/rhetoric in, 421–2	War of Independence, 438
key concepts, 423–6	Irish Supreme Court, 438–69, 779
democracy, 424	appeals, 445–6
human dignity, 425	constitutional arguments, 463–4
proportionality, 425	structure of, 452–3
rule of law, 424	types of, 453-63: analogies, 455
Wesensgehalt, 425	applicability of constitutions
locus standi rules, 431	law, 454; arguments based or
official journal, 404	structural values and
opinions	principles, 459-61; individua
concurring, 422–3, 431	rights, 461–2; interpretive
dissenting, 422-3, 431	arguments, 456–9; non-legal
length of, 422–3	arguments, 463; precedents,
pathology of, 427–30	455–6; scholarly work, 462–3
transformation of constitutional	weight of, 463–4
system and, 430–4	as a constitutional court, 444–6
Hunting Act 2004 (United Kingdom),	
TIGHTHE ACT AND CHINER KINEGOTII.	
	constitutional litigation and, 443-
694–5 Hurtado v. California (1884), domestic,	

e 26 and the Abortion ormation Bill 1995, 444, 453 power, 69 lism, 258–9 societies, 43-4 rights, 461-2 rican Commission on man Rights, 488 nmental immunity, 65 al Convention on the nination of All Forms of ial Discrimination, 107 al Covenant on Civil and itical Rights (ICCPR), 654, nal Covenant on Economic, ial and Cultural Rights ESCR), 654, 658 al harmonising arguments, ale Handelsgesellschaft 70), 303–4 e methods, 32 rade, 58 e system, 439 ndependence, 438 me Court, 438-69, 779 445-6 tional arguments, 463–4 ure of, 452–3 of, 453-63: analogies, 455-6; licability of constitutional 454; arguments based on ctural values and nciples, 459-61; individual nts, 461–2; interpretive uments, 456–9; non-legal uments, 463; precedents, -6; scholarly work, 462-3 t of, 463-4 titutional court, 444-6 tional litigation and, 443-6 sarial structure, 443-4 e 26 proceedings, 444 ete structure, 443–4



840 INDEX

Irish Supreme Court (cont.) dual appellate functions, 445 constitutional reasoning arguments in, 449 legal culture as context for, 438-43 legal scholarship and, 447–9 political culture as context for, 438 - 4340 leading cases, 469-70 framing of constitutional issues in, 465 - 6judicial candor/rhetoric in, 464 key concepts autonomy, 466 implied constitutional rights, separation of powers, 467 key concepts in, 466-7 proportionality, 466 sovereignty, 466 opinions concurring, 464-5 dissenting, 464–5 length of, 464-5 basic laws in, 472, 484 constitutional case law, 820 constitutional revolution in, 472 establishment of state in 1948, 471 First Knesset, 471 Israeli Supreme Court, 471–514, 780 comparative perspective, 510–12 constitutional arguments in, 483-510 structure of, 484-5 types of, 485-99: analogies, 485-6; applicability of Constitution, 486-7; doctrinal analysis of legal concepts or principles, 490-1; economic arguments, 497; establishing text of the Constitution, 486; harmonising arguments, 488-9; historical circumstances, 497; linguistic-logic formulae based on silence, 492; moral arguments, 496-7; non-legal arguments, 494-7; ordinary

meanings of words of Constitution, 488; other methods/arguments, 499; precedents, 489-90; reference to wording of Constitution, 488; references to foreign (national) law, 498-9; references to scholarly work. 498; security considerations, 495–6; teleological/purposive referring to purpose of Constitution-maker, 493-4; teleological/purposive referring to purpose of text, 492-3 weight of, 499-501 constitutional history and, 471-2 constitutional interpretation in, constitutional litigation and, 474-7 constitutional reasoning arguments in, 483-510 judicial activism and, 482-3 legal culture as context for, 473-4 legal scholarship and, 480-1 political culture as context for, 473 - 4storytelling style of, 352 theories, 481 counter-arguments in, 501 criticisms of, 512-14 evaluation of, 512-14 40 leading cases, 514–15 framing of constitutional issues in, glocal constitutionalism in, 792 judges, 477–8 judgments concurring opinions, 506–7 degree of generalizations in, 503-4 degree of rhetoric in, 504-5 dissenting opinions, 506–7 judicial candour in, 500-1 length of opinions, 506-7 target audience, 502-3 translation of educational works and, 502-3 key concepts basic procedural rights, 510



equality, 508	political culture as context for,
federalism, 510	516–18
government form, 509	constitutional review in, 519-20
human dignity, 508–9	decisions
nation, 509–10	effects of, 522–4
proportionality, 508	types of, 522–4
secularism, 509	40 leading cases, 528–9, 558–9
sovereignty, 509–10	framing of constitutional issues in,
Wesensgehalt, 509	552–3
key concepts in, 507	judges, 524–5
democracy, 507-8	appointment of, 524–5
rule of law, 507–8	collegiality principle, 525
Knesset and, 473	exclusion of separate opinions,
pathology of, 512–14	525
technical language in, 502	requirements, 524–5
Italian Constitutional Court, 516–58,	judicial candour and rhetoric of,
767	551–2
comparative perspective, 556–8	key concepts, 553–6
competences of, 519–21	basic procedural rights, 554
constitutional arguments, 528–9	democracy, 554
structure of, 529, 549–51	equality, 553
types of, 529-49: analogies, 533-4;	federalism, 554
applicability of Constitution,	freedom of expression, 556
531–3; arguments from silence,	government form, 555
541–2; doctrinal analysis of	human dignity, 556
legal concepts or principles,	proportionality, 555–6
539–41; establishing text of the	rule of law, 555
Constitution, 529–31;	secularism, 555
harmonizing arguments,	sovereignty, 554–5
535–8; non-legal arguments,	state form, 556
546–7; precedents, 538–9;	Wesensgehalt, 555
references to foreign law, 548–9;	opinions
references to scholarly work,	concurring, 552
547–8; teleological/purposive	dissenting, 552
referring to purpose of	length of, 552
Constitution-maker, 544–6;	separate, exclusion of, 525
teleological/purposive referring	power of, 519
to purpose of text, 542–4;	roles of, 516
wording and ordinary meaning	* 1
of words, 534–5	Jackson, Robert, 756
constitutional litigation and,	Jackson v Attorney General (2005), 700,
518–24	702, 703, 704, 705, 708
oral arguments, 521–2	judges
rules of procedure, 521	Australian High Court, 39–40, 774
constitutional reasoning	Austrian Constitutional Court, 85–7
arguments in, 528–9	balancing tests, use of, 22–3
legal culture as context for, 516–18	Canadian Supreme Court, 167–9 Czech Constitutional Court, 208–10
ievai scholarshib and. 575–8	CZECH CONSHIUHONAI COURT, 208–10



842 INDEX

judges (cont.) decisions, 4-5, 17-18 European Court of Human Rights, 251 - 4European Court of Justice, 283-6 French Constitutional Court, 329-30 German Federal Constitutional Court, 365-6 Hungarian Constitutional Court, 405, 430 Irish Supreme Court, 446-7 Israel Supreme Court, 478–80 Israeli Supreme Court, 477–8 Italian Constitutional Court, 524–5 language of rights, 21-2 opinion writing of, 18-20 public perception of, 20-1 reasoning practices, 5-6 South African Constitutional Court, 573-5 Spanish Constitutional Court, 616 - 17Supreme Court of the United States, Supreme Federal Tribunal of Brazil, 128 - 30Taiwanese Constitutional Court, 647 - 8judgments, argumentative and conceptual diversity of, 787-8 judicial candour and rhetoric Australian High Court, 59–63 Austrian Constitutional Court, 98 - 100Canadian Supreme Court, 187–9 Czech Constitutional Court, 227-30 European Court of Human Rights, 265 - 8French Constitutional Court, 346-7 German Federal Constitutional Court, 380-1 Italian Constitutional Court, 551-2 South African Constitutional Court, 589-90 Supreme Court (House of Lords) of the United Kingdom, 711-12 Supreme Court of the United States,

Taiwanese Constitutional Court, 671 Judicial Circuits Act of 1866, 730 Judicial Committee of the Privy Council (ICPC) Canadian appeals to, 158 iurisprudence, 705 powers of, 688 state of emergency and, 173 judicial empowerment hypothesis, 786 judicial power, 48 Judicial Service Commission (South Africa), 573 Judicial Yuan (Taiwan), 642 Judiciary Act of 1789, 730 Judiciary Act of 1869, 730 Judiciary Act of 1925, 728, 729 Justastat, 575 justificatory reasons, 11 Kadi (2008), 319, 320 Kartinyeri v Commonwealth (1998), 56, Katz v. United States (1967), 743 Kavanagh, Aileen, 450 Kebilene, 707 Kelsen, Hans, 75, 102, 234, 357, 605 Kennedy, Hugh, 468 Kirk v Industrial Court of New South Wales (2010), 62 Klaus, Václav, 203, 204, 208, 221 Klokocka, V., 211 Knesset, 473, 494, 503 Kol Ha'am (1953), 504 Korematsu v. United States (1944), 738 La Forest, Gérard Vincent, 193 Labour Relations Act (South Africa), 592 Lambert, Edouard, 323 Lancelot, Alain, 329 Länder, 386 Lange v Australian Broadcasting Commission (1997), 41, 56, 63 Lasser, Mitchell, 6, 335-6, 352, 353 Law, David, 9, 20 law clerks, 210 Law Lords, 689-91 The Law of Human Rights, 704

746 - 7



INDEX 843

Lords of Appeal in Ordinary (LAOs),

law professors, 87-8, 406, 617-19 Lawrence v. Texas (2003), 740, 744, 754, legal originalism, 736 legal reasoning, 6 legal scholarship Australian High Court, legal scholarship and context for, 40 - 5Austrian Constitutional Court, 87-8 black-letter, 169 Canadian Supreme Court, 169-70 Czech Constitutional Court, 210-11 European Court of Human Rights, 254-9 European Court of Justice, 286–8 French Constitutional Court, 330-4 German Federal Constitutional Court, 366 Hungarian Constitutional Court, 406 Irish Supreme Court, 447-9 Italian Constitutional Court, 525-8 South African Constitutional Court, 576 Spanish Constitutional Court, 617 - 19Supreme Court (House of Lords) of the United Kingdom, 691-2 Supreme Court of the United States, 732 - 3Taiwanese Contract Law, 648-9 legalism, 41, 42, 70 legislative branches, 19 Legislative Yuan (Taiwan), 642 Leitmotifs, 563, 597-8 Lepsius, Oliver, 367, 390-1 Les Verts (1986), 315, 320 LexisNexis, 575 LGBT rights, 109 Lisbon decision, 344, 350, 352 Lisbon Treaty, 202, 284, 317, 532 literalism, 580-1

689-91 Lustration case (2001), 226 Lüth, 372 Maastricht decision, 350, 374 Maastricht Treaty, 287, 312, 317 Mabo v Queensland [No 2], 43-4 Magna Carta of 1215, 693 Maguire v Ardagh, 441, 456, 462, 467 Makwanyane case, 563, 582, 585, 586, 591, 596 Manitoba language case, 172 Mankayi v Anglogold Ashanti Ltd., 593 Marbury v. Madison (1803), 29, 370, 726, 727, 733, 737, 742, 748, 753-4, 755 margin of appreciation doctrine, 241, 257 Martial Law Decree (Taiwan), 641 Martin v. Hunter's Lessee (1816), 739, Maryland v. King (2013), 628 Massstäbe, 367, 368 material constitution, 156 mation, 752 Mazibuko case, 589 McCulloch v. Maryland (1819), 748 McD v L, 458 McDonald v Bord na gCon (no. 2), 462 McKay v. The Queen (1965), 163 McKenna v An Taoiseach (no. 2), 441, 456, 460, 462 MEC for Education, 572, 594 Meech Lake Accord (1987), 156 Melbourne Corporation v Commonwealth, 63 Melcák case, 215, 220 Menschenbild, 380 meta-teleological interpretation, 256 Mhlungu case, 580 militant democracy, 356 Miller v. Minister of Defence (1995), 485 Minister of Environmental Affairs and Tourism case, 575 Minister of Home Affairs case, 577 Miranda v. Arizona (1966), 754 mischief rule, 700

Liversidge v Anderson, 712

locus standi rules, 431, 434

living constitution, 3

living law doctrine, 403

Loewenstein, Karl, 356



> 844 INDEX

Mitterrand, François, 326 European Court of Justice, 301–3 mixed constitution, 316, 317 German Federal Constitutional Moldova, 238 monarchy, 385 moral arguments, 142, 183-4, 264, 416-17, 496-7, 547, 627-8, 665-7, 702-4. See also non-legal arguments motivating reasons, 11 Movement for Quality in Government v. Knesset (2006), 485 Müller, Peter, 365 multilevel governance, 316, 317 Munn v. Illinois (1877), 755 Natal Tamil Vedic Society Trust, 571-2 nation, 67, 102-4, 385-6, 509-10, 595-6, 637, 716, 805-6 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs, 586-7 National Education Health and Allied Workers Union v University of Cape Town, 593 national emergency doctrine, 173-4 National Socialism (Germany), 377 natural justice, 191 ne bis in idem doctrine, 624 Neiman v. Central Election Committee (1988), 500neoconstitutionalism, 119 network analysis, 8 New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 172 new constitutional interpretation, 119 New Deal programs, 724, 772 New Originalism, 737 Ninth Amendment, 738-9 Nold (1974), 295-6 non-discrimination. See equality non-legal arguments, 772-3. See also

Hungarian Constitutional Court, 416-17, 434 Irish Supreme Court, 463 Israeli Supreme Court, 494-7 Italian Constitutional Court, 546-7 South African Constitutional Court, Spanish Constitutional Court, 627-8 Supreme Court (House of Lords) of the United Kingdom, 702-4 Supreme Court of the United States, 744 Taiwanese Constitutional Court, 665 - 7Northern Ireland Act 1998, 684-5 Northwestern Health Board v HW, 456 Nowak, Manfred, 417 nulla poena principle, 263 obiter dicta, 588 On Law and Policy in the European Court of Justice (Rasmussen), one-line conclusive arguments. See chain structure (one-line conclusive arguments) Online Gambling (2012), 344, 350, 351 Operation Dismantle v. The Queen (1985), 173opinions, 17 tone, mode and diction of, 770-1 topical and argumentative structures of, 31-2writing, 24-5 Organic Act Regarding the Council of Grand Justice (Taiwan), 643–4 original intent, 816 original legal understanding, 816 originalism, 3, 51, 736, 745, 750

American, 816

types of, 816

Palais Royal, 329

Palestinian Authority (PA), 488

Court, 377-8

arguments Australian High Court, 57–9

Brazilian Federal Supreme Court,

Canadian Supreme Court, 183-4

Czech Constitutional Court, 224-5



INDEX 845

Palko v. Connecticut (1937), 724, 737,
754
Panama Refining Co. v Ryan, 469
parallel, individually inconclusive, but
together conclusive arguments, 802
parallel conclusive arguments, 135, 802
Parliament Act 1911 (United
Kingdom), 705
Parliament Act 1949 (United
Kingdom), 694–5
Parliamentary Assembly of the Council
of Europe (PACE), 251–2
Patriation of 1982, 194
Pepper v Hart, 686-7, 702, 703, 708
permission to appeal, 689
personal autonomy, 271
Pescatore, Pierre, 309
petrification theory
(Versteinerungstheorie), 89–90,
816
Pfersmann, Otto, 332
Pharmaceutical Manufacturers
Association of SA, 594
Physically and Mentally Disabled
Citizens Protection Act
(Taiwan), 665–6
Pierce v. Society of Sisters (1925), 755
Planned Parenthood of Southeastern
Pennsylvania v. Casey (1992),
741
pluralism, 262, 270–1
political community, purpose of, 44
political question doctrine, 173, 216,
738, 751
political science, 7–9
Portuguese Constitutional Court, 226
Posner, Eric, 16
Poultry Growers Association v.
Government of Israel (2004),
492
Pound, Roscoe, 15
pragmatic arguments, 171
praktische Konkordanz (practical
concordance), 219, 373
precedential reasoning, 52–3
precedents

Brazilian Federal Supreme Court, 139 - 40Constitution Act of 1982 (Canada), 180 - 1European Court of Justice (ECJ), 296-7, 308-10 German Federal Constitutional Court, 375 Hungarian Constitutional Court (HCC), 411 Irish Supreme Court, 455–6 Israeli Supreme Court, 489–90 Italian Constitutional Court, 538–9 South African Constitutional Court, Spanish Constitutional Court, 624–5 Supreme Court (House of Lords) of the United Kingdom, 698 Supreme Court of the United States, 741 - 2Taiwanese Constitutional Court, 659-60 preemptive killings case, 503 Pretty v. United Kingdom, 263, 264 Prigg v Pennsylvania (1842), 744, 754 primarity, 257 principle of reasonability, 90 Pringle v Ireland, 460 prior-period license fee, 49 privacy rights, 776-80, 805-6 Germany, 378, 390-1 Hungary, 351 South Africa, 596 Spain, 638 United States, 755 privatization of prisons case, 509-10 Privileges and Immunities Clause, 736 Privy Council, Judicial Committee of, 158, 173 procedural basic rights, 805-6 Austria, 107-8 Brazil, 151 ECtHR approach to, 271–2 France, 351 Germany, 389-90 Israel, 510 Italy, 554

Australian High Court, 52-6



846 INDEX

procedural basic rights (cont.) South Africa, 596 United Kingdom, 718 United States, 754-5 Prolife Alliance decision, 705 Promotion of Equality and Prevention of Unfair Discrimination Act (South Africa), 594 proportionality, 22-3, 68-9, 764, 776, 786, 805-6 ECtHR approach to, 272 France, 351 Germany, 387 Hungary, 420, 425 Ireland, 466 Israel, 508 Italy, 555-6 South Africa, 595-6 Spain, 634-5 Taiwan, 662 United States, 752-3

Québec, 155 question prioritaire de constitutionnalité, 328

R (Anderson) v Secretary of State for the Home Department, 705 R (ProLife Alliance) v BBC (2003), 707 R (Ullah) v Special Adjudicator, 717 R v Barger (1908), 60 R v Kirby; Ex parte Boilermakers' Society of Australia (1956), 62 R. v. Oakes, 181 R v Secretary of State for Transport, ex p Factortame Ltd (No.2), 684-5 Radbruch, Gustav, 15 Rasmussen, Hialte, 287 ratio decidendi, 139-40, 309, 588 Ratti (1979), 296 Re Haughey, 441, 462 Re Wakim; Ex parte McNally (1999), 47, 55, 58-9, 60 reasoning practices, 10 Rechtsstaat, 356, 383 Refah Partisi (Welfare Party) and Others Reference as to the Validity of the Wartime Leasehold Regulation, Reference re Manitoba Language Rights, 172, 175 Reference re Remuneration of Judges of the Provincial Court (P.E.I.), 161-2, 172Reference re Same-Sex Marriage, 188 Reference re Secession of Quebec, 172, 175, 185 references to scholarly work Austrian Constitutional Court, 94-5 Brazilian Federal Supreme Court, Canadian Supreme Court, 184 Czech Constitutional Court, 225 European Court of Human Rights, 254–5 European Court of Justice, 303 German Federal Constitutional Court, 378 Hungarian Constitutional Court, 417-18, 434 Irish Supreme Court, 462-3 Israeli Supreme Court, 498 Italian Constitutional Court, 547-8 South African Constitutional Court, 585 - 6Supreme Court (House of Lords) of the United Kingdom, 704-5 Supreme Court of the United States, 744 Taiwanese Constitutional Court, 667 - 8

Regarding the Luftsicherheitsgesetz,

representative government, 67-8

Republic of China Constitution, 641

753 - 4

republic, 385

Article 4, 663

Article 7, 662

Article 11, 657

Article 21, 662 Article 22, 662

Article 9-18, 662

Rehnquist, William, 743

religious arguments, 547

v. Turkey, 264



INDEX 847

Article 23, 661, 662	Sarkozy, Nicolas, 329
Article 63, 656–7	Saunders, Cheryl, 41
Chapter 2, 660	Scalia, Antonin, 352, 741, 743, 776, 792
provisions, 660	Schechter (A.L.A.) Poultry Corporation
Republic of Ireland Act, 438	v United States, 469
responsible government, 67–8	Schlink, Bernhard, 330
Restitution of Land Rights Act (South	Schmitt, Carl, 668
Africa), 593	Schnapper, Dominique, 329
Revolution of 1688, 679–80	Schumacker (1995), 293
rhetoric. See judicial candour and	Scotland Act of 1998, 684–5
rhetoric	Scottish Faculty of Advocates, 689–91
rights creep, 10	second marriage, legality of, 665–6
rights discourse, 23–4	Second Uniform Tax Case, 58
Rinfret, Thibaudeau, 184	secularism, 805–6
Roach v Electoral Commission, 58	Austria, 102–4
Rodriguez v. British Columbia (Attorney	ECtHR approach to, 270-1
General), 176	France, 351
Roe v. Wade (1972), 29, 379, 741, 743	Germany, 385
Rome Statute decision, 350	Israel, 509
Roosevelt, Franklin, 724, 731	Italy, 555
Roper v. Sims (2005), 740	South Africa, 595–6
Rousseau, Jean-Jacques, 772	Spain, 638
Rubinstein, Amnon, 480	United Kingdom, 716
rule of law, 22–3, 764, 785, 786, 805–6	United States, 752
Australia, 42–3, 66–7	separation of church and state, 385, 752
Austria, 90, 96, 262	separation of powers, 65, 467, 662–3
in Austrian Constitutional Court,	settled usage, 745
101, 105	Shalit case, 506, 510
ECJ approach to, 315–16	Shapiro, Martin, 18
ECtHR approach to, 270–1	Silih v. Slovenia, 271–2
Germany, 383	Simmenthal doctrine, 539
Israel, 507–8	Single European Act of 1987, 301, 460
Italy, 555	Sinnott v Minister for Education, 449–50
South Africa, 595	Slaughterhouse Cases (1873), 732, 736
Spain, 636–7	Smend, Rudolf, 360
United Kingdom, 715	Smith v. Jones (1750), 817
United States, 750	Smith v. Jones (1795), 817
Russia, 238	Smith v. Jones (1830), 817, 818
Ryan v AG, 451, 466–7	social arguments, 547
Rychetský, Pavel, 208	social context arguments, 171
SA Association of Donor of Luisses	Social Order Maintenance Act
SA Association of Personal Injury	(Taiwan), 666, 670
Lawyers case, 578	sociological arguments, 57–9, 142,
Saflii, 575	183–4, 416–17, 627–8, 665–7,
same-sex marriage, 141, 547, 548	702–4. <i>See also</i> non-legal
Sample Judgments, 815	arguments
Sankey, Lord, 159	Solange II, 374

Sólyom, László, 394, 399

SARFU case, 564



848 INDEX

South African Bill of Rights. See South interpretative constitutional African Constitutional Court provisions, 562-5 South African Constitutional Court, 9, judges, 573-5 judicial candour and rhetoric of, 560-601, 764, 779 589-90 amici curae, 571-2 iurisdiction, 566-9 comparative perspective, 597-9 competences of, 569-70 key concepts, 595–7 constitutional arguments, 576-89 basic procedural rights, 596 structure of, 576-7 democracy, 595-6 types of, 577-88: analogies, equality, 596 577-8; applicability of federalism, 595-6 Constitution, 579–80; freedom of expression, 596 arguments from silence, 583–4; human dignity, 596 concepts or principles not nation, 595-6 mention in the text of privacy rights, 596 Constitution, 583; domestic proportionality, 595-6 harmonising arguments, 581-2; rule of law, 595 establishing/debating text of secularism, 595-6 Constitution, 578–9; sovereignty, 595-6 international harmonising Wesensgehaltsgarantie, 596 arguments, 582; non-legal opinions arguments, 585; ordinary concurring, 591-2 meanings of words of dissenting, 591-2 Constitution, 580-1; other length of, 591-2 pathology of, 599-601 methods/arguments, 587-8; precedents, 583; references to proceedings in, 570–3 foreign law, 586-7; references to regulation of activities and scholarly works, 585-6; proceedings, 566-9 teleological/purposive referring types of cases, 571 to purpose of Constitutionworkload, 574 sovereignty, 776, 805-6 maker, 585; teleological/ purposive referring to purpose Austria, 102-4 of text, 584 ECJ approach to, 317–18 weight of, 588-9 France, 351 constitutional litigation and, 565-73 Germany, 384-5 constitutional reasoning Hungary, 397-8 arguments in, 576-89 Ireland, 466 legal culture as context for, 561–5 Israel, 509-10 legal scholarship and, 576 Italy, 554-5 political culture as context for, South Africa, 595-6 561 - 5Spain, 637 criticism of, 599-601 United Kingdom, 715 evaluation of, 599-601 United States, 751 formation of, 565 Spanish Constitution, 787 40 leading cases, 601–3 applicability of, 621 framing of constitutional issues in, Articles 592-5 28.1, 623 glocal constitutionalism in, 792-3 35.1, 623



Civil Code, 608–9	freedom of expression, 638
establishment of, 604-5	government form, 637
as a legal rule, 607	human dignity, 637
as lex suprema and lex posterior, 621	nation, 637
obligation of citizens and authorities	non-discrimination, 635-6
to comply with, 607	privacy rights, 638
Title IX of, 605	proportionality, 634–5
Spanish Constitutional Court, 604–39,	rule of law, 636–7
765, 779	secularism, 638
constitutional arguments, 619-31	sovereignty, 637
structure of, 619–21	Wesensgehalt, 633
types of, 621-9, 630: analogies,	legal culture as context for, 604–11
622, 623; applicability of	opinions
Constitution, 621–2; arguments	concurring, 632–3
from silence, 626-7; doctrinal	dissenting, 632–3
analysis of legal concepts or	length of, 632–3
principles, 625–6; economic,	political culture as context for,
627–8; harmonising arguments,	604–11
623–4; moral, 627–8; non-legal	as supreme interpreter of
arguments, 627-8; precedents,	Constitution, 611
624–5; references to foreign law,	types of cases in, 611-12, 616
629; sociological, 627–8;	<i>amparo</i> procedure, 612
teleological/purposive referring	conflicts jurisdiction, 612
to purpose of text, 627	constitutional review of
weight of, 630–1	legislation, 612
constitutional litigation and, 611-16	Spanish Constitutional Tribunal, 31,
admission process, 613-14	226
initiation of constitutional	Spycatcher case, 697
proceeding, 612–13	Staatsgerichtshof, 359
intervention in constitutional	Staatsrechtslehrer, 330
proceedings, 613	stare decisis, 18, 124, 583, 588, 741, 742
judgments, 614–15	State (Healy) v Donoghue, 462
resolutions, 614	State (Nicolaou) v An Bord Uchtála, 463
written procedures, 614	state form, 805–6
constitutional reasoning	Austria, 104
arguments in, 619–31	Germany, 385
comparative perspective, 638	Italy, 556
legal scholarship and, 617–19	United Kingdom, 715
first epoch, 606–7	United States, 751
40 leading cases, 639–40	state nation, 385–6
framing of constitutional issues in,	state neutrality, 270–1
633	Status-Denkschrift, 360
judges, 616–17	Statute of the Region Sardinia, 532
judicial candor/rhetoric in, 631-2	Statute of Westminster of 1931, 154,
key concepts in, 633-8	438
democracy, 636	Steenkolenmijnen (1961), 293
equality, 635–6	Stone, Adrienne, 41
federalism, 637	Stone, Julius, 42



850 INDEX

Strasbourg Court, 91, 226, 698 Street v Queensland Bar Association, 52 subsidiarity, 123, 257, 262-3, 765 substantive approaches, 95–7 sui generis court, 277-82 summulas, 123 Sunstein, Cass, 151 Superior Courts of Ireland, 444 judges, 446-7 supranational, 316, 317, 319 Supreme Administrative Court (SAC), Supreme Court Act (Canada), 166 Supreme Court (Austria), 80-1 Supreme Court (House of Lords) of the United Kingdom, 679 caseload, 689 comparative analysis of, 718-20 constitutional arguments, 692-711 structure of, 692-4: one-line conclusive arguments, 692-3; parallel conclusive arguments, 692 - 3types of, 694-708: analogies, 695; applicability of Constitution, 694-5; deference, 706; doctrinal analysis of legal concepts or principles, 699-700; economic arguments, 702–4; establishing text of the Constitution, 694; harmonising arguments, 695–8; moral arguments, 702–4; non-legal arguments, 702-4; precedents, 698; references to foreign law, 705-6; references to scholarly works, 704-5; sociological arguments, 702-4; teleological/purposive referring to purpose of Constitutionmaker, 701-2; teleological/ purposive referring to purpose of text, 700-1; wording and ordinary meaning of words, weight of, 708-11 constitutional cases in, 680-3

arguments in, 692-711 legal scholarship and, 691–2 constitutional reasoning in lack of codified constitution and, legal culture as context for, 679-87 political culture as context for, 679 - 8740 leading cases, 720-2 framing of constitutional issues in, 714 - 15judges, 689-91 judgments, 689 judicial candour and rhetoric of, 711 - 12jurisdiction, 687-8 key concepts in, 715-18 basic procedural rights, 718 democracy, 715 devolution, 716 equality, 718 freedom of expression, 718 human dignity, 717 nation, 716 rule of law, 715 secularism, 716 sovereignty, 715 state form, 715 system of government, 716 opinions concurring, 712-14 dissenting, 712-14 length of, 712-14 permission to appeal, 689 procedures in, 689 reporting in, 689 Supreme Court Justice, role of, 20 Supreme Court of Ireland. See Irish Supreme Court Supreme Court of the United States, 8, 9,723-59 caseload, 729-30 comparative perspective, 756-7 constitutional arguments, 733-46 structure of, 735-7 types of, 737-46: analogies, 739; applicability of Constitution, 738–9; arguments from silence,

constitutional litigation and, 687-9

constitutional reasoning



INDEX 851

742-3; case disposition, 737; concept or principle not mentioned in text, 742; domestic harmonising arguments, 739-40; general topic, 737-8; international harmonising arguments, 740–1; non-legal arguments, 744; originalism, 745; precedents, 741-2; references to foreign legal material, 745; references to scholarly work, 744; settled usage, 745; wording and ordinary meaning of words, 739 weight of, 745-6 constitutional litigation and, 725-30 constitutional reasoning arguments in, 733-46 legal culture as context for, 723-5 legal scholarship and, 732–3 political culture as context for, 723 - 5evaluation, pathology and criticism of, 757-9 40 leading cases, 759-60 framing of constitutional issues in, 749-50 influence of, 226 iudges, 730-2 judicial candour and rhetoric of, 746 - 7jurisdiction of, 726-9 key concepts, 750-5 basic procedural rights, 754–5 democracy, 750-1 equality, 754 federalism, 752 freedom of expression, 755 government form, 751 human dignity, 754 nation, 752 privacy rights, 755 proportionality, 752-3 rule of law, 750 secularism, 752 sovereignty, 751 state form, 751 Wesensgehalt, 753-4

Opinion of the Court, 730
opinions
concurring, 748–9
dissenting, 748–9
length of, 748–9
Rule 24(1), 728
Supreme Federal Tribunal of Brazil. See
Brazilian Federal Supreme
Court
Swiss Federal Supreme Court, 226
system of government, 716
Szabó, Imre, 396–7
Taiwanese Constitutional Court,
641–77, 764, 779
caseload, 646–7

comparative perspective, 676–7 constitutional arguments structure of, 650-3: chain (one-line conclusive arguments), 650-1; dialogic, 651-2; legs of a chair (parallel conclusive arguments), 652-3 types of, 653: analogies, 653; applicability of Constitution, 654-6; arguments from silence, 663-4; doctrinal analysis of legal concepts or principles, 660-3; domestic harmonising arguments, 657; economic arguments, 665-7; establishing/ debating text of Constitution, 653-4; international harmonising arguments, 658–9; moral arguments, 665–7; non-legal arguments, 665–7; ordinary meanings of words of Constitution, 656–7; precedents, 659-60; references to foreign law, 668-9; references to scholarly work, 667-8; sociological arguments, 665-7; teleological/purposive referring to purpose of constitutionmaker, 664-5; teleological/ purposive referring to purpose of text, 664 weight of, 670-1



Taiwanese Constitutional Court (<i>cont.</i>) constitutional litigation and, 643–7	Israeli Supreme Court, 492–4 Italian Constitutional Court, 542–6
constitutional reasoning	purpose of Constitution-maker in,
arguments in, 649–71	183, 377, 415–16, 492–4, 544–6,
legal scholarship and, 648–9	585, 664–5, 701–2
40 leading cases, 677–8	purpose of text in, 182-3, 298-300,
framing of constitutional issues in,	376, 413–15, 542–4, 584, 627,
674–5	664, 700–1
functions of, 644–5	purpose of Treaty-maker in, 300-1
judges, 647–8, 774	South African Constitutional Court,
appointment of, 647	584, 585
qualifications of, 647–8	Spanish Constitutional Court, 627
judgments, 650	structure of, 493
judicial candour and rhetoric of,	Supreme Court (House of Lords) of
671	the United Kingdom, 700–2
jurisdictions, 644	Taiwanese Constitutional Court,
key concepts, 675–6	664–5
opinions	teleological/purposive interpretation,
concurring, 674	786
dissenting, 674	Temporary Provisions (Taiwan),
in the first ten years (1948–1958),	641
646	terroristic emergency, 546
length of, 672–3	TEU. See Treaty of European Union
requests for interpretations of, 646	(TEU)
review of constitutionality or	text-positivism, 395–9
unconstitutionality of laws and	textual arguments, 171
regulations, 645–6	textual interpretation, 263
Tal Law case, 485, 506	textualism, 816
Tasmanian Dam, 46, 47	TFEU. See Treaty on the Functioning of
Tax Rebate (2007), constitutional	European Union (TFEU)
arguments in, 341	Tibi case, 506
TD v Minister for Education, 448, 465,	Torres Strait Islanders, 45
467	transformative constitutionalism,
teleological method, 396–7	596
teleological reduction, 172	transnational harmonization, 218
teleological/purposive arguments,	travaux préparatoires, 183-4, 263, 265,
171	301, 343, 415–16, 550, 627, 701–2
case types and, 493	
Constitution Act of 1982 (Canada), 182–3	Treaty of European Union (TEU), 299, 317
constitutional law and, 493	Article 19, 278
European Court of Justice, 298–301	Article 263(4), 279
German Federal Constitutional	Article 267(1)(a), 280
Court, 376, 377	Article 267(1)(a), 260 Article 267(1)(b), 279
human rights law and, 493	Treaty on the Functioning of
Hungarian Constitutional Court,	European Union (TFEU),
413–16	Article 267(1)(b), 375



INDEX 853

Troper, Michel, 332 Trstenjak, Veroca, 305 Tushnet, Mark, 16 *uBuntu*, 596, 598 Union citizenship, 314 United Kingdom

constitutional landscape of, 683–7
Devolution Acts, 684–5
lack of codified constitution in,
679–80
legal systems, 705

political constitution in, 683

Revolution of 1688, 680 United Mizrahi Bank Ltd. v. Migdal Cooperative Village (1995), 472, 473, 482, 486, 494, 505, 506

United States

American Revolution, 723 political backlash to liberalism in 1980s, 724–5

United States Supreme Court. See
Supreme Court of the United
States

United States v. Carolene Products (1938), 735

United States v. Virginia, 743 Universal Declaration of Human Rights, 489

Urban Renewal Act (Taiwan), 654, 674

Vade-mecum, 309 Van Gend en Loos and Costa v. ENEL (1963), 29, 292, 298, 305, 318 Vedel, Georges, 329 Verfassungsdogmatik, 181–2, 194, 212, 398, 399, 400, 422, 425, 599

398, 399, 400, 422, 425, 599 Verfassungslehre (Schmitt), 668

Verfassungspraxis, 380 Versteeg, Mila, 9

Versteinerungstheorie, 89–90, 816 victim requirement, 242

Vienna Convention on the Law of Treaties, 301

Viking (2007), 293

vista, 148 Voeten, Erik, 8 von Beyme, Klaus, 668 von Hayek, Friedrich, 15 Vondrácková v. Rejžek, 212 Vriend v. Alberta, 164

Wagnerová, Eliška, 212, 224 *Wakim*, 43

Walz v. Tax Comm'n of New York City (1970), 745

War of Independence (Ireland), 438 Warren, Earl, 21, 724

Warren Court, 750 Washington, George, 726 Washminster system, 467–9

Weimar Constitution, 357–8, 371

Weimar Republic, 359, 366 Weimarer Methodenstreit, 358

Weinrib, Lorraine, 15

Wesensgehalt, 805-6

Australian High Court, 69 European Court of Justice, 316, 317

German Federal Constitutional Court, 388

Hungarian Constitutional Court, 425

Israeli Supreme Court, 509 Italian Constitutional Court, 555 South African Constitutional Court, 596, 597

Spanish Constitutional Court, 633 Supreme Court of the United States, 753–4

Wesentlichkeitsgebot, 383

West Coast Hotel v. Parrish (1937), 744, 772

Williams v Commonwealth, 61 wiretapping, 542

workload

Austrian Constitutional Court, 83 Brazilian Federal Supreme Court, 126–8

European Court of Justice (ECJ), 282–3

German Federal Constitutional Court, 363–5

South African Constitutional Court, 574



854 INDEX

workload (*cont.*)
Supreme Court (House of Lords) of the United Kingdom, 689
Supreme Court of the United States, 729–30
Taiwanese Constitutional Court, 646–7

writ of injunction, 125 writ of mandamus, 124 *Wunsiedel* decision, 370, 390

Zeman, Miloš, 204, 208, 209 Zines, Leslie, 41 Zuma case, 577, 580, 585