

## INDEX

A v Home Secretary, 448-9 African constitutions and savings clauses, 309, 332 Alberta and same-sex marriage, 395 Allan, James, 12 Allan, Trevor, 52, 54, 61-2 Aquinas, St. Thomas, 132 Arendt, Hannah, 82, 100 Aristotle, 82-3, 132 August v. Electoral Commission, 172-4, 346 Australian Commonwealth Constitution and dialogue, 14-16, 149-50 and its lack of a bill of rights, 362-3 and prisoner disenfranchisement, 352 - 3

Bagehot, Walter, 410, 412 Baigent's Case, 12 Baker v. State, 28, 378-9 Baker, Dennis, 28-9, 222-3, 293-4, 397-420 Baker, Jack, 370 Barak, Aharon, 17, 299 Barber, Nicholas, 55, 406 Barendt, Eric, 405 Baron, Joanna, 212, 223 Baude, William, 116 Belize, 321 Bellamy, Richard, 59, 77, 79, 81 Bickel, Alexander, 8, 24, 56, 58, 187, 194-6, 205, 282, 305, 389 Bill of Rights 1689, 459 Blackstone, William, 69, 375

Blakeney, Allan, 24, 213, 215-17, 224, 227, 271 Bowers v. Hardwick, 375, 389 Brettschneider, Corey, 120, 387 Brexit, 394 British Columbia and right to same-sex marriage, 394 Brodie, Ian, 289 Brown v. Board of Education, 305, 390 Brown, Jerry, 381 burdens of inertia, 9, 86, 109, 114, 166, 178, 184, 196 burdens of judgment, 136-7, 159 Burger, Warren, 375 Bush, George, 379-80 Bushell, Alison, 3-5, 16, 30, 51, 165, 176, 188-94 Butler, Petra, 12

California Proposition 8, 381-2 Cameron, Jamie, 298 Canada (Attorney General) v. JTI-Macdonald Corp., 190-1, 291, 300 Canada v. Bedford, 122, 156, 277, 300, 418 Canadian Bill of Rights Act 1960 and the notwithstanding mechanism, 214 - 15and savings clauses, 313-15 Canadian Charter of Rights and Freedoms and democratic rights of prisoners, 350 - 1and dialogue theory, 4 limitations clause, 4, 24, 74-6, 177, 217, 414



INDEX 467

notwithstanding clause, 4, 24, 49-51, 65, 71, 75, 195, 209–34, 256, 269, 418, 424 Caribbean constitutions and savings clauses, 26, 309, 316, 320, 332 Carolan, Eoin, 185 Carter v. Canada, 29, 230, 233, 279-81, 399-403, 416-19 Carter, Lee, 303, 416 Certain Children v. Minister for Families and Children (No 2), 180 Chaoulli v. Quebec (A.G.), 155, 271 Chrétien, Jean, 395 Clinton, Bill, 377, 380 Coke, Sir Edward, 77, 141, 144 Constitution Act, 1982 (Canada) and section 52 supremacy clause, 414 construction, 6, 21-2, 68-9, 72-8, 87-9, 114-25, 158, 161, 268, 286, 292-5, constructive dialogue. See construction Costa Rica and right to same-sex marriage, 394 counter-pluralitarian dilemma, 71 Court of Justice of the European Union, 36, 457-60, 464 Dbeljak, Julie, 14 death penalty, 426

Defence of Marriage Act, 377 departmentalism, 6-8, 72-4 dialogue and common law constitutionalism, 52 and deference, 196-206 and judicial deference, 23-4, 26, 43, 50, 62, 106, 120, 123, 185, 226-7 as a metaphor, 1-2, 8, 85-6, 161-71, 177, 206 Dicey, A.V., 56 Diefenbaker, John and the Canadian Bill of Rights Act 1960, 215 Dixon, Rosalind, 23, 110, 118, 192-3, 196-206, 277, 293, 407 domination, 22, 85–125, 181, 192, 455

Dred Scott v. Sandford, 75, 77, 292, 331, 390

Dworkin, Ronald, 102, 150, 194, 199, 361, 387–9

and law's integrity, 143

and majority rule, 384

Eisenhower, Dwight, 369

Eisgruber, Christopher, 387
Ekins, Richard, 30, 94, 436–65
Ely, John Hart, 24, 71, 187, 199, 288, 350
Erdos, David, 242
European Convention on Human Rights, 316
Article 3 and prisoner voting, 264
Article 8, 169
and original public meaning, 356–8
European Court of Human Rights, 27, 36, 66, 148, 204, 263–4, 304, 337–54, 446, 449, 451–6, 464
European Union, 18–19, 36, 202, 457–65
European Union Act 2011, 457
Evans v. Attorney General, 442–5

Fallon, Richard, 59–60 Finnis, John, 27–8, 337–63 Ford v. Quebec (Attorney General), 210, 295 Friedman, Barry, 52, 188

Ewing, Keith, 238

Gae, R.S., 324
Gardbaum, Stephen, 39–41, 44, 51, 55, 58, 180, 197, 199–202, 212, 231, 262, 281, 284–5, 420
Gargarella, Roberto, 17
gay rights, 28, 304–5, 364–96
Gearty, Conor, 168
Geddis, Andrew, 239
Golder v. UK, 357
Goldsworthy, Jeffrey, 25, 219–20, 222–3
Gonthier, Charles, 189
Good Spirit School Division No. 204
v. Christ the Teacher Roman
Catholic Separate School Division
No. 212, 227–9



468

INDEX

Goodridge v. Mass. Dept. of Public Health, 379 Gordon, Scott, 405, 407 Gore, Al, 379 Graber, Mark, 390 Griffith, J.A.G., 53–4, 61–2 grundnorm, 433

Habermas, Juergen, 81-2 Harper, Stephen and assited suicide legislation, 401 and Omar Khadr, 275 tough on crime agenda, 276, 288 Harrington, James, 90 Hart, H.L.A., 129-33, 136, 156, 343, 433 Hayne, Kenneth, 353 Heydon, Dyson, 149, 353 Hickey, Tom, 181 Hickman, Tom, 56 Hiebert, Janet, 25, 51 Hirst v. U.K. (no.2), 27, 337-44, 349-50 Hirst, John, 340 Hoadley, Bishop Benjamin, 415 Hogg, Peter, 3-5, 16, 30, 51, 70, 77, 165, 176, 188-94, 300 and Canadian judicial supremacy, 415 Hollingsworth v. Perry, 381 Hong Kong, 16

Rights (Canada), 394
Human Rights Act 1998
and dialogue, 8–10, 41–5, 63–4,
199–204, 254–65, 424, 445–56
and single member plurality
elections, 237
and the Joint Committee on Human
Rights, 236, 264–5
Human Rights Act 2004 (Australian
Capital Territory), 14
Huscroft, Grant, 222, 269

Committee on Justice and Human

House of Commons Standing

India

and savings clauses, 326, 333 interrogative dialogue, 21, 86–9, 105–9 interruptive dialogue, 21, 86–9, 109–14

Irish Constitution and same-sex marriage amendment, 393 Israel, 299 and dialogue, 17–18 and savings clauses, 326–30 Issacharoff, Samuel, 382

Jackson, Andrew, 74, 76 Joseph, Philip, 12

Kavanagh, Aileen, 3, 9-10, 36, 161-2, 165, 182, 185-6, 193, 224, 236-7, 267, 271, 285, 287, 297-8, 398, 407-8, 433, 446 Kelly, James, 25, 51, 235-66, 404 Kelsen, Hans, 323, 433 Kennedy, Anthony, 367 Kerry, John, 379 King, Jeff, 23-4, 255-6 Klarman, Michael, 373, 390 Klug, Francesca, 199 Knesset, 17, 320-1, 326-7 Knopff, Rainer, 114, 278 Kramer, Larry, 292 Kumm, Mattias, 108, 154, 291

Lacey, Nicola, 247 Lamb v. Canada, 418 Leckey, Robert, 302 Leclair, Jean, 298 legal constitutionalism, 9, 61-2 legislative blind spots, 56, 106, 109, 118, 178, 184, 196, 198 Leitch, Kelly, 276 Levinson, Sanford, 389 Levy, Jacob, 21, 68-84 Lincoln, Abraham, 74, 76–8 liquidation, 115-16, 124 living instrument interpretation. See living tree interpretation living tree interpretation, 27, 356, 358 Lochner v. New York, 155, 189, 195, 204, 271, 292 Lougheed, Peter, 24, 213, 215, 217-19, 227

Louis XIV, 71



INDEX 469

M v H, 176MacFarlane, Emmett, 271 Madala, Tholakele, 347, 349 Madison, James, 115, 119-20, 124, 331, 404, 409 Malaysia, 16 Manfredi, Christopher, 39, 175, 272, 293 Mansfield, Harvey, 409-10 Marbury v. Madison, 308 Marshall, Margaret, 367 Martin, Paul, 210, 395 Mathen, Carissima, 298 McConnell, Michael, 370 McDonald, Leighton, 13 McLachlin, Beverley, 174, 189, 301, 350, 353 Miller, Bradley, 148, 358 Minister for Home Affairs v. NICRO, 174, 182-3, 347-8 Mohin-Mathieu v. Belgium, 339-40 Momcilovic v. The Queen, 15-16, 149-50, 170-1, 299 Montesquieu, Charles-Louis de Secondat, 68-70, 77, 404, 407 Moonen v Film and Literature Board of Review, 11 Morton, F.L., 114, 278, 294 Munro, Colin, 404 Nehru, Pandit Jawaharlal, 324

neo-Kantian. See Habermas and Rawls new commonwealth model, 5, 35, 39-41, 43, 197-200, 236-7, 246, 284-6, 306, 313, 397, 419 and Canada's notwithstanding clause, 212-13 and interruptive dialogue, 86, 112 and political and legal constitutionalism, 10 New Natural Law, 366 New Zealand Bill of Rights Act and declarations of inconsistency, 10-12, 67, 238-9 and dialogue, 10-12 and mixed member proportional elections, 237, 242-51 and parliamentary bills of rights model, 25, 237-54

and prisoner disenfranchisement, 351–2 and section 7 Attorney General reporting function, 236–7, 239–42, 246–54 Newman, Dwight, 25, 209–34 Ngcobo, Sandile, 347, 349 Nicol, Danny, 50, 61, 199, 264 Nourse, Victoria, 408

Obergefell v. Hodges, 28, 364–74, 389 Ontario and collective bargaining, 272 and right to same-sex marriage, 394 originalist interpretation, 26, 316–18, 358 and original public meaning, 355–6

Palmer, Geoffrey, 239, 242 Palmer, Mathew, 12 Pannick, Lord David, 337-8, 344 parlement, 21, 68-80, 84 passive virtues, 23, 187-9, 194-8, 204-6 penal populism, 241, 248, 288-9 Petter, Andrew, 294-5 Pham v Secretary of State for the Home Department, 459-60 Pinckney, Charles, 331 political constitutionalism, 10, 61-2 Posner, Richard, 367 precedent. See stare decisis Pretty v. UK, 450 prisoner disenfranchisement, 27-8, 66-7, 172-5, 182-3, 189, 247, 264-6, 289-90, 301-2, 337-63, 448, 454 and African Americans, 289 proportionality analysis, 27, 43, 49-50, 56, 66, 107–12, 154–5, 157, 172–3, 292, 294, 299–302, 307, 341–2, 344, 347, 349-50, 353-4

## Quebec

bilateral amendments to education rights, 229 and constitutionality of private health insurance, 271 and right to same-sex marriage, 394



470

INDEX

Quebec (cont.) opposition to the Charter, 333 use of notwithstanding clause, 74, 224 R (Chester) v. Secretary of State for Justice, 345 R (HS2 Action Alliance Ltd) v Secretary of State for Transport), 459-60 R (Nicklinson) v. Ministry of Justice, 43, 159, 279, 449-51 R v Mills, 6, 175 R v Morgentaler (1993), 361 R v O'Connor, 6, 176 R v Seaboyer, 176 R v. A (No 2), 447, 449 R v. Secretary of State for the Home Department, Ex Parte Simms, 443 R. v. Jordan, 229-30 R. v. Morgentaler (1993), 114 R. v. Oakes, 108, 171, 191 Rawls, John, 81-2, 136, 343 Re McR, 169 republicanism, 21-2, 71, 87-125, 195 res judicata, 121-2, 152, 156 Rishworth, Paul, 12 RJR-MacDonald v. Canada (A.G.), 155, 176, 190, 414 Roach v. Electoral Commissioner, 352 Roach, Kent, 25-6, 175, 177-8, 181, 414 Robertson and Rosetanni v. The Queen, 315 Rodriguez v. British Columbia, 400 Roe v. Wade, 367, 388, 391

Sauvé v. Canada (A.G.) "Sauvé I", 172 - 5Sauvé v. Canada (Chief Electoral Officer) "Sauvé II", 172-5, 183,

272, 289, 300–1, 342, 348, 353–5

Romer v. Evans, 361, 389 Romney, Mitt, 379 Rosenberger, Gerald, 390 rule of adjudication, 130-1 rule of change, 130-1, 135-6, 145-6, 156, 159 Trudeau, Justin, 270, 302 rule of recognition, 118, 130, 146, 433 Trudeau, Pierre, 214 Ryder, Bruce, 302 Tushnet, Mark, 39, 60, 103, 164, 180, 268,

Sauvé v. Canada (Federal Court of Appeal), 348-9 Scalia, Antonin, 426 Schauer, Frederick, 29-30, 423-35 Schwarzenegger, Arnold, 381 Scoppola v. Italy, 27, 344-5, 347, 349-52 separation of powers, 20, 24, 28-9, 50-1, 187Shinar, Adam, 17 Sigalet, Geoffrey, 21-2, 71, 85-125, 181, 212, 223 Singapore, 16 Socratic dialogue, 56, 106-7, 291, See interrogative dialogue South Africa, 17 and constitutional recognition of foreign law, 425 and prisoner disenfranchisement, 345-8, 351 stare decisis, 58, 121, 152, 156 statutory bill of rights, 8 Stephenson, Scott, 13, 295 Steyn, Lord Johan, 400 Strayer, Barry, 214 strong-form judicial review and the U.S. constitution, 391 Sunstein, Cass, 24, 181, 187, 196-7, 378 Taylor v. A.G. (2017), 11, 239, 352, 424 Taylor, Gloria, 303, 416 Thayer, J.B., 197, 199 Tom Hickman, 299 transnational dialogue, 29-30, 424-35 and co-operative arguments, 428-9 and epistemic arguments, 427-8 Treaty of Waitingi, 12 Tremblay, Luc, 298-9 Trinidad and Tobago

U.S. v. Windsor, 361, 389 United States Constitution and constitutional recognition of foreign law, 426

281, 292, 306, 366, 389, 391, 397

and savings clauses, 316



INDEX 471

and departmentalist dialogue, 6–8 and the Eighth Amendment, 73 and savings clauses, 318

Victoria Charter of Human Rights and Responsibilities, 13–16, 149, 170–1 and rights of juvenile detainees, 179–80 Vriend v. Alberta, 176, 223

Waldron, Jeremy, 25–6, 59–61, 66, 77, 79, 81, 219–23, 225, 245, 265, 268–9, 286–9, 293–5, 306, 364–7, 383–7, 410–11
Wall, Brad, 273

weak-form judicial review, 16, 46, 163–7, 179–85, 238, 283–6, 397 and the U.S. constitution, 391 Webber, Gregoire, 22–3, 119, 129–60, 292, 303, 395 Weill, Rivka, 17, 27, 308–33 White, Byron, 375 Whittington, Keith, 74, 77, 390, 392 Williams, Bernard, 83 Wilson-Raybould, Jody, 416–17

Yap, Po Jen, 16 Young, Alison, 20, 35–67, 241

zamindars, 323–4 Zeisberg, Mariah, 73, 77