

## INDEX

- absorption of the court, 158
- abstract norm, 313
- accommodation, 216, 252, 261, 280
- accountability gap, 212
- accountability in judicialization of politics, 73–80
- acquis communautaire*, 104
- acquis humanitaire*, 104
- adaptionism, 38, 58
- Advisory Panel of Experts (APE), 90–91, 101–103, 108
- Alexy, Robert, 176, 314
- American federalism, 57
- American Revolution, 348
- antagonism, 192, 318, 326, 345, 347, 349
- anti-democratic political parties, 67, 110
- anti-party parties in politics, 337
- antimajoritarianism and democracy, 35, 46–47
- Apex courts
  - attack against, 330–331, 334
  - cooperation and, 248
  - EU context, 234, 237
  - impact of, 259, 333, 361
  - judicial review, 331, 343
  - jurisdictional essentialism, 268, 334–335
  - populism and, 318, 320, 322–323
  - TOGAs and, 278
- Aquinas, Thomas, 251
- Arendt, Hannah, 346
- argumentative representativeness, 282, 287
- Aristotle, 42
- Asshiddiqie, Jimly, 292
- Australian Constitutional Court, 26
- authoritarian populism, 325
- authoritarian regimes/rulers
  - defense of, 332
  - judicial review by, 25, 32–34
  - military dictatorships, 333
  - populist authoritarian regimes, 328–330
- authoritative allocation of values, 32
- authoritative constitutional review, 37
- autopoietic conception of law, 40
- Avotins v. Latvia*, 210–211, 221
- backlash, 298–300, 303
- Barak, Aharon, 53–54, 299–300
- Basic Laws of the Union, 234
- border crossings/border regimes, 368–371
- borderings, 365, 367, 369, 372
- borders and operational spaces, 366–368
- Bowman v. UK*, 128–130
- Brazilian Constitution, 13
- Brazilian Supreme Court
  - counter-majoritarian role, 174–175, 182
  - enlightened role, 178–181
  - representative role, 175–178
- Brexit, 106, 133, 251, 275–276
- Brighton Declaration (2012), 132, 275
- Brown v. Board of Education*, 180
- Buckley v. Valeo*, 130
- Bundesverfassungsgericht, 209, 224, 234
- Bush v. Gore*, 56–60, 62, 308
- campaign finance, 77, 128–131
- Canadian Constitutional Court, 26, 40

- Canadian Supreme Court, 177–178  
 capital market, 374–376  
 capitalist economy, 28–29  
 capitalist order, 332  
 case-law cooperation, 237–243  
 CETA (Comprehensive Economic and Trade Agreement), xi, 199  
*Citizens United v. Federal Election Commission*, 56–59  
 civil law jurisdiction, 33  
 civil rights, 48–49  
 civil society  
   associations and initiatives of, 318  
   constitutional courts and, 6, 16, 72, 363  
   fighting populist authoritarianism, 334–341  
   judicialization of, 163  
   political class and, 164, 175  
 Colombian Constitutional Court, 71  
 Committee of the Regions in Europe, 254  
 common law-countries, 311  
 common legal space, 239  
 communism, 64, 157, 327  
 Communist Party, 142  
 community of law  
   (Rechtsgemeinschaft), 184  
 comparative constitutional law, 300–302  
 competitive elections, 79  
 compromise, 7, 80, 186, 215, 219, 248–249, 252, 274–275  
 Conference of European Constitutional Courts, 237  
 Conseil d'État, 289  
 consensus method, 14–15  
 constitutional adjudication  
   democratic governance, 2–3, 15–16  
   insurance function of, 143–144, 160  
   political consequences of, 37–38  
   politics of, 307–317  
   transnational context, 249  
 constitutional amendments, 146, 225, 290–291  
 constitutional complaint, 240, 242, 247, 308  
 constitutional court judges. *See* heroic constitutional court judges  
 Constitutional Court of Poland. *See* Polish Constitutional Court  
 constitutional courts. *See also* heroic constitutional court judges; populist governments and constitutional courts; representativeness of constitutional courts  
   accountability, 73–80  
   autonomy of, 69, 74  
   civil society and, 6, 16, 72, 363  
   democratic legitimacy of judicial power, 9–13  
   judicial review, 22–34  
   rejection of, 360–364  
   transnational constitutional courts, 1, 9–13  
 constitutional democracy, 36, 58, 94, 111–114, 176, 331–334, 342, 344–350, 355–360  
 constitutional embeddedness of judicial institutions, 282, 289, 364  
 constitutional identity, 247, 353  
 constitutional interpretation, 42–44, 59, 144, 147, 158, 174, 315–316  
 constitutional judgments, 308  
 constitutional jurisdiction, 165–168, 174, 176  
 constitutional norms, 4, 314–315  
 constitutional patriotism, 360  
 constitutional people, 356  
 constitutional review, 71, 81  
 constitutional theory, 174  
 constitutionalism, 2–3, 356  
 constitutionalization of politics, 40–64, 348–349  
 Consultative Council of European Judges (CCJE), 238  
 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 262  
 cooperation  
   Apex courts and, 248  
   case-law cooperation, 237–243  
   civil society cooperation, 334–341

- cooperation (cont.)
  - extra-case-law cooperation, 237–238
  - in-case-cooperation, 241–243
  - intra-case-law cooperation, 239–243
  - ping-pong game cooperation, 7
- Council of Europe
  - Advisory Panel of Experts, 90–91
- counter-heroic judges, 299
- counter-majoritarian difficulty, 39, 157, 174–175, 182
- court-packing-plan, 147, 340
- courts. *See* Apex courts; constitutional courts; specific supreme courts
- Cover, Robert, 252
- crimes against humanity, 262–263
- criminal jurisdiction, 33, 167–168
- criminalization of undocumented movement, 265
- cross-border geographies, 365–366, 372
- cross-border joint ventures, 253
- death penalty case, South Africa, 51–53, 64
- decision-making modes of judicial power, 3–8, 10
- declaratory action of constitutionality (ADC), 166
- deliberation
  - advisory committee for, 86
  - decision-making and, 311
  - importance of, 5, 362
  - internal deliberation, 249
  - judicial deliberation, 248, 286
  - legal arguments through, 313
  - political deliberation, 174
- deliberative democracy, 176
- democracy. *See also* judicialization of politics in new democracies
  - antimajoritarianism and, 35
  - constitutional adjudication for, 2–3
  - constitutional democracy, 36, 58, 94, 176, 331–334, 342, 344–350, 355–360
  - deliberative democracy, 176
  - illiberal democracy, 157–161
  - law of democracy, 8, 122
  - liberal constitutional democracy, 282, 331, 342–355
  - liberal representative democracy, 318
  - plurality of democracies, 16, 337–338, 342
  - representative democracy, 336
- democratic constitutionalism, 143
- democratic effectiveness, 13–16
- democratic legitimacy, 9–13, 21–35, 174, 343
- demos-sphere, 357
- difference between judicial and political decision-making, 4, 17
- difference of communication, 6, 17
- difference of competence, 6, 17
- difference of methodology, 6, 17
- difference of representativeness, 6, 17
- difference of temporality, 6, 17
- differentiation of powers, 5
- dignity based concerns, 50
- diplomatization, 233, 243–249
- discounts, 253, 259–280
- discrimination, 49
- discursive level of the public debates, 5, 17
- diversity of legal cultures, 236
- Dixon, Rosalind, 300
- Dworkin, Ronald, 48
- ECtHR. *See* European Court of Human Rights
- ECJ. *See* European Court of Justice
- ECtHR. *See* European Court of Human Rights
- Egyptian Constitution, 320–337
- Egyptian Supreme Constitutional Court, 70
- election law, 57, 115, 192, 308
- electoral system, 78–80, 120, 325
- Ely, John Hart, 6, 68
- Equal Protection Clause of the Fourteenth Amendment, 261
- ethnic identity, 359
- EU. *See* European Union
- EU-Canada Free Trade Agreement, 199
- Euro crisis, 195–201
- European Central Bank (ECB), 183, 196–197, 201, 241–242

- European Commission for Democracy through Law (Venice Commission), 238, 254
- European Committee on Crime Problems (CDPC), 276–277
- European consensus, 14, 270
- European Convention on Human Rights (ECHR)
  - Charter of Fundamental Rights, 202
  - judicial dialogue, 222–229, 237
  - jurisprudential cross-fertilization, 215–222
- European Court of Human Rights (ECtHR)
  - appointment of judges, 92, 101–102
  - defining democratic rights, 114
  - election to, 85, 87–89
  - judicial interactions with, 233, 240
  - jurisdictional overlap, 204–212
  - margin of appreciation, 109–110, 120, 123, 253, 260, 270
- European Court of Justice (ECJ)
  - appointment of judges, 92
  - EU and, 83, 222
  - German Federal Constitutional Court referrals to, 242–243
  - judicial interactions with, 233
  - populism and, 330
  - as powerful institutional player, 95
  - primacy of EU law, 189
- European Financial Stability Facility (EFSF), 195
- European integration, 11, 187–189
- European Parliament (EP), 199
- European Stability Mechanism (ESM), 183–196
- European Union (EU)
  - admittance to, 92
  - anti-liberal political tendency in, 350
  - ECJ and, 83, 222
  - process of cooperation, 11
  - subsidiarity in, 260
  - supervisory mechanism, 209
- extra-case-law interactions, 237–238, 249
- fascism, 229, 336
- federalism, 24–26, 34–35, 252, 258–279
  - federalism discounts, 253, 259–280
  - finance and operational spaces, 373–374
- First Amendment (US Constitution), 117
- first-generation courts, 49, 297
- Florida Supreme Court, 57
- Fourteenth Amendment (US Constitution), 261
- free movement of goods, 191
- free trade rules, 24
- free trade zones, 26
- freedom of expression, 112, 117, 130, 133, 169
- freedom of speech, 48–49
- French *ancien régime*, 73
- French Conseil Constitutionnel, 289
- French Constitutional Council, 30, 346, 348
- French constitutions, 346
- French Revolution, 345
- Frodl v. Austria*, 126
- fundamental rights
  - judicial dialogue, 222–229
  - jurisdictional overlap regarding, 204–212
  - jurisprudential cross-fertilization, 215–222
  - mutual trust and, 198, 203, 212, 218–219, 221
  - opinion 2/13 impact, 212–215
  - populism and, 336
- gender-based violence, 262–263
- gender identity, 170
- German Constitution (1949). *See* Grundgesetz
- German Federal Constitutional Court
  - Euro crisis and, 195–199
  - European integration and, 187–189
  - Outright Monetary Transactions (OMT) program, 196–197, 201
  - referrals to ECJ, 242–243
  - transnational context, 239–240
- Ginsburg, Tom, 66, 300
- globalization, 16, 31, 360, 366–367, 369
- gouvernement des juges*, 73
- Greens and M.T. v. United Kingdom*, 273

- Griswold v. Connecticut*, 177  
 Grundgesetz, German Constitution (1949), 186–189, 191
- Habermas, Jürgen, 5, 336  
*Handyside* judgment, 253–269, 272  
 heroic constitutional court judges  
   counter-heroic judges, 299  
   non-heroic courts, 301–303  
   successor courts, 297–301  
   temporality and, 303–304  
*Hirst v. United Kingdom*, 122–127, 131–132, 272–277  
 human rights, 31, 263, 271. *See also*  
   European Convention on Human Rights; European Court of Human Rights; fundamental rights  
 Hungarian Constitutional Court, 64, 70, 75, 299, 351  
*Husted v. A. Philip Randolph Institute*, 266–268
- identitarian representativeness, 282, 286–287  
 identity  
   abortion rights and, 271  
   constitutional identity, 247, 353  
   ethnic identity, 359  
   gender identity, 170  
   legal-political identity, 250  
   political identity, 270, 325–330, 334, 354–355  
   protection of, 360  
   sexual-identity discrimination, 266  
 illiberal democracy, 157–161  
 immigration laws, 265–266  
 impeachment courts/trials, 319, 322, 353  
 in-case-cooperation, 241–243  
 Indian Supreme Court, 283, 335  
 Indonesian Constitutional Court, 292  
 input-legitimacy, 13  
 insurance function of constitutional adjudication, 143–144, 160  
 Inter-American Commission on Human Rights, 263  
 intergovernmentalism, 83, 91–96, 103–104  
 International Criminal Court, 262–263  
 international criminal tribunals, 262–263  
 International Monetary Fund (IMF), 378–379, 381–382  
 international organizations (IOs), 227  
 international treaty system, 367  
 internationalization of constitutional law, 52–53  
 intra-case-law cooperation, 239–243  
 Irish Constitution, 270–271  
 Israeli Supreme Court, 325  
 Italian Constitutional Court, 50, 77  
 Italian Court of Cassation, 220
- judicial activism, 164, 181–182  
 judicial behavior, 309, 311–312, 316  
 judicial competence, 104  
 judicial cooperation, 233–236, 243, 247  
 judicial councils, 97–98, 148  
 judicial creativity, 74  
 judicial decision-making, 3–8, 243–249  
 judicial deliberation, 248, 286  
 judicial dialogue, 2, 222–229, 237  
 judicial impartiality, 74  
 judicial independence, 13, 74, 93–94  
 judicial interaction, 7, 9, 233  
 judicial philosophy, 38, 42–44, 57–59, 62  
 judicial politics vs. ordinary politics  
   constitutionalization in actual  
     judicial decisions, 46–59  
   in form vs. in substance, 59–60  
   introduction to, 36–39  
   philosophical debate, 40–46  
   summary of, 64–65  
 judicial power  
   decision-making modes, 3–8  
   democratic legitimacy of, 9–13  
 judicial power during transformation  
   crisis of the constitutional state, 355–360  
   modes of transformation, 344–350  
   rejection of constitutional courts, 360–364  
   transitional constitutionality, 349–355  
 judicial quality, 82, 95–96, 105, 107

- judicial review, 4, 7, 22–34, 165–167, 308–309
- judicial talent, 300
- judicial time, 303–304
- judicialization, defined, 11, 163–164, 181–182
- judicialization of politics in new democracies
  - accountability of constitutional courts, 73–80
  - introduction to, 66–68
  - judicialization, defined, 71–73
  - role of constitutional courts, 68–71
  - summary of, 80–81
- junkyard dog theory of judicial review, 32–33
- jurisdictional essentialism, 259–278
- jurisprudential cross-fertilization, 215–222
- juristocracy, 361
  
- Kadi (I and II) cases, 221
- Kelsen, Hans, 185–186
- Koskenniemi, Martti, 8
  
- Laclau, Ernesto, 326, 328
- law of democracy, 8, 122
- Lefort, Claude, 331
- legal arguments, 310–311
- legal culture, 7, 233, 236, 249
- legal method, 4–5, 187, 311, 314–315
- legal mistrust, 74
- legal mobilization, 72
- legal operation, 311
- legal-political identity, 250
- legal proceeding, 310
- legal vs. non-legal arguments, 315
- legitimacy of supranational court decisions, 113–114
- liberal constitutional democracy, 282, 331, 342–355
- liberal representative democracy, 318
- Lisbon decision (2009), 191–193
- Lisbon Treaty, 212
- Lithuanian Court, 75
- living tree constitution, 38–39
- Luhmann, Niklas, 40–41
  
- M. & Co. v. Germany*, 209
- Maastricht Treaty, 190–191, 194–195, 204–205
- Marbury v. Madison*, 70, 348
- Marckx v. Belgium*, 216
- margin of appreciation (MA), 109–110, 120, 123, 253, 260, 270, 275
- Marshall, John, 29
- mature democracies, 71
- McHugh* decision, 274
- mediating conflicts
  - jurisdictional essentialism and federalism, 259–278
  - territorial boundaries, 253–259
- Michaud v. France*, 209
- military dictatorships, 333
- modes of decision-making, 3–8, 10
- M.S.S. v. Belgium and Greece*, 209–210, 218–219
- multilateral agreements, 367
- multinational corporations (MNCs), 58
- mutual trust, 198, 203, 212, 218–219, 221
  
- Nada v. Switzerland*, 221
- national sovereignty, 331
- neo-institutionalism, 83, 91, 97–104
- Network of the Presidents of the Supreme Judicial Courts of the European Union, 237–238
- neutralization of the court, 160–161
- new democracies. *See* judicialization of politics in new democracies
- Nigerian Constitution, 165
- non-heroic courts, 301–303
- norm implementation
  - abstract norm, 313
  - constitutional norms, 4, 314–315
  - general norm, 313
  - interpretation of norms, 313
  - noncompliance with a fundamental norm, 166
- obiter dictum*, 241
- operational spaces
  - border crossings/border regimes, 368–371

- operational spaces (cont.)
  - capital market, 374–376
  - emergent field for transactions, 376–377
  - finance and, 373–374
  - sovereign default, 381–382
  - territorial inserts, 371–373
  - vulture funds, 366, 377–380
- open statehood, 188, 360
- ordinary politics. *See* judicial politics vs. ordinary politics
- originalism, 287–288
- output-legitimacy, 13
- Outright Monetary Transaction (OMT), 183, 196–197, 201, 241–242, 247
- Parliamentary Assembly of the Council of Europe (PACE), 85, 101–102
- parliamentary government, 4, 293, 319, 324
- people, 2, 263–264, 356
- Peruvian Constitutional Tribunal, 71
- Peruzzoti, Enrique, 329
- pilot judgment procedure, 125
- ping-pong game cooperation, 7
- plausibility argument, 312
- pluralism, 235
- plurality of democracies, 16, 337–338, 342
- plurality of opinions, 289
- Polish Constitution, 75
- Polish Constitutional Court, 75
- political autonomy, 68–69
- political conflict, 4, 144, 186–187
- political deliberation, 174
- political identity, 270, 325–330, 334, 354–355
- political operation, 307
- political parties
  - court decisions and, 131
  - legal arguments and, 311
  - nomination of judges, 187
  - pending prohibitions, 128
- political time, 303–304
- politicization of constitution, 40–46, 62
- politicization of courts, 11, 310
- politics/political context, 15–16. *See also* judicial politics vs. ordinary politics
- populism, defined, 325–330, 364
- populist governments and
  - constitutional courts
  - civil society cooperation with, 334–341
  - constitutional democracy and, 331–334
  - disempowerment of, 319–325
  - political identity of, 325–330, 355
- populist movement, 318, 320, 327–328, 336, 355, 357, 360
- populist regime, 319–320, 330, 332–335, 337–338, 340
- Posner, Richard, 41
- post-authoritarian transformation
  - states, 355
- post-communist transformation, 350, 352
- presidential governments, 293, 319
- proportionality standard, 47, 281–282
- public hearings, 285
- public opinion, 5, 44, 115, 119, 166, 317, 338
- public reason oriented approach, 288
- public sphere, 2
- Rawls, John, 336
- reflexive constitutionalism, 3
- religious education, 61
- representative democracy, 336
- representativeness of constitutional courts
  - argumentative representativeness, 282, 287
  - identitarian representativeness, 282, 286–287
  - interpretive methodology, 287–289
  - vicarious representativeness, 282, 289–291
  - volitional representativeness, 282–286

- rights. *See also* European Convention on Human Rights; European Court of Human Rights; fundamental rights  
 civil rights, 48–49  
 economic rights, 50  
 first generation rights, 49  
 second generation rights, 49  
 social rights, 50  
*Roe v. Wade*, 55–56  
 role of constitutional courts, 68–71, 175–181  
*Roper v. Simmons*, 54  
 Round Table Constitution, 324  
 rule of law, 16, 124  
 ruling orders, 382–383
- Schmitt, Carl, 185, 334, 362  
*Scoppola v. Italy*, 126–127, 273  
 second generation rights, 49  
 selection procedures, 100  
 self-governance rules, 2, 137  
 semi-Presidential constitutions, 28  
 separate but equal doctrine, 180  
 separation of powers, 3, 310  
*seriatim* individual judgments, 248  
 Shapiro, Martin, 9, 13, 17  
 Skowronek, Stephen, 303  
 social divisiveness, 116  
 social evolution, 179  
 social foundations of law, 12, 14  
 social rights, 50  
 socio-political shift, 16, 359  
 Solange cases, 189–190, 198, 201, 224  
 South African constitution, 320–337  
 South African Constitutional Court, 50, 64, 295–296  
 sovereign debt, 377–380  
 sovereign default, 381–382  
 Stone Sweet, Alec, 72  
 subsidiarity, 132, 191, 236, 260, 275  
 substantive subsidiarity, 236  
 subunit authority, 269  
 successor courts, 297–301  
 super-majoritarian processes, 37  
 super-majority requirements, 75  
 Superior Courts Network, 254  
 Swiss Constitutional Court, 26
- Tate, Neal, 66  
 Teitel, Ruti, 348–349  
 temporality and heroic constitutional court judges, 303–304  
 territories/territorial boundaries, 253–259, 365, 371–373  
 third wave of democratization, 343  
 totalitarianism, 116, 229  
 transformational processes of European integration, 8  
 transitional constitutionality, 349–355  
 translocal organizations of government actors (TOGAs), 253–259  
 transnational constitutional courts, 1, 9–13  
 transnational judicial interactions  
   cooperation problems, 233–236  
   cooperation types, 237–243  
   diplomatisation of judicial decision-making, 243–249  
   diversity of legal cultures, 236  
   extra-case-law cooperation, 237–238  
   gaps in knowledge and sensitivity, 235–236  
   in-case-cooperation, 241–243  
   intra-case-law cooperation, 239–243  
   national and transnational courts, 233–235  
   *obiter dictum*, 241  
   as ping-pong-like, 243–247  
 transnational law, 233–235  
 transnational organizations of government actors (TOGAs), 254–256, 258–259, 268–269, 278–279  
 Treaty of Amsterdam, 86  
 Treaty of Lisbon, 85, 88, 90  
 Treaty of Maastricht, 84, 246  
 Treaty of Rome, 85  
 tri-dimensional crisis of constitutional adjudication, 153  
 Tunisian Constitution, 321–322
- ultra vires*-control, 191  
*ultra vires* decisions, 193–194, 234  
 UN Human Rights Committee, 271



- unconstitutional constitutional amendments, 291, 297, 334
- US civil rights, 30
- US Constitution, 343
- US Department of Justice, 268
- US federalism, 253
- US Supreme Court, 55
- Valiulienė v. Lithuania*, 263
- Vallinder, Torbjörn, 66
- Venezuelan Supreme Court, 322–323
- vicarious representativeness, 282, 289–291
- Vienna Convention on the Law of Treaties, 227
- Vinter v. The United Kingdom*, 135
- violence against vulnerable people, 263–264
- Violence Against Women Act (VAWA), 260–263
- volitional representativeness, 282–286
- voting rights
  - prisoner access, 122–127, 272–275
  - system for the European Parliament election, 192
  - voice of political parties, 80
- vulture funds, 366, 377–380
- Warren, Earl, 180, 299, 333
- Weber, Max, 358, 361–362
- Weiler, Joseph H.H., 106–107
- Weimar Republic, 187–188, 357
- World Bank, 97, 378
- World War II, 27–28