

Contents

1	Introduction: comparative constitutional law – history and contours	1
2	Constitution-making	11
2.1	Why make a constitution?	11
2.2	The foundation of constitution-making: the constituent power	18
2.3	The processes of constitution-making: questions about inclusiveness	26
2.4	The substance of constitution-making: scope and comprehensiveness	32
2.5	Why comply with the constitution?	46
2.6	Conclusion	48
3	The structures of constitutional review and some implications for substantive constitutional law	49
3.1	Introduction	49
3.2	Establishing constitutional review	50
3.3	Political constitutionalism as an alternative to constitutional review in the courts	53
3.4	The classical issues in the structure of constitutional review	57
3.5	New structures of constitutional review	66
3.6	The relation between structures of constitutional review and second- and third-generation constitutional rights	74
3.7	The structure of constitutional review and third-generation rights	78
3.8	Conclusion	82
4	The structure of rights analysis: proportionality, rules and international law	83
4.1	Introduction	83

4.2	Balancing, proportionality and rules compared	84
4.3	Explaining the difference	96
4.4	A different alternative to proportionality review	101
4.5	The role of international law in domestic constitutional law	104
5	The structure of government	107
5.1	The classical enumeration of the branches of government and its modification	107
5.2	An emerging fifth branch of government?	109
5.3	Beyond the fifth branch – or modifying the three-branch model	123
5.4	Conclusion	128
6	Conclusion	129
6.1	Forms of constitutionalism other than liberal constitutionalism	129
6.2	Constitutions for modern and highly divided nations: contradictory definitions of “thin” constitutions	132
	<i>References</i>	138
	<i>Index</i>	143