

## Index

- Achnacary Agreement (1928), 477  
 Ackermann, Josef, 370  
 Acquis Group, 441, 446  
 Adoption, 67  
 Adorno, Theodor, 42, 104  
 Advertising, information and, 238–9  
 Affirmative action, 202, 266  
 Agency relationship in corporations  
   agency costs and, 384–8  
   bankruptcy, risk of, 387–8  
   capital markets and, 386  
   covenants limiting risk, 387  
   debt capital and, 383, 386–8  
   network of contracts and, 383–4  
   organization theory and, 397  
   overview, 369, 373–4, 389–90  
   ownership structure versus capital structure,  
     383, 388  
   private law and, 388  
   property rights theory and, 382–3, 388  
   risky investments, incentive for, 386–7  
   share capital and, 383, 385–6  
   texts of reference, 372  
   transaction costs and, 384  
 Aguilera, Ruth, 125, 127, 128  
 Ahlering, Beth, 117–18, 127, 417  
 Akerlof, George, 232–3, 234, 238, 239, 241–6, 247, 398,  
   400, 507–8. *See also* Information and private law  
 Alchian, Armen, 413  
 Alexy, Robert, 157–8  
 Alienation, 42  
 Alimony, 512–13  
 Allocative efficiency, 380  
 amazon.com, 248  
 American critical legalism, 163  
 American legal realism  
   critical legal studies and, 42, 163 et seq.  
   formalism versus, 60, 195–6  
   judges, role of, 159  
   legal history and, 119  
   overview, 37  
 American Revolution (1775), 195–6  
 Amsterdam Treaty (1999), 460  
 Amstutz, Marc, 468  
 Anchoring, bias of, 226–7  
 Anti-Discrimination Directive (EU), 261–2  
 Anti-discrimination law  
   affirmative action and, 202, 266  
   customer preferences and, 8, 262, 268–9  
   direct discrimination and, 8–9  
   distribution agents and, 267–8, 269–70  
   equal choice, compatibility with, 264  
   in European Union, 258, 261–2  
   feminist legal theory and, 262, 266  
   freedom of contract and, 267  
   in Germany, 263–4  
   immigration and, 262  
   indirect discrimination, 268  
   indirect indirect discrimination, 268–9  
   material justice in private law, racial discrimination  
     and, 198  
   mixed-race persons and, 193, 201, 202, 203, 204  
   overview, 261–2, 270–1  
   private power and, 258  
   quotas and, 202  
   sex differences approach, 265–7  
   sex inequality approach, 265, 266–7  
   sexual harassment, 264–7  
   social models and, 264–5  
   texts of reference, 262–3  
   in United States, 261, 270  
 Antitrust law  
   competition and, 252–3  
   constitutionalization of private law and, 176–8  
   economic approach to, 406  
   in European Union, 255  
   in Germany, 176–7, 250, 251  
   in Italy, 176–7  
   monopolies and, 252–3  
   multilevel governance and, 462–3

- Antitrust law (cont.)  
 New Brandeis School, 248, 253  
 ordo-liberalism and, 252  
 organizational contracts, bilateral monopoly and, 326–7  
 private power and, 251–2  
 takeovers and, 406, 407–8 (*See also* Takeovers)  
 in United States, 176, 251  
 Application-oriented nature of private law, 3  
 Arbitration  
 in organizational contracts, 327–8  
 transnational law and, 481  
 Aristotle, 43, 122–3, 217  
 Armour, John, 128  
 Arrow, Kenneth, 87  
 Asclepius, 401–2  
 Atiyah, Patrick Selim, 194–5  
 Auer, Marietta, 1  
 Austin, John L., 52, 98, 127  
 Australia, shareholder protection rights in, 124–5  
 Austria  
 Civil Code, 277, 439  
 codification of private law in, 182, 439  
*Nationalökonomie* in, 3  
 tort law in, 277  
 Autopoiesis, 99  
 Availability, bias of, 226
- Bachmann, Gregor, 484–5  
 Bank, Steven, 126, 127  
 Bankruptcy  
 agency relationship in corporations and, 387–8  
 takeovers and, 406  
 von Bar, Christian, 441  
 Bargaining. *See* Negotiation  
 de Beauvoir, Simone, 143  
 Beck, Ulrich, 272–4, 283–4, 289, 292–7. *See also*  
 Tort law  
 Becker, Gary, 331  
 Behavioural economics  
 bias and, 221–2  
 private law and, 73  
 status-related rights and, 346, 349  
 Behavioural science  
 bias, contract law and, 210, 221–8 (*See also* Bias)  
 bounded rationality and, 90, 92  
 Belgium, shareholder protection rights in, 125  
 Ben-Porath, Yoram, 490  
 Benson, Peter, 2  
 Bentham, Jeremy, 52, 121  
 Berle, Adolf A., 255, 362, 372, 374–82, 383, 412. *See also*  
 Ownership versus control of corporations  
 Berle-Means corporations, 373  
 Berman, Harold J., 120, 473  
 Bernatzik, Edmund, 348, 350
- Bernholz, Peter, 465  
 Bernstein, Lisa, 30, 31, 484–5, 487–91, 492. *See also*  
 Private ordering  
 Berthelemy, M., 350  
 Bezos, Jeff, 370  
 Bhopal chemical disaster, 293, 429, 432  
 Bias  
 of anchoring, 226–7  
 of availability, 226  
 bounded rationality and, 222–5  
 contract law and, 210, 221–9  
 heuristics and, 225–6  
 negotiation and, 223–5  
 prospect theory and, 222  
 of representativeness, 226  
 Big data, 240–1  
 Bingham, Tom (Lord), 445  
 von Bismarck, Otto, 199, 285  
 Bix, Brian, 484–5  
 Blair, Tony, 342, 352, 354  
 Blankenburg, Erhard, 194–5  
 Bloch, Ernst, 187  
 Blood doping in sports, 248–9  
 Blum, Walter, 287  
 Böckenförde, Ernst-Wolfgang, 131  
 Bodenheimer, Edgar, 121–2  
 Bohle, Dorothee, 417, 426–7  
 Böhm, Franz, 11, 25, 31, 134–5, 136–42, 145, 151, 152, 153,  
 154–5, 166, 168, 173, 213, 249–51, 252–5, 259, 454,  
 459, 461. *See also* Ordo-liberalism; Private power  
 and private law  
 Bounded rationality  
 behavioural science and, 90, 92  
 bias and, 222–5  
 cognitive errors and, 91–2  
 evolution of, 78–9, 89–90  
 integration with economics versus departure from  
 economics, 92–3  
 irrational behaviour and, 92  
 learning, role of, 91  
 neoclassical economics versus, 89–90  
 overview, 71–2, 73–4, 93–4  
 prospect theory and, 91–2  
 psychology and, 90, 92  
 rational choice theory versus, 90–1  
 simplifications and, 90–1  
 texts of reference, 72–4  
 transaction costs versus, 89–90  
 Bradford, Anu, 314  
 Brazil  
 big data in, 240  
 private actors, constitutional protections against in,  
 132–3  
 Breast implants, tort law and, 272  
 Brexit, 128

- Brownsword, Roger, 301, 302  
 Brüggemeier, Gert, 283  
 Bukovina, living law in, 29  
 Bulgaria, Mediterranean model and, 427  
 Business judgment rule, 370–1, 380–1, 389, 409–10  
 Butler, Judith, 263, 266  
 Buxbaum, Richard M., 456–7, 460, 463–6, 467, 469–70. *See also* Multilevel governance
- Calabresi, Guido, 73, 77, 80, 84, 94, 272–4, 280, 282–3, 286–93, 297, 306, 405. *See also* Tort law  
 Calliess, Graf-Peter, 28, 309, 311  
 Camus, Albert, 143  
 Canaris, Claus-Wilhelm, 167–8, 173–6. *See also* Constitutionalization of private law  
 Canon of texts of reference, 4. *see also specific topic*  
 Capitalism  
   private law and, 183, 195–6  
   Rhenish capitalism, 215–16  
   tort law and, 295–6  
   varieties of capitalism (VoC) (*See* Varieties of capitalism (VoC))  
 Capital markets  
   agency relationship in corporations and, 386  
   corporations and, 372, 405  
   multilevel governance and, 457, 463–6  
   ownership versus control of corporations and, 377–82  
   takeovers and, 410  
 Capital Requirements Directive IV (EU), 387  
 Capitant, Henri, 347  
 Cappelletti, Mauro, 457  
 Carbonnier, Jean, 347, 497–8, 499, 500–3, 504, 515–16.  
   *See also* Scope of law  
 Castells, Manuel, 330  
 Cattle industry, private ordering in, 484, 487, 491–3  
 Centre for Judicial Cooperation, 445  
 Charmont, Edmont, 184  
 Chase Manhattan Bank, 428–9  
 Cheapest cost avoider, 282–3, 287–8, 289  
 Cheffins, Brian, 126, 127  
 Chernobyl nuclear disaster, 293, 294  
 Chicago Cubs, 370–1  
 Chicago School, 30, 62, 75, 82, 139  
 Chicago Tribune Inc., 371  
 Child custody, 512–13  
 Child support, 512–13  
 China, digital technology in, 307  
 Circularity  
   in discourse theory, 107  
   in systems theory, 99–100  
 Civil rights  
   anti-discrimination law (*See* Anti-discrimination law)
- material justice in private law and, 193, 201, 202, 203, 204  
 Climate change, 180–1  
 Clinton, Bill, 477  
 CMEs. *See* Co-ordinated market economies (CMEs)  
 Coase, Ronald, 30, 36, 55, 72–3, 74–7, 78, 79–85, 87, 93–4, 139, 230, 237, 238–9, 276–7, 286, 287, 288, 289, 325, 360–3, 365–8, 372, 397, 405, 443, 506, 508–9. *See also* Corporations; Law and Economics; Theory of the firm (Coase); Transaction costs  
 Coase Theorem, 80–2  
 Codes of conduct  
   organizational contracts and, 328  
   overview, 6, 7  
   private ordering and, 492  
 Codetermination laws, 201–2  
 Coffee, Jack, 128  
 Cognitive errors, bounded rationality and, 91–2  
 Cohen, Morris, 164  
 Cohn-Bendit, Daniel, 394  
 Coing, Helmut, 118  
 Collins, Hugh, 28, 309  
 Columbia University, 396  
 Common Agricultural Policy, 461  
 Common European Sales Law (proposed), 116, 183, 446, 447, 452  
 Communication process, 12–13  
 Communication theory  
   discourse theory (*See* Discourse theory)  
   inside versus outside question and, 36, 41–44, 57  
   overview, 95  
   philosophy and, 96  
   social sciences and, 96  
   systems theory (*See* Systems theory)  
   texts of reference, 95–7  
 Commutative justice, contract law and, 216, 217  
 Comparative advantage, 465  
 Comparative institutional analysis, 71, et seq., 77, 87, et seq. 420, 431  
 Comparative law  
   *Cassis de Dijon* case and, 111–12  
   functionalism and, 114–15  
   functional method in private law and, 443–5 (*See also* Functional method in private law)  
   interdisciplinary approach to private law and, 18  
   legal history, relationship to, 113–16  
   Legal origin theory (*See* Legal origin theory (LOT))  
   texts of reference, 112–14  
   varieties of capitalism (VoC) and, 417  
 Comparative nature of private law  
   communication process and, 12–13  
   hermeneutics and, 12–14  
   interdisciplinary approach, integrating, 11  
   interpretation and, 13–14

- Comparative nature of private law (cont.)
  - in jurisprudence, 11–14
  - as thesis of private law theory, 2–3
- Competition law. *See* Antitrust law
- Computer technology. *See* Digital technology and private law
- Condon, Rónán, 190
- Consent, freedom of contract and, 213
- Constitutionalization of private law
  - antitrust law and, 176–8
  - contract law and, 173–6
  - defined, 166
  - evolution of, 169
  - family law and, 174
  - in France, 171–3
  - fundamental rights and, 169–71
  - in Germany, 173–6
  - human rights and, 169–71
  - in Italy, 176–8
  - ordo-liberalism and, 167–8, 169, 174
  - overview, 166, 178–9
  - social interests and, 171–3
  - subjective rights and, 171–3
  - texts of reference, 166–8
  - transnational law and, 483
- Constitutional law
  - economic constitution, 26
  - evolution of, 24–5
  - instrumentalization of rights and, 27
  - labour constitution, 26
  - ordo-liberalism and, 25
  - private law and, 24–9
  - statutory regulation and, 26–8
  - transnational private ordering and, 28–9
- Constitutional pluralism, 351
- Consumer law
  - democratization of private law and, 188–91
  - in European Union, 346
  - in Germany, 346, 352, 356
  - information paradigm and, 247
  - material justice in private law and, 199
  - multilevel governance and, 458
  - in Netherlands, 346
  - private power and, 251
  - sharing economy and, 346–7
  - status-related rights and, 345–6, 354–8
- Consumer Sales Directive (EU), 404
- Contract law
  - bias and, 210, 221–9 (*See also* Bias)
  - commutative justice and, 216, 217
  - consent and, 213
  - constitutionalization of private law and, 173–6
  - corrective justice and, 216, 217
  - digital technology and, 306–7
  - in France, 404
  - function of contract law as limit on freedom of contract, 211, 212–15
  - in Germany, 211–12, 404
  - income tax, redistribution through versus, 217–20
  - incomplete contracts, 328–9
  - individualism and, 210–11
  - inequality of bargaining power, 221
  - inheritance tax, redistribution through versus, 217–20
  - justice of consensus (*See* Justice of consensus)
  - justification of freedom of contract, 210, 211–16, 228–9
  - lenders, contractual obligations of, 59–60, 64, 65
  - market order and, 213
  - markets and, 216
  - negotiation (*See* Negotiation)
  - normative tone of, 216
  - ordo-liberalism and, 213
  - organizational contracts (*See* Organizational contracts)
  - overview, 207, 228–9
  - parties versus society, 216
  - private law theory and, 2
  - private power and, 251
  - redistribution as limit on freedom of contract, 210, 217–21, 228–9
  - reforms in, 404
  - regulation and, 216
  - relational contracting and, 85–6
  - responsible lending and, 207–8, 220
  - scope of law and, 499, 505, 508–9
  - socio-economic function of contract, 215
  - sociology and, 66–9
  - spot contracts, 323, 324–5, 335–7
  - state power and, 210–11
  - subsidiarity and, 219–20
  - systems theory and, 102–3
  - texts of reference, 208–9
  - tort law and, 285–6
  - total welfare and, 220
  - transnational law and, 477, 480–1
  - welfare state and, 188–91
- Contributory negligence, 46–7
- Control
  - control premia, 409
  - in corporations, 394–5, 406–8
  - direct share purchases and, 408
  - proxy fights and, 408
  - takeovers and, 394–5, 406–9
- Control premia, 409
- Co-ordinated market economies (CMEs)
  - comparative law and, 417
  - liberal market economies (LMEs) versus, 418–19, 425, 427

- overview, 417
- tort law in, 278
- Corporate governance research, 395
- Corporate social responsibility (CSR)
  - comparative institutional analysis and, 431
  - contract governance and, 428
  - corporations, tort liability for violations of international law, 415–16
  - criticisms of, 420
  - different versions of, 420
  - in Ecuador, 428
  - empirical research in, 421, 430–1
  - in European Union, 419, 421, 432
  - evolution of, 419–20
  - globalization and, 421
  - international regulations and, 428
  - Internet and, 430
  - market for virtue, 427–8
  - NGOs and, 429
  - in Norway, 428
  - organizational contracts and, 315
  - organization theory and, 398, 404
  - origins of, 371
  - overview, 361–2, 414, 431
  - profitability and, 428–30
  - regulation and, 415
  - rise of, 417, 428
  - in South Africa, 428
  - texts of reference, 416–418
  - United Nations and, 421
  - varieties of capitalism (VoC) compared, 422, 424, 430
- Corporations
  - agency relationship in (*See* Agency relationship in corporations)
  - Berle-Means corporations, 373
  - bipolar market-firm relationship rejected, 333–5
  - black box model of, 87–8, 372, 382, 383–4, 410
  - business judgment rule, 370–1, 380–1, 389, 409–10
  - capital markets and, 372, 405
  - control in, 394–5, 406–8
  - corporate governance research, 395
  - corporate social responsibility (CSR) (*See* Corporate social responsibility (CSR))
  - Delaware effect, 438–9, 443, 446, 447, 449–50, 465
  - direct share purchases, 408
  - as efficient means of economic organization, 363
  - executive pay in, 385
  - external relations of, 362
  - external versus internal governance, 395, 404
  - incorporation theory, 437
  - information paradigm and, 247
  - insider trading, 404–5
  - institutional economics and, 85–6, 360, 363
  - internal relations of, 362
  - law and economics and, 360, 394, 395–6, 404, 405
  - as legal organisms, 363–4
  - legal personhood of, 360
  - mergers (*See* Takeovers)
  - minority shareholders, duties to, 360, 370–1
  - in neoclassical economics, 361–2
  - as network of contracts, 372
  - organistic theory of, 363–5
  - organizational actors, 369–71
  - overview, 360, 367–8
  - ownership versus control of (*See* Ownership versus control of corporations)
  - principal-agent relationship in (*See* Agency relationship in corporations)
  - property rights theory and, 369
  - proxy fights, 408
  - seat theory, 437
  - shareholders (*See* Shareholders)
  - society as social organism and, 363, 364–5
  - stakeholders in, 369, 371
  - state and, 364–5
  - takeovers (*See* Takeovers)
  - texts of reference, 360–2
  - theory of the firm, 365–7 (*See also* Theory of the firm (Coase))
  - tort liability for violations of international law, 415–16
  - transaction costs and, 360
  - transnational corporations (*See* Transnational corporations)
- Corporatism, 423
- Corrective justice
  - contract law and, 216, 217
  - tort law and, 275
- Court of Arbitration for Sports (CAS), 248–9
- Cover, Robert, 65
- Creative destruction, 235
- Creeping constitutionalization, digital technology and, 311
- Critical approaches to private law, 4–5
- Critical legal studies
  - American critical legalism and, 163
  - American legal realism and, 42, 163 et seq.
  - family law and, 67
  - legal history and, 119
  - values in private law and, 159–60, 162–3
- Critical theory
  - legal positivism versus, 53
  - Marxism and, 42
  - organization theory and, 397
  - overview, 42
- Croatia, Mediterranean model and, 427
- CSR. *See* Corporate social responsibility (CSR)
- Customer preference, anti-discrimination law and, 8
- Cyberlaw. *See* Digital technology and private law

522

Czech Republic  
 Mediterranean model and, 427  
 private law in, 183

Dagan, Hanoch, 2, 27, 328

Damages  
 private ordering, criticism based on, 489–90  
 in tort law, 293

Darwin, Charles, 402

Data protection, digital technology and, 304

David, René, 113–14, 117, 446

Dawson, Mark, 471

Deakin, Simon, 117–18, 125, 126, 127, 128, 417

De Beers (diamond dealers), 487–8

Declaration of the Business Roundtable, 369

Decolar (Brazilian company), 240

Default rules  
 in divorce, 513–14  
 scope of law and, 499–500, 515–16

de Filippi, Primavera, 303

Delaware effect, 438–9, 443, 446, 447, 449–50, 465

Delors, Jacques, 421

Democratization of private law  
 capitalism and, 183  
 consequences of, 188  
 consumer law, 188–91  
 contract law, welfare state and, 188–91  
 courts, role of, 187  
 democratic deficit of EU, 182  
 evolution of, 182  
 freedom versus equality and, 187  
 judges and, 185, 186  
 justice versus reason and, 185  
 legal history and, 186  
 legislatures and, 184–5  
 methodology and, 186  
 ordo-liberalism and, 187–8  
 overview, 180, 191–2  
 socio-economic issues and, 187  
 texts of reference, 181–2

Demogue, René, 341–3, 347–51, 352, 355, 357, 358, 359.  
*See also* Status-related rights

DeMott, Deborah A., 59

Demsetz, Harold, 382, 413

Denmark, seat theory in, 437

Dependent market economies (DPM), 417, 417

Deutsche Bank, 370

Diamond industry, private ordering in, 484, 487–91

Dietz, Thomas, 484–5, 490

Digital technology and private law  
 architecture and law, relationship between, 305–6  
 architecture defined, 303  
 in China, 307  
 code and law, relationship between, 301–2,  
 305–6, 307

## Index

code defined, 303

constitutionalization without state, 302, 309–10

contract law and, 306–7

creeping constitutionalization and, 311

data protection and, 304

digitization, effect of, 300–1

dilemma of rationalization and, 310

in European Union, 301–2, 304

hackers, 313

hierarchy of norms and, 312

judicial review and, 312–13

*lex digitalis*, 309–10

meta-rules, 313

Nazi memorabilia and, 308

overview, 298, 313–14

polycentric globalization and, 310–11

pornography and, 303–4

*Privatrechtsgesellschaft* (private law society) and, 302

regulation and, 302–3, 305

search engines, privacy and, 298

societal constitutionalism and, 308

structural linking of subsystems and law and, 311–12

texts of reference, 298–300

in United States, 301–2, 307

Dilthey, Wilhelm, 42, 43

Direct discrimination, 8–9

Direct share purchases, 408

Discourse theory  
 circularity in, 107  
 facts and norms in, 104  
 hermeneutics and, 50–1  
 individual versus collective in, 104–5, 106–7  
 interdisciplinary approach to private law and, 18

language and, 104

legal positivism compared, 107

legislation and, 107–8

Marxism versus, 104

materialization of private law and, 105–6

methodology of, 104

overview, 108–9

procedural legitimacy of law in, 107–8

reciprocal recognition of co-operating legal persons  
 in, 105–6

social contract and, 106, 107

subjective rights and, 105

systems theory compared, 96–8, 108–9

texts of reference, 95–7

Discrimination. *See* Anti-discrimination law

Dishonesty, cost of, 242–3

Dispositives of power, 252

Distributive justice. *See* Material justice in private law

Division of labour, sociology and, 62–3, 65, 66–9

Divorce  
 bargaining process in, 513–15  
 default rules in, 513–14

- elements of importance, 513
- no-fault divorce, 512
- private ordering in, 511–15
- shadow of law and, 511, 513–15
- Droit* versus *non-droit*, 500–3, 515–16
- Duguit, Léon, 184, 185–6, 282, 347, 348–9, 350
- Durkheim, Émile, 29, 63, 66–9, 95, 172–3, 185–6, 480.
  - See also Sociology and private law
- Duve, Thomas, 116, 118–19, 128
- Dworkin, Ronald, 37–8, 41, 53, 156–7, 159, 160–3, 164, 165, 444. See also Values in private law
- Easterbrook, Frank, 302, 307–8, 448
- E-Commerce Directive (EU), 497
- Economic constitution
  - constitutional law and, 26
  - multilevel governance and, 458–63
- Economics and private law
  - behavioural economics, 73
  - bounded rationality (See Bounded rationality)
  - institutional economics (See Institutional economics)
  - interdisciplinary approach to private law and, 18
  - overview, 71
  - texts of reference, 72–4
  - tort law and, 73, 77
  - transaction costs (See Transaction costs)
- Economic sociology
  - embeddedness, 497, 504–10, 515–16
  - New economic sociology, 330, 504–5
  - organizational contracts and, 318, 319, 330–1
  - private law and, 63
- Ecuador, corporate social responsibility (CSR) in, 428
- Ehrlich, Eugen, 29, 30, 60, 61–2, 477, 478
- Eidenmüller, Horst, 446–7, 450
- Ellickson, Robert, 30, 484–5, 487, 491–3. See also Private ordering
- Embeddedness, 497, 504–10, 515–16
- Emergency Rescue Committee, 396
- Employment law, corporations and, 366–7
- England. See United Kingdom
- Enlightenment, 197–8
- Enterprise liability in tort law, 278, 288–90
- Esser, Josef, 13, 36, 37–8, 39, 41–51, 159. See also Hermeneutics
- Estonia
  - internet platforms, freedom of expression of, 495
  - private law in, 183
- Eucken, Walter, 136, 139, 141, 252, 459, 461
- Euro crisis, 191, 421, 454–6, 457, 463
- European Central Bank (ECB), 454, 455–6, 470
- European Charter of Fundamental Rights
  - constitutionalization of private law and, 27–8, 170
  - human dignity in, 211–12
- European Civil Code (proposed), 115, 123, 182, 183–4, 274, 281, 351, 446
- European Commission
  - anti-discrimination law and, 191
  - antitrust law and, 177
  - comparative law and, 110, 116, 442
  - consumer law and, 355
  - contract law and, 441
  - European Civil Code (proposed) and, 183–4
  - multilevel governance and, 458
  - tort law and, 274, 281
- European Convention on Human Rights, 497
- European Court of Human Rights (ECtHR)
  - constitutionalization of private law and, 27–8
  - Delfi AS v. Estonia* (2015), 495–7, 502, 510
  - hate speech and, 495–7, 502, 510
  - internet platforms, freedom of expression of, 495–7, 502, 510
- European Court of Justice (ECJ)
  - generally, 45
  - anti-discrimination law in, 202, 262
  - Audiolux*, 360, 367–8
  - Aziz v. CatalunyaCaixa* (2013), 175–6
  - CA Consumer Finance SA v. Bakkus* (2014), 207–8
  - Cartesio* (2008), 452
  - Cassis de Dijon* case, 110–12, 123, 125–6, 128, 461
  - Centros Ltd* (1999), 437, 441, 442, 443, 452, 453, 464
  - Centrum voor gelijkheid v. Feryn*, 262, 271
  - common foundations of law in, 110
  - constitutionalization of private law in, 27–8, 170, 178–9
  - Corporate Social Responsibility (CSR) and, 430
  - Courage Ltd v. Crehan* (2001), 178
  - direct discrimination and, 8
  - Francovich and Bonifaci v. Italy* (1991), 296
  - Google Spain v. AEPD and Costeja González* (2014), 298, 304, 308, 312–13, 314
  - Gruber* (2005), 341, 350–1, 357, 358–9
  - Janecek* decision (2008), 192
  - labour law in, 448
  - Manfredi v. Lloyd Adriatico Assicurazioni SpA* (2006), 178
  - multilevel governance and, 460
  - Pringle v. Government of Ireland* (2012), 454–6, 470–1
  - Rewe Zentrale v. Bundesverwaltung für Branntwein* (1979), 110–12, 123, 125–6, 128
  - Schmitt v. TÜV Rheinland LGA Products GmbH* (2017), 272, 289–90, 291, 297
  - status-related rights in, 341, 350–1, 357, 358–9
- European internal market, 267, 357, 358, 458, 460, 461–2, 467–8
- European Law School, 445
- European Parliament, 110, 116, 177, 182, 183–4, 191, 274
- European Society for Comparative Legal History, 116
- European Stability Mechanism (ESM), 454–6, 470–1

524

European Stewardship Codes, 432  
 European Union. *See also specific country*  
   Academic Draft Common Frame of Reference, 183, 191, 281, 441, 446  
   Anti-Discrimination Directive, 261–2  
   anti-discrimination law in, 258, 261–2  
   antitrust law in, 255  
   Banking Union, 502–3  
   Capital Requirements Directive IV, 387  
   Circular economy, 190  
   Common Agricultural Policy, 461  
   common foundations of law in, 110–11  
   consumer law in, 346  
   Consumer Sales Directive, 404  
   contract law in, 175  
   Corporate social responsibility (CSR) in, 419, 421, 432  
   digital technology in, 301–2, 304  
   E-Commerce Directive, 497  
   family law in, 174  
   free movement of goods in, 110–12  
   functional method in private law in, 441  
   Law and Economics in, 292  
   law as a product in, 452  
   organizational contracts in, 319  
   privacy law in, 298  
   Product Liability Directive, 279, 285–6  
   product liability in, 279  
   Sales Directive, 319  
   Takeover Directive, 368, 392  
   tax avoidance in, 449  
   tort law in, 289–90, 296  
   transaction costs in, 76–7  
   transfer of law in, 440–1  
   varieties of capitalism (VoC) and, 424  
 European University Institute, 445  
 Evolution, 402  
 Ewald, François, 284  
 Executive pay, 385  
 Existentialism, 143  
 Faber, Malte, 465  
 Facebook, 496–7, 510  
 Family law  
   alimony, 512–13  
   child custody, 512–13  
   child support, 512–13  
   constitutionalization of private law and, 174  
   Critical legal studies and, 67  
   divorce, private ordering in, 511–15  
   in European Union, 174  
   feminist legal theory and, 67  
   in France, 174  
   no-fault divorce, 512  
   patrimony, 512–13

## Index

private ordering in, 484, 511–15  
 private power and, 251  
 sociology and, 67  
 Federalism  
   law as a product in federal states, 449  
   multilevel governance (*See* Multilevel governance)  
 Feminist legal theory  
   anti-discrimination law and, 262, 266  
   family law and, 67  
   material justice in private law and, 202  
 Fiduciary duties, private ordering and, 493–4  
 Firms. *See* Theory of the firm (Coase)  
 Fischel, Daniel, 448  
 Fischer-Lescano, Andreas, 96  
 Flume, Werner, 175  
 Ford, Henry, 431  
 Formalism  
   American legal realism versus, 60, 195–6  
   legal formalism, 60  
   material justice replacing, 193–4, 199 (*See also* Material justice in private law)  
   social question and, 347  
 Forsthoff, Ernst, 463  
 Foucault, Michel, 249–51, 252, 256–60. *See also* Private power and private law  
 France  
   Code Civil, 68, 182, 184, 185, 186, 187–8, 198, 277, 281, 282, 284–6, 343, 344–5, 347, 404, 439  
   Code Napoléon, 182  
   codification of private law in, 182, 439  
   constitutionalization of private law in, 171–3  
   contract law in, 404  
   European Constitution, rejection of, 116  
   evolution of civil law in, 184  
   family law in, 174  
   French Revolution (1789), 119–20, 121, 195–6, 343  
   internet platforms, freedom of expression of, 495  
   Mediterranean model and, 427  
   modernization in, 423  
   1968 riots, 503  
   organizational contracts in, 319  
   Parliament, 184  
   product liability in, 291  
   protest in, 394  
   special purpose companies in, 381  
   status related rights in, 343, 344–5  
   tort law in, 277, 281–2, 283–6  
   Workers' Compensation Act, 281–2  
 Frank, Jerome, 119  
 Frankenberg, Günter, 114  
 Frankfurt School, 42, 104, 394, 397  
 Freedom of contract  
   anti-discrimination law and, 267  
   consent and, 213  
   function of contract as limit on, 211, 212–15



- income tax, redistribution through versus, 217–20  
 inheritance tax, redistribution through versus, 217–20  
 justification of, 210, 211–16, 228–9  
 market order and, 213  
 markets and, 216  
 ordo-liberalism and, 213  
 overview, 228–9  
 parties versus society, 216  
 redistribution as limit on, 210, 217–21, 228–9  
 regulation and, 216  
 socio-economic function of contract and, 215
- Freedom of expression  
 hate speech, 495–7, 502, 510  
 internet platforms, 495–7, 502, 510
- Freiburg School, 25, 76, 136, 139  
*Freirechtsschule*, 159
- Freud, Sigmund, 42, 55
- Fried, Charles, 2, 87
- Friedman, Milton, 75, 420, 427, 429, 431
- Friedmann, Wolfgang, 477
- Friedrich II (Prussia), 120–1
- Fry, Varian, 396
- Fukushima nuclear disaster, 293
- Fuller, Lon, 37, 39–41, 51, 52, 53, 158, 161
- Functional differentiation, 69
- Functional method in private law  
 common law and, 445–6  
 comparative law and, 443–5  
 in European Union, 441  
 integration through law and, 442–3  
 interpretation and, 444–5  
 law as a product versus, 343  
 legal education and, 445  
 legal positivism and, 444  
 legal transplants and, 444  
 overview, 437, 438, 451–3  
 texts of reference, 437–9
- Gadamer, Hans-Georg, 39, 42, 43–4
- Galanter, Marc, 432
- Game theory  
 alternative game theory, 223–5  
 bargaining in, 21  
 irrational behaviour and, 225  
*iustum pretium* and, 21–2  
 maximizers, 223–5  
 multiple shot versus one shot games, 23  
 negotiation and, 223–5  
 organizational contracts and, 321  
 other decision theory versus, 20  
 prisoner's dilemma and, 22, 23–4  
 private ordering and, 491  
 reconstruction of interdisciplinary theory in law and, 23–4  
 relevance of interdisciplinary theory and, 20–3  
 satisficers, 223–5  
 third parties and, 225  
 trembling hand problem and, 23  
 usefulness of, 20
- Gardner, John, 51–2
- Gates, Bill, 370
- Gelter, Martin, 157–8
- General Agreement on Tariffs and Trade (GATT), 309
- General Electric, 373
- Gény, François, 347, 354–5
- George Mason University, 404
- Germany  
 Act against Restraints of Competition, 177  
*Allgemeines Gleichbehandlungsgesetz* (German Equal Treatment Act), 263–4, 270  
 anti-discrimination law in, 263–4  
 antitrust law in, 176–7, 250, 251  
*Bank Surety* case, 26, 166, 175–6, 178  
 Basic Law, 26, 175  
*Blinkfür* decision, 142, 149, 151–2, 153  
*Bürgerliches Gesetzbuch* (Civil Code) (BGB), 95, 100–1, 108, 133, 183, 187–8, 198, 199, 211–12, 277, 343–5, 356, 404  
 codetermination laws in, 201–2  
 codification of private law in, 182  
 communism, law under, 191–2  
 Constitution, 211–12  
 constitutionalization of private law in, 173–6  
 Constitutional Law, 17  
 consumer law in, 346, 352, 356  
 contract law in, 175, 211–12, 404  
 corporatism in, 423  
*Freirechtsschule* (Free School) in, 159  
*Game Damage* case (1989), 73, 82–3  
*Holocaust Law* case (2018), 156, 161–2, 163–4  
 human dignity in, 211–12  
 internet platforms, freedom of expression of, 495  
 kickbacks in, 231  
 Liberal Democratic Party, 352  
*Lüth* decision, 26, 132–3, 142, 149, 151–2, 153  
 material justice in, 199  
 National Socialism, law under, 191–2  
 new production regimes in, 423  
 organizational contracts in, 319  
*Pechstein/International Skating Union* case (2016), 248–9, 255, 258–60, 481  
 protest in, 394  
 seat theory in, 437  
 shareholder protection rights in, 124  
 Social Democratic Party, 352  
*Sozialstaatsprinzip* (Social State Principle), 26  
*Staatswissenschaften* in, 3

- Germany (cont.)  
 status-related rights in, 343–5  
 Stock Corporation Act, 371  
 tort law in, 277  
 values in private law in, 160  
*Volkswagen/Prevent Group* case (2019), 315–17, 324, 326–7, 334, 337  
 welfare state in, 199
- Gerstenberg, Oliver, 312–13
- van Gerven, Walter, 445
- Ghaleigh, Navraj Singh, 118–19
- Gide, André, 185–6
- von Gierke, Otto, 4, 67, 169–70, 184, 187, 188, 196, 199, 200, 345, 356, 360–2, 363–5, 367–8. *See also* Corporations
- Globalization  
 corporate social responsibility (CSR) and, 421  
 private power and, 248  
 status-related rights and, 342  
 transnational law and, 474, 475
- Goldberg, Victor, 317–18, 333
- Goldmann, Berthold, 479
- Gond, Jean-Pascal, 420
- Google, 370
- Governance research, 74, 78, 85
- Granovetter, Mark, 63, 319, 332, 333, 497–8, 499, 504–10, 511, 515–16. *See also* Scope of law
- Grechenig, Kristoffel, 157–8
- Greece, Mediterranean model and, 427
- Green, Leslie, 51
- Greenhouse gas emissions, 180–1
- Greskovits, Béla, 417, 426–7
- Grundmann, Stefan, 452
- Grundnorm* (hypothetical norm), 41, 52
- Gurvitch, Georges, 185–6
- Habermas, Jürgen, 50–1, 95–8, 102–3, 104–8, 144, 152, 194–5, 196, 200–4, 263, 264–5. *See also* Discourse theory; Material justice in private law
- Hackers, 313
- Hale, Robert, 164
- Hall, Peter, 416, 417–419, 422–7, 429, 430, 431. *See also* Varieties of capitalism (VoC)
- Halliday, Terence C., 480–1
- Hallstein, Walter, 255, 440
- Hand, Learned, 36, 46–7, 55–6, 82, 278, 289
- Hart, H.L.A., 37, 39–41, 51, 52, 53, 95, 158, 311
- Harvard University, 396
- Hate speech, 495–7, 502, 510
- von Hayek, Friedrich A., 14–15, 56–7, 127, 173, 232–3, 234–7, 239, 240, 241, 247, 328, 352, 353, 467–8. *See also* Information and private law
- Health insurance, imperfect distribution of information and, 244
- Heck, Philipp, 348
- Hegel, Georg W.F., 69, 104, 120, 211–12, 349, 365, 506
- Heidegger, Martin, 43–4
- Heller, Michael, 2, 27, 328
- Henry VIII (England), 120
- Hermeneutics  
 comparative nature of private law and, 12–14  
 compatibility with legal positivism, 13–14  
 discourse theory and, 50–1  
 evolution of, 43–4  
 freedom and limits in, 44  
 hermeneutic circle, 49–50  
 inside versus outside question and, 39  
 interdisciplinary approach to private law and, 12–14  
 judges, role of, 45–6, 47–9, 50–1  
 legal positivism compared, 41–2  
 methodology of, 44, 47–8, 50–1  
 overview, 57–8  
 precedent and, 48–9  
 pre-conception and, 39, 47, 48–9  
 principles and norms in, 44–5  
 private law theory and, 36  
 result-based decision-making in law and, 44  
 rule of law and, 48–9  
 systems theory and, 50–1
- Hesselink, Martijn, 189
- Heuristics, bias and, 225–6
- Hirschman, Albert, 391, 394–404, 407, 410, 411–13, 446, 506. *See also* Organization theory
- Historical School, 197
- Hobbes, Thomas, 106, 131–2, 146, 505
- Hofer, Sybille, 198–9
- Hollingsworth, J. Rogers, 432
- Holmes, Oliver Wendell, 62, 127, 348
- Homogeneity of design, 2
- Hopt, Klaus, J., 456–7, 460, 463–6, 467, 469–70. *See also* Multilevel governance
- Horkheimer, Max, 42, 104
- Human dignity, 211–12
- Human rights  
 constitutionalization of private law and, 169–71  
 status-related rights and, 349–50  
 transnational corporations and, 6–8
- Hume, David, 146, 280, 352, 353, 354
- Hungary  
 Civil Code, 440  
 Mediterranean model and, 427  
 private law in, 183
- Husa, Jaakko, 114–15
- Husserl, Edmund, 143
- Hybrid forms of organization, 7
- Idea of justice (Sen), 135, 145–6
- Identity Economics, 508
- Immigration, anti-discrimination law and, 262
- Income tax, redistribution and, 217–20

- Incomplete contracts, 328–9  
 Incorporation theory, 437  
 Individualism  
   contract law and, 210–11  
   discourse theory, individual versus collective in, 104–5, 106–7  
   methodological versus normative individualism, 505  
   social question and, 347  
   status-related rights versus, 350  
   in United States, 106  
 Industrial Revolution  
   status-related rights and, 344  
   tort law and, 277–8  
 Information and private law  
   advertising and, 238–9  
   big data and, 240–1  
   brand names as solution to imperfect distribution of information, 244–5  
   central planning, criticism of, 233, 234–7  
   commodity prices and, 234, 241–6  
   decentralized distribution of information, 233, 234–7  
   dishonesty, cost of, 242–3  
   health insurance and, 244  
   imperfect distribution of information, 233–4, 237–41  
   information economics, 237  
   information intermediaries, 244, 245  
   information paradigm, 246–7  
   institutions as solution to imperfect distribution of information, 244, 245  
   invisible hand and, 237  
   job selection and race and, 244  
   kickbacks and, 231–2  
   neoclassical economics, critique of, 234  
   organizational contracts, distributed knowledge and, 328  
   overlapping information, 240, 246–7  
   overview, 230–1, 233–4  
   ownership versus control of corporations and, 379–80  
   price dispersion and, 237–8  
   reputation as solution to imperfect distribution of information, 244  
   scientific knowledge versus ordinary knowledge, 235–6  
   screening and, 245–6  
   signals and, 236, 245–6  
   texts of reference, 232–3  
   transaction costs and, 230  
   used cars and, 243–4  
 Information economics, 237  
 Information overkill, 18–19  
 Inheritance tax, redistribution and, 217–20  
 Innovation  
   in legal positivism, 53, 54–7  
   sociology, legal innovation and, 64–5  
 Insider trading, 404–5  
 Institut für Sozialforschung (Frankfurt/Main), 42  
 Institutional economics  
   corporations and, 85–6, 360, 363  
   evolution of, 77–8, 84–5  
   governance research and, 74, 78, 85  
   governance schemes and, 88–9  
   markets and, 85–6  
   monopolies and, 87–8  
   neoclassical economics versus, 86–7  
   new institutional economics, 30, 63, 363, 374, 416–17  
   overview, 71, 93–4  
   relational contracting and, 85–6  
   texts of reference, 72–4  
   total welfare and, 220  
   transaction costs versus, 87  
   varieties of capitalism (VoC) and, 416–17  
 Instrumentalization of rights, 27  
 Integration through law, 442–3, 457  
 Intellectualism, legal history and, 122–3  
 Interdisciplinary approach to private law  
   communication process and, 12–13  
   comparative approach, integrating, 11  
   comparative law and, 18  
   discourse theory and, 18  
   economics and, 18  
   extension of interdisciplinary perspectives, 10  
   hermeneutics and, 12–14  
   information overkill and, 18–19  
   interpretation and, 13–14  
   in jurisprudence, 11–14  
   law and economics compared, 2, 15–17  
   legal history and, 18  
   legal practice, importance for, 14–15  
   legal scholarship, importance for, 14–15  
   methodology of, 18  
   overview, 9–10  
   pluralistic nature of private law as thesis of private law theory, 1–2  
   reconstruction of theory in law and, 18–19  
   relevance of theory and, 18–19  
   sociology and, 18  
   systems theory and, 18  
   which disciplines considered, 17–18  
 International Capital Markets Association (ICMA), 488  
 International law. *See* Transnational law  
 International Skating Union, 248–9, 255  
 International Standardisation Body (ISB), 421  
 International Swaps and Derivatives Association (ISDA), 472, 478, 482, 483  
 Internet. *See also* Digital technology and private law  
   corporate social responsibility (CSR) and, 430

- Internet (cont.)  
 freedom of expression of internet platforms, 495–7,  
 502, 510  
 Internet Corporation for Assigned Names and  
 Numbers (ICANN), 311, 312  
 Internet Engineering Task Force (IETF), 312  
 Interpretation. *See also* Hermeneutics  
 comparative nature of private law and, 13–14  
 functional method in private law and, 444–5  
 interdisciplinary approach to private law and, 13–14  
 in legal positivism, 53, 54–7  
 Invisible hand, 237  
 Israel, shareholder protection rights in, 124  
 Italy  
 antitrust law in, 176–7  
*Codice Civile*, 199  
 codification of private law in, 182  
 Constitution, 176  
 constitutionalization of private law in, 176–8  
 Mediterranean model and, 427  
 modernization in, 423  
 new production regimes in, 423  
 private actors, constitutional protections against in,  
 132–3  
 shareholder protection rights in, 124  
 status-related rights in, 345  
 values in private law in, 160  
*Ius commune*, 25, 113, 115, 440. *See also* Legal history  
*Ius Commune Casebooks for the Common Law of  
 Europe*, 445  
*Iustum pretium*, game theory and, 21–2  
 Japan, modernization in, 423  
 Jellinek, Georg, 172, 349, 350  
 Jensen, Michael, 361, 362, 366, 372, 382–9, 397. *See  
 also* Agency relationship in corporations  
 Jessup, Philipp C., 472–4, 475–7, 481–2. *See also*  
 Transnational law  
 von Jhering, Rudolf, 105, 121, 171, 348–9,  
 350  
 Jobs, Steve, 370  
 Joerges, Christian, 5, 118–19, 157–8, 456–7, 466–9,  
 470–1. *See also* Multilevel governance  
 Joint ventures, organizational contracts and, 328  
 Jolls, Christine, 92  
 Josserand, Louis, 272–4, 281–2, 283–6, 287, 292–3, 297,  
 347. *See also* Tort law  
*Journal of Comparative Legal History*, 116  
 Judicial review, digital technology and, 312–13  
 Juridical schematism, 257–8  
 Justice of consensus  
 bias, contract law and, 210, 221–8  
 justification of freedom of contract, 210,  
 211–16  
 overview, 19  
 reconstruction of interdisciplinary theory in law  
 and, 23–4  
 redistribution as limit on freedom of contract, 210,  
 217–21  
 relevance of interdisciplinary theory and, 20–3  
 texts of reference, 208–9  
 third parties and, 211 (*See also* Social ordering)  
 Justified expectations, 70  
 Kahnemann, Daniel, 24, 75, 91–2, 208–9, 210, 221–8.  
*See also* Contract law  
 Kahn-Freund, Otto, 444  
 Kalven, Harry, 287  
 Kang, Nahee, 420  
 Kant, Immanuel, 25, 43, 105, 106–7, 122, 146, 150, 173,  
 211–12, 215, 354, 478  
 Kantorowicz, Hermann, 4, 105, 356  
 Kaplow, Louis, 208–9, 210, 214, 216, 217–21, 228, 283,  
 291. *See also* Contract law  
 Katelouzou, Dionysia, 432  
 Kelsen, Hans, 41, 52, 60, 61–2, 101, 105, 124  
 Kennedy, Duncan, 5, 119, 121, 156–7, 159–60, 162–5,  
 170, 174, 287, 342, 347, 348, 359. *See also* Values in  
 private law  
 Kennedy, John F., 188, 279, 354  
 Keynes, John Maynard, 234–5  
 Kickbacks, 231–2  
 Kilpatrick, Claire, 296  
 Kinderman, Daniel, 421  
 Kischel, Uwe, 117  
 Kjaer, Poul, 96  
 Knight, Frank, 366  
 Knowledge. *See* Information and private law  
 Kornhauser, Lewis, 497–8, 499, 511–16. *See also* Scope  
 of law  
 Koschacker, Paul, 118  
 Kötz, Hein, 82–3, 113–14, 117, 175, 437–9, 441, 443–6,  
 447, 448, 453. *See also* Functional method in  
 private law  
 Kranton, Rachel, 507–8  
 Krupp Company, 429  
 Kübler, Friedrich, 181, 186–8, 190. *See also* democra-  
 tization of private law  
 Kuhn, Thomas, 256  
 Kumm, Matthias, 25, 169  
 Labour constitution, 26  
 Labour law, 354  
 Lando, Ole, 441  
 Lando Group, 441, 445  
 Language, discourse theory and, 104  
 La Porta, Rafael, 11, 112–13, 117, 123–7. *See also* Legal  
 origin theory  
 Lasalle, Ferdinand, 355  
 Latvia, private law in, 183

- Law and Economics
- corporations and, 360, 394, 395–6, 404, 405
  - in European Union, 292
  - interdisciplinary approach to private law compared, 2, 15–17
  - in jurisprudence, 11
  - Law and Society Movement compared, 62
  - Legal Origin Theory and, 117
  - negligence and, 36
  - popularity of, 1
  - private ordering and, 29–31, 484 (*See also* Private ordering)
  - redistribution, freedom of contract and, 208
  - sociology and, 60–1, 63, 68, 331, et seq., 488, 504–506
  - status related rights and, 346
  - tort law and, 280, 286, 292
  - in United States, 72
- Law and Society Movement, 29, 62, 63
- Law as a product
- criticisms of, 450–1
  - definition of appropriate market, 450–1
  - Delaware effect and, 438–9, 443, 446, 447, 449–50
  - in federal states, 449
  - functional method in private law versus, 443
  - overview, 437, 438, 451–3
  - regulatory competition and, 446–9, 450–1
  - texts of reference, 437–9
  - United States, European Union contrasted, 452
- Legal formalism, 60
- Legal history
- Cassis de Dijon* case and, 111–12
  - comparative law, relationship to, 113–16
  - Critical Legal Studies and, 119
  - debate regarding, 113
  - democratization of private law and, 186
  - evolution of, 118–19
  - insufficiency of, 123
  - intellectualism and, 122–3
  - interdisciplinary approach to private law and, 18
  - Judeo-Christian culture and, 119
  - law as system of rules in, 119
  - legalism and, 122
  - Marxism and, 113
  - material justice in private law and, 197
  - overview, 112, 128
  - personalism and, 121–2
  - phases of European legal history, 119–21
  - social question in, 121
  - texts of reference, 112–14
- Legalism, legal history and, 122
- Legal norms, sociology and, 64
- Legal origin theory (LOT)
- common law versus civil law, 124–7
  - comparative law contrasted, 117
  - lack of law, criticism based on, 127
  - law and economics and, 117
  - legal culture, criticism based on, 126–7
  - methodology of, 113
  - overview, 112–13, 128
  - prominence of, 117–18
  - shareholder protection rights and, 123–6
  - texts of reference, 112–14
  - transfers between legal orders in, 124
  - variables, criticism based on selection of, 126
  - varieties of capitalism (VoC) and, 417, 427
- Legal positivism
- compatibility with hermeneutics, 13–14
  - critical theory versus, 53
  - discourse theory compared, 107
  - functional method in private law and, 444
  - Grundnorm* and, 41, 52
  - hermeneutics compared, 41–2
  - innovation in, 53, 54–7
  - inside versus outside question and, 39–41
  - interpretation in, 53, 54–7
  - material justice in private law versus, 197
  - morality and, 39–41, 51–3
  - open society and, 53–4
  - overview, 57–8
  - Oxford positivism, 41
  - pluralism in, 53, 54–7
  - private law theory and, 36
  - systems theory compared, 101, 103
  - traditional positivism, 54
  - transnational law versus, 476
  - values in private law and, 158–9
- Legal realism
- American legal realism (*See* American legal realism)
  - values in private law and, 159–60, 162–3, 164
- Legislation
- constitutional law, statutory regulation and, 26–8
  - discourse theory and, 107–8
  - organizational contracts and, 328
  - scope of law and, 515–16
  - sociology and, 66
  - systems theory and, 102
- Legrand, Pierre, 114, 425
- Lehman Brothers, 191, 293, 294, 421
- Lele, Priya, 128
- Lenders
- contractual obligations of, 59–60, 64, 65
  - one-off fees, 95, 100–1
  - responsible lending and, 207–8, 220
  - subprime lending, 207, 219, 220
- Lessig, Lawrence, 298–300, 301–8, 309, 311, 312, 313–14. *See also* Digital technology and private law
- Lex digitalis*, 309–10
- Lex mercatoria*, 478–80

- Liability in tort law. *See also* Tort law  
 enterprise liability, 278, 288–90  
 organizational liability, 278  
 product liability, 278–9, 285–6  
 strict liability, 280, 285–6, 287–8  
 vicarious liability, 278
- Liberalism, status-related rights and, 351–4
- Liberal market economies (LMEs)  
 comparative law and, 417  
 co-ordinated market economies (CMEs) versus,  
 418–19, 425, 427  
 overview, 417  
 tort law in, 278
- Liberia, regulatory competition in, 447
- Libertarian paternalist theory of regulation, 203–4
- Lieder, Jan, 127, 128
- Lisbon Summit (2000), 419–20, 421, 468
- Lithuania, private law in, 183
- Living law, 29, 30, 60
- Llewellyn, Karl, 60, 119
- LMEs. *See* Liberal market economies (LMEs)
- Loan Market Association (LMA), 64, 65
- Lomfeld, Bertram, 96
- London School of Economics, 396
- Lopez-de-Silanes, Florencio, 11, 112–13, 117, 123–7. *See also* Legal Origin Theory
- LOT. *See* Legal origin theory (LOT)
- Luhmann, Niklas, 30, 45, 50–1, 69, 95–104, 105, 108, 258, 310, 335, 474, 478, 480, 503. *See also* Systems theory
- Lukes, Steven, 250
- Luther, Martin, 402
- Lycée Franco-Allemand, 396
- Lysenko, Trofim, 256
- Maastricht Treaty (1991), 177, 296, 454, 457, 460
- Macaulay, Stewart, 317–18, 320–4, 337–8, 490, 509. *See also* Organizational contracts
- MacCormick, Neil, 341–3, 351–4, 355, 357, 358. *See also* Status-related rights
- MacKinnon, Catharine, 262–3, 264–7, 268, 269, 270. *See also* Anti-discrimination law
- Macneil, Ian, 317, 318–19, 323–4, 333
- Maine, Henry, 67
- Malfeasance, 505, 507–8
- Mann, Frederick Alexander, 479
- Manne, Henry, 139, 240–1, 250, 367, 391, 394–6, 404–13. *See also* Takeovers
- Manning, Bayless, 375
- Marginal utility of money, 290
- Market instruments versus hierarchies, 505, 508–9
- Market order, 135, 152–3, 154–5, 213
- Market rationality test, 111
- Markets  
 bipolar market-firm relationship rejected, 333–5  
 contract law and, 216  
 freedom of contract and, 216  
 institutional economics and, 85–6  
 networks distinguished, 335  
 platform markets, 255
- Markovits, Daniel, 218–19
- Marriage, 67
- Marshall Islands, regulatory competition in, 447
- Marx, Karl, 69, 344, 506
- Marxism  
 critical theory and, 42  
 discourse theory versus, 104  
 legal history and, 113  
 ordo-liberalism versus, 142, 254–5  
 status-related rights and, 351–4
- Masferrer, Aniceto, 116
- Material justice in private law  
 civil rights and, 193, 201, 202, 203, 204  
 communitarian nature of, 200  
 consumer law and, 199  
 courts, role of, 199  
 democracy versus liberalism and, 198–9  
 evolution of, 196  
 feminist legal theory and, 202  
 freedom versus equality and, 198–9, 203–4  
 lack of institutional analysis, 203  
 legal history and, 197  
 legal positivism versus, 197  
 libertarian paternalist theory of regulation and,  
 203–4  
 natural law versus, 197–8  
 overgeneralized classifications and, 202–3  
 overview, 193, 203–4  
 proceduralist understanding of law and, 194–5, 201  
 racial discrimination and, 198  
 as replacing formalism, 193–4, 199  
 social model of private law and, 194, 197–200  
 socio-economic issues and, 198–9  
 state, role of, 200–1  
 texts of reference, 194–5  
 welfare state model of, 194, 200–3
- Maturana, Humberto, 99
- Mauss, Marcel, 214
- Max-Planck Institute, 444
- Means, Gardiner, 362, 372, 374–82, 383, 412. *See also* Ownership versus control of corporations
- Meckling, William, 361, 362, 366, 372, 382–9, 397. *See also* Agency relationship in corporations
- Mediterranean model, 417, 427
- Die Meistersinger* (Wagner), 54
- Menger, Anton, 4, 187, 188, 196, 356
- Mengoni, Luigi, 135, 152–3, 154–5
- Mergers. *See* Takeovers
- Mestmäcker, Ernst-Joachim, 25, 57–8, 73, 168, 456–7, 460–3, 464, 467. *See also* Multilevel governance

- Michaels, Ralf, 127, 452, 486  
 Michoud, Léon, 350  
 Minority shareholders, duties to, 360, 370–1  
 von Mises, Ludwig, 235  
 Mixed-race persons, discrimination and, 193, 201, 202, 203, 204  
 Mnookin, Robert, 497–8, 499, 511–16. *See also* Scope of law  
 Modéer, Kjell A., 116  
 Modern Age, 121  
 Moglen, Eben, 313  
 Monopolies  
   antitrust law and, 252–3  
   institutional economics and, 87–8  
   organizational contracts, bilateral monopoly and, 326–7  
   private power and, 252–3  
 de Montaigne, Michel, 284  
 Montesquieu, 286  
 Mont Pèlerin Society, 235  
 Moon, Jeremy, 420  
 Morality  
   legal positivism and, 39–41, 51–3  
   scope of law and, 499–500  
   systems theory and, 101–2  
 Moréteau, Olivier, 116  
 Morgenstern, Oskar, 20  
 Multilevel governance  
   antitrust law and, 462–3  
   capital markets and, 457, 463–6  
   comparative advantage and, 465  
   consumer law and, 458  
   courts versus legislatures, 464  
   economic constitution and, 458–63  
   euro crisis and, 454–6, 457, 463  
   European Internal Market and, 460, 461–2, 467–8  
   experimentalist governance and, 457  
   harmonization of law and, 465  
   open method of co-ordination (OMC) and, 466–9, 470–1  
   ordo-liberalism and, 454, 456, 460–3  
   overview, 454–6, 469–71  
   public choice and, 464–5  
   regulation and, 458  
   role of law in, 457  
   Rome Treaty and, 460–1, 463  
   Single European Act and, 460, 461–2  
   social dimension of, 457, 466–9, 470–1  
   texts of reference, 456–7  
   United States, European Union compared, 457, 463–6, 470  
 Multiple-shot games, 23  
 Musk, Elon, 370  
 Nader, Ralph, 279, 447–8  
 Naphtali, Fritz, 254–5  
 Nash, John, 20  
 Nash Equilibrium, 21, 225  
 National, private law not deemed, 3–4  
 Natural law, material justice versus, 197–8  
 Negligence  
   contributory negligence, 46–7  
   cost avoidance and, 72, 82–3  
   formula for determining, 36, 47, 55–6, 278, 289  
   law and economics and, 36  
   strict liability versus, 287–8  
 Negotiation. *See also* Contract law  
   bias and, 223–5  
   divorce, bargaining process in, 513–15  
   game theory and, 223–5  
   inequality if bargaining power, 221  
   overview, 19, 207  
   reconstruction of interdisciplinary theory in law and, 23–4  
   relevance of interdisciplinary theory and, 20–3  
   texts of reference, 208–9  
 Nelken, David, 114–15  
 Neoclassical economics  
   bounded rationality versus, 89–90  
   corporations in, 361–2, 365  
   information, critique of neoclassical economics and, 234  
   institutional economics versus, 86–7  
   tort law and, 276  
 Neo-liberalism, 138–9  
 Netherlands  
   Civil Code, 180–1  
   consumer law in, 346  
   European Constitution, rejection of, 116  
   private law in, 183  
   *Urgenda Foundation v. State of the Netherlands* (2015), 180–1, 188, 192  
 Net-short debt investing, 484  
 Network arrangements  
   organizational contracts and, 318, 319, 329–37  
   scope of law and, 504  
   spot contracts and, 335–7  
 Network contracts. *See* Organizational contracts  
 von Neumann, John, 20  
 New Brandeis School, 248, 253  
 New Economic Sociology, 330, 504–5  
 New Economics of Organizations, 426  
 New Institutional Economics, 30, 63, 363, 374, 416–17  
 New York Diamond Dealers Club (DDC), 488–9  
 New Zealand, product liability in, 290  
 Nice Treaty (2001), 460  
 Nietzsche, Friedrich, 284  
 Nipperdey, Hans, 174  
 Nixon, Richard, 419–20

- Nobel Memorial Prize in Economics, 75, 234, 241, 363  
 No-fault divorce, 512  
 Nölke, Andreas, 417  
 Non-discrimination. *See* Anti-discrimination law  
 Nongovernmental organizations (NGOs), corporate social responsibility (CSR) and, 429  
 North, Douglas, 140, 423  
 Norway, corporate social responsibility (CSR) in, 428  
 Nuisance cases, transaction costs in, 79–80  
 Nuremberg Tribunals, 396–7
- October Revolution (1917), 120  
 O'Hara, Erin, 446–7  
 Ohmae, Ken'ichi, 418  
 Olin, John M. Foundation, 29–30  
 One-shot games, 23  
 Open method of co-ordination (OMC), 466–9, 470–1  
 Open society, 53–4, 174  
 Operative constructivism, 99–100, 101  
 Ordo-liberalism  
   antitrust law and, 252  
   beyond Germany, 459  
   Common Agricultural Policy and, 461  
   constitutionalization of private law and, 167–8, 169, 174  
   constitutional law and, 25  
   democratization of private law and, 187–8  
   economics and law, intertwining of, 139  
   evolution of, 136  
   freedom of contract and, 213  
   institutions and, 140  
   lack of definition of private law in, 142  
   laissez-faire versus, 136  
   Marxism versus, 142, 254–5  
   multilevel governance and, 454, 456, 460–3 (*See also* Multilevel governance)  
   neo-liberalism versus, 138–9  
   normative analysis in, 137–8  
   normative claims of, 141–2  
   organization theory and, 397  
   overview, 134–5, 154–5  
   private power and, 250, 252, 254–5  
   *Privatrechtsgesellschaft* (private law society) in, 136–7  
   public ordering versus private ordering, 137–8  
   regulation in, 138–40  
   socialism versus, 254–5  
   state, role of, 137–8  
   subsidiarity and, 140–1  
   texts of reference, 133–4  
 Organizational contracts  
   arbitration in, 327–8  
   bilateral monopoly and, 326–7  
   bipolar market-firm relationship rejected, 333–5  
   codes of conduct and, 328  
   contingencies in, 323  
   corporate social responsibility (CSR) and, 315  
   detrimental effect of legal planning on, 320  
   distributed knowledge and, 328  
   economic sociology and, 318, 319, 330–1  
   in European Union, 319  
   factors impacting legal planning in, 322  
   in France, 319  
   frequency of transactions and, 324–5  
   game theory and, 321  
   in Germany, 319  
   governance schemes for, 327–8  
   hierarchies distinguished from networks, 335  
   incomplete contracts compared, 328–9  
   institutional economics and, 318, 319  
   joint ventures and, 328  
   law context of, 318–19  
   legislation and, 328  
   markets distinguished from networks, 335  
   network arrangements and, 318, 319, 329–37  
   overview, 315, 337–8  
   private ordering and, 315  
   reciprocity and, 334  
   relational contracting, 85–6  
   social context of, 323–4  
   social norms and, 320–1  
   spot contracts versus, 323, 324–5, 335–7  
   subject matter of, 321  
   texts of reference, 317–18  
   transaction-specific investments and, 325–7  
   transnational law and, 315  
   trust and, 328, 334  
   uncertainty and, 324–5  
   in United States, 319  
 Organisation for Economic Co-operation and Development (OECD), 421, 428  
 Organization theory  
   agency relationship in corporations and, 397  
   combination of exit and voice, 401–2  
   corporate social responsibility (CSR) and, 398, 404  
   critical theory and, 397  
   criticisms of, 403–4  
   economics and, 399  
   exit option in, 394, 395, 398–400, 412, 413  
   loyalty in, 398, 402–3, 412  
   marshalling forces and, 398  
   ordo-liberalism and, 397  
   overview, 391, 394, 411–13  
   pan-social theory and, 396  
   political theory and, 399  
   sociology and, 394, 395  
   texts of reference, 393  
   voice option in, 394, 395, 398, 399, 400–1, 412, 413  
 Orlando, Vittorio Emanuele, 350



- Örücü, Esin, 114–15
- Overgeneralized classifications, material justice in  
 private law and, 202–3
- Ownership versus control of corporations  
 agency relationship (*See* Agency relationship in corporations)  
 allocative efficiency and, 380  
 business judgment rule and, 380–1  
 capital markets and, 377–82  
 debt capital versus share capital, 376–7  
 information and, 379–80  
 liquidity and, 378, 379–80  
 overview, 373, 389–90  
 price transparency and, 380  
 principal-agent relationship (*See* Agency relationship in corporations)  
 property rights theory and, 374, 378–9, 381–2  
 publicly traded companies, 377  
 securitization and, 378  
 shareholder rights traded for expectations, 375–6  
 shareholders versus management, 374–5, 378–9  
 texts of reference, 372
- Oxford positivism, 41
- Panama, regulatory competition in, 447
- Pandect law, 120
- Pan-social theory, 396
- Parsons, Talcott, 98, 331, 506
- Pashukanis, Evgeny, 353
- Patrimony, 512–13
- Pax Americana, 478
- Peace of Westphalia (1648), 182, 439
- Personalism  
 legal history and, 121–2  
 status related rights and, 344
- Pescatore, Pierre, 467
- Peter the Great (Russia), 119
- Phenomenology, 143
- Picard, E., 184
- Pichai, Sundar, 370
- Pigou, Arthur-Cecil, 83–4
- Piketty, Thomas, 151
- Pinker, Steven, 284
- Pistor, Katharina, 125, 128
- Planiol, Marcel, 350
- Platform markets, 255
- Plato, 174, 401–2
- Pluralism  
 constitutional pluralism, 351  
 in legal positivism, 53, 54–7  
 pluralistic nature of private law as thesis of private law theory, 1–2
- Poland, Mediterranean model and, 427
- Polanyi, Karl, 61, 69, 310, 451–2, 504, 506
- Polycentric globalization, digital technology and, 310–11
- Popper, Karl, 53–4, 174
- Pornography, digital technology and, 303–4
- Portugal, Mediterranean model and, 427
- Positivism. *See* Legal positivism
- Posner, Richard, 40, 77, 161, 280, 283, 286, 442
- Post-Modern Age, 121
- Postmodernism, 143
- Pound, Roscoe, 60, 445
- Powell, Walter, 317–18, 319, 329–38. *See also* Organizational contracts
- Precedent, values in private law and, 162
- Preconception, 39, 47, 48–9
- Prevent Group, 315–17
- Price dispersion, 237–8
- Princeton University, 396, 428–9
- Principal-agent relationship in corporations. *See* Agency relationship in corporations
- Principles of European Tort Law (PETL), 281
- Pringsheim, Fritz, 118
- Prisoner's dilemma, 22, 23–4
- Privacy law  
 in European Union, 298  
 in United States, 298
- Private law. *See specific topic*
- Private ordering  
 advantages of, 487  
 approaches to, 485–7  
 in cattle industry, 484, 487, 491–3  
 codes of conduct and, 492  
 damages, criticism of, 489–90  
 in diamond industry, 484, 487–91  
 in divorce, 511–15 (*See also* Divorce)  
 efficiency of, 489, 490–1  
 elements of, 492  
 exclusion as enforcement mechanism, 488–9  
 in family law, 484, 511–15  
 fiduciary duties and, 493–4  
 first-party, second-party, and third-party control in, 492  
 formal and informal rules in, 488  
 game theory and, 491  
 law and economics and, 29–31, 484  
 legal problems in, 31  
 meta-rules in, 492–3  
 net-short debt investing and, 484  
 organizational contracts and, 315  
 overview, 484, 493–4  
 private law and, 29–31  
 problems of, 491  
 reputation as enforcement mechanism, 490  
 sociology and, 29  
 software and, 484

534

- Private ordering (cont.)
  - texts of reference, 484–5
  - theory of social co-operation in, 491–2
  - transaction costs and, 491
  - transnational private ordering, 28–9
- Private power and private law
  - anti-discrimination law and, 258
  - antitrust law and, 251–2
  - competition and, 252–3
  - consumer law and, 251
  - contract law and, 251
  - defining power, 257
  - democracy, compatibility with, 253–4
  - dispositives of power, 252
  - family law and, 251
  - globalization and, 248
  - juridical schematism and, 257–8
  - knowledge generation and, 256–7
  - legitimacy and, 253
  - monopolies and, 252–3
  - ordo-liberalism and, 250, 252, 254–5
  - overview, 248, 259–60
  - platform markets and, 255
  - preventive solution to problem of, 254
  - scientific knowledge and, 256
  - socio-economic inequality and, 258
  - structuralism and, 256–7
  - technology and, 248
  - texts of reference, 249–51
- Privatrechtsgesellschaft* (private law society)
  - constitutionalization of private law and, 166, 174
  - digital technology and, 302
  - ordo-liberalism and, 136–7
  - overview, 25, 31
- Proceduralist understanding of law, 194–5, 201
- Product liability, 278–9, 285–6
- Product Liability Directive (EU), 279, 285–6
- Property rights theory
  - agency relationship in corporations and, 382–3, 388
  - corporations and, 369
  - overview, 382
  - ownership versus control of corporations and, 374, 378–9, 381–2
- Prospect theory
  - bias and, 222
  - bounded rationality and, 91–2
- Proxy fights, 408
- Psychology
  - bias, contract law and, 210, 221–8 (*See also* Bias)
  - bounded rationality and, 90, 92
- Public goods
  - Corporate Social Responsibility (CSR) (*See* Corporate Social Responsibility (CSR))
  - varieties of capitalism (VoC) (*See* Varieties of capitalism (VoC))

## Index

- Public reason, 131
- Pure theory of law, 60, 101, 105
- Quotas, 202
- Rabel, Ernst, 113–14, 117, 446
- Race
  - job selection, imperfect distribution of information and, 244
  - mixed-race persons, discrimination and, 193, 201, 202, 203, 204
- Radbruch formula, 158
- Raiser, Ludwig, 105, 178, 186, 208–9, 210, 211–16, 217, 219, 221, 224, 228, 381. *See also* Contract law
- Rajan, Raghuran, 127
- Rational choice theory, bounded rationality versus, 90–1
- Rationalization of rule-making, 65–6, 69
- Rawls, John, 11, 16, 50, 131, 133–5, 142–52, 153, 154–5, 354, 464. *See also* Theory of justice (Rawls)
- Raz, Joseph, 13–14, 36, 39, 41, 51–7, 95. *See also* Legal positivism
- Reciprocity, organizational contracts and, 334
- Reconstruction of interdisciplinary theory in law
  - game theory and, 23–4
  - justice of consensus and, 23–4
  - negotiation and, 23–4
  - overview, 18–19, 35–6
- Redistribution
  - income tax and, 217–20
  - inheritance tax and, 217–20
  - as limit on freedom of contract, 210, 217–21, 228–9
  - transaction costs and, 79
- Regulation
  - binding effect of, 499
  - constitutional law and, 26–8
  - contract law and, 216
  - corporate social responsibility (CSR) and, 415
  - digital technology and, 302–3, 305
  - freedom of contract and, 216
  - libertarian paternalist theory of, 203–4
  - multilevel governance and, 458
  - in ordo-liberalism, 138–40
  - scope of law and, 499, 515–16
  - systems theory and, 103
  - varieties of capitalism (VoC) and, 415
- Reich, Norbert, 172, 341–3, 354–8. *See also* Status-related rights
- Relational contracts. *See* Organizational contracts
- Relevance of interdisciplinary theory
  - game theory and, 20–3
  - justice of consensus and, 20–3
  - negotiation and, 20–3
  - overview, 18–19, 35–6

- Renner, Karl, 187, 188  
 Representativeness, bias of, 226  
 Research agenda, 32  
 Resourceful Evaluative Maximizing Model (REMM), 505, 506  
 Responsible lending, 207–8, 220  
 Restatement (Second) of Torts, 279  
 Restatement (Third) of Torts, 279  
 Rhenish capitalism, 215–16  
 Ribstein, Larry, 446–7  
 Richman, Barack, 487–8  
 Ripert, Georges, 171–2, 174, 181, 184–6, 187, 188, 192, 347. *See also* Democratization of private law  
 Ripstein, Arthur, 127  
 Risk  
   deep pocket justification for risk allocation, 288, 291–2  
   evolution of, 275, 277–8  
   loss spreading justification for risk allocation, 288, 290–1  
   non-calculability of, 281, 283, 292–7  
   risk society, 281, 283, 292–7  
   social justice versus economic efficiency in allocation of, 274–6, 280–1  
   wealth distribution versus risk distribution, 294–7  
 Risk society, 281, 283, 292–7  
 Rockefeller, David, 428–9  
 Roman Catholic Church, 120  
 Roman Empire, 120  
 Romania, Mediterranean model and, 427  
 Romano, Roberta, 437–9, 443, 446–51, 453. *See also* Law as a product  
 Rome I Regulation, 437  
 Romeo, R., 176–7  
 Rome Treaty (1957), 110, 119–20, 141, 176, 460–1, 463  
 Rousseau, Jean-Jacques, 106–7, 146, 186, 354  
 Royal Dutch Petroleum Company, 415–16, 427, 428, 429, 431, 432–3  
 Rubinstein, Ariel, 20  
 Russell, Bertrand, 143  
 Russian (October) Revolution (1917), 120  
 Rüstow, Alexander, 459  
  
 Sabel, Charles, 468–9  
 Saleilles, Raymond, 167, 171–4, 185–6, 282, 283, 347, 361. *See also* Constitutionalization of private law  
 Sales Directive (EU), 319  
 Samuel, Geoffrey, 114–15  
 Sartre, Jean-Paul, 143  
 Satisficers, 223–5  
 von Savigny, Friedrich Carl, 47, 48, 50, 105, 142, 182, 186–7, 197  
 Schäfer, Hans-Bernd, 82–3  
 Scharpf, Fritz, 26, 188, 278, 354, 356–7  
 Scheuermann, William E., 468  
  
 Schleiermacher, Friedrich, 41, 42, 43  
 Schleifer, Andrei, 11, 112–13, 117, 123–7. *See also* Legal origin theory  
 Schmidt-Rimpler, Walter, 175, 214–15  
 Schmitter, Philippe, 432  
 Schmitthoff, Clive, 479  
 Schnyder, Gerhard, 125, 127, 128  
 School of Bologna, 120  
 Schulz, Fritz, 118  
 Schumann Declaration, 119–20  
 Schumpeter, Joseph, 235  
 Scitovsky, Tibor, 465  
 Scope of law  
   absence of law, 501–2  
   contract law and, 499, 505, 508–9  
   default rules and, 499–500, 515–16  
   divorce, private ordering in, 511–15 (*See also* Divorce)  
   *droit* versus *non-droit*, 500–3, 515–16  
   legislation and, 515–16  
   malfeasance, 505, 507–8  
   market instruments versus hierarchies, 505, 508–9  
   morality and, 499–500  
   network arrangements and, 504  
   new economic sociology and, 504–5  
   overview, 495–7  
   regulation and, 499, 515–16  
   shadow of law, 502, 511, 513–15  
   social embeddedness and, 499–500, 504–10, 515–16  
   social norms and, 499–500  
   systems theory and, 502, 503  
   texts of reference, 497–8  
 Search engines, privacy and, 298  
 Searle, John R., 98  
 Seat theory, 437  
 Seccombe, Monica, 457  
 Securities. *See* Capital markets  
 Securitization, 378  
 Self-regulation. *See* Private ordering  
 Sen, Amartya, 11, 50, 57–8, 135, 144, 145–6, 150–1, 155  
 Separation of powers, values in private law and, 162  
 Sexual harassment, 264–7  
 Shadow of law, 502, 511, 513–15  
 Shaffer, Gregory, 480–1  
 Shakespeare, William, 55  
 Shareholders  
   appraisal rights, 375  
   codetermination laws and, 201–2  
   minority shareholders, duties to, 360, 370–1  
   organization theory and (*See* Organization theory)  
   ownership versus control of corporations (*See* Ownership versus control of corporations)  
   protection rights, 123–6

- Shareholders (cont.)  
 rights traded for expectations, 375–6  
 stakeholders versus, 389  
 takeovers and (*See* Takeovers)
- Sharing economy, 346–7
- Shavell, Steven, 208–9, 210, 214, 216, 217–21, 228, 283, 291, 292. *See also* Contract law
- Shell Petroleum Development Company of Nigeria, Ltd, 415–16
- Siems, Mathias, 114–15, 117, 125, 127, 128, 432
- Simon, Herbert, 24, 73, 78–9, 87, 89–94, 222–3, 276–7.  
*See also* Bounded rationality
- Simplifications, bounded rationality and, 90–1
- Single European Act  
 comparative law and, 110  
 constitutionalization of private law and, 177  
 economic constitution and, 25  
 market integration and, 123  
 multilevel governance and, 456, 457, 458, 460, 461–2  
 status-related rights and, 356
- Sinn, Hans-Werner, 448
- Sinzheimer, Hugo, 26, 344, 347, 458–9
- Slovakia, Mediterranean model and, 427
- Slovenia, Mediterranean model and, 427
- Smith, Adam, 237, 280, 382, 506
- Smith, Stephen, 2
- Smits, Jan, 114–15
- Social contract  
 discourse theory and, 106, 107  
 social ordering and, 131–2
- Social democracy, 352–3
- Social democratization, 26, 188
- Social embeddedness, 497, 504–10, 515–16
- Socialism, ordo-liberalism versus, 254–5
- Social Justice Group, 171
- Social model of private law, 194, 197–200
- Social norms  
 binding effect of, 499  
 organizational contracts and, 320–1  
 private ordering and, 491–2  
 scope of law and, 499–500
- Social ordering  
 market order, 135, 152–3  
 ordo-liberalism (*See* Ordo-liberalism)  
 overview, 131–2  
 private actors, constitutional protections against, 26  
 social contract and, 131–2  
 texts of reference, 133–4  
 theory of justice (*See* Theory of justice (Rawls))
- Societal constitutionalism, digital technology and, 308
- Sociology and private law  
 adoption and, 67  
 contract law and, 66–9  
 division of labour and, 62–3, 65, 66–9
- economic sociology, 63 (*See also* Economic sociology)
- family law and, 67
- functional differentiation and, 69
- interdisciplinary approach to private law and, 18
- justified expectations and, 70
- law and economics and, 60–1, 68, 331, et seq., 488, 504–506
- law-making versus law-finding, 66
- legal innovation and, 64–5
- legal norms and, 64
- marriage and, 67
- overview, 59
- private ordering and, 29
- rationalization of rule-making, 65–6, 69
- relationship with law, 61–3
- scope of law and, 499
- shareholders and, 394, 395
- socialization of private law, 69
- solidarity and, 63, 68, 69–70
- state and, 68–9, 70
- texts of reference, 60–1
- transnational corporations and, 67
- Socrates, 401–2
- Solidarity, 63, 68, 69–70
- Somek, Alexander, 262–3, 264, 267–70, 468. *See also* Anti-discrimination law
- Soskice, David, 416, 417–419, 422–7, 429, 430, 431. *See also* Varieties of capitalism (VoC)
- South Africa, corporate social responsibility (CSR) in, 428
- Spade, Dean, 270
- Spain  
 Mediterranean model and, 427  
 Spanish Civil War, 396
- Spamann, Holger, 126, 128
- Spence, Michael, 236, 241, 245–6
- Spencer, Herbert, 67
- Sports, blood doping in, 248–9
- Spot contracts  
 network arrangements and, 335–7  
 organizational contracts versus, 323, 324–5
- Standard Oil of New Jersey, 428–9
- State action doctrine, 495
- State-centered, private law not deemed, 3–4
- Status-related rights  
 balancing approach, 348  
 behavioural economics and, 346, 349  
 civil law and, 342–3, 354–8  
 consumer law and, 345–6, 354–8  
 evolution of, 343–7  
 fragmentation of legal order caused by, 343  
 in France, 343, 344–5  
 in Germany, 343–5  
 globalization and, 342

- human rights and, 349–50
- individualism versus, 350
- Industrial Revolution and, 344
- in Italy, 345
- labour law and, 354
- Law and Economics and, 346
- law context of, 341–2
- legal subject, locating, 347, 348–9, 350
- middle way between Marxism and liberalism, 351–4
- overview, 341, 358–9
- personalism and, 344
- politico-philosophical context of, 342, 351–4
- social democracy and, 352–3
- social question and, 344–6, 347
- subjective rights and, 349–50
- texts of reference, 341–3
- will and, 350
- Statutory regulation, 26–8
- Steinmo, Sven, 424
- Stigler, George, 230, 232–4, 237–41, 242, 247. *See also* Information and private law
- Stiglitz, Joseph, 241, 245–6
- Streeck, Wolfgang, 418, 432
- Strict liability in tort law, 280, 285–6, 287–8
- Structural coupling, 102
- Structuralism, private power and, 256–7
- Structure of book, 31–2
- Study Group, 441, 445–6
- Subjective rights
  - constitutionalization of private law and, 171–3
  - discourse theory and, 105
  - status-related rights and, 349–50
- Subprime lending, 207, 219, 220
- Subsidiarity, 140–1
- Sunstein, Cass, 92
- Super-diversity, 3
- Surowiecki, James, 14–15
- Sustainable Development Goals, 190, 421
- Sweden, shareholder protection rights in, 124
- Switzerland
  - kickbacks in, 231
  - Swiss Foundation U v. Portfolio Management A* (2006), 231–2, 239–40
- Systems theory
  - circularity in, 99–100
  - contract law and, 102–3
  - courts, role of, 103–4
  - discourse theory compared, 96–8, 108–9
  - evolution of, 98–9
  - hermeneutics and, 50–1
  - interdisciplinary approach to private law and, 18
  - legal positivism compared, 101, 103
  - legislation and, 102–3
  - morality and, 101–2
  - operative closure of legal system in, 99
  - operative constructivism and, 99–100, 101
  - overview, 108–9
  - regulation and, 103
  - scope of law and, 502, 503
  - self-referentiality in, 99–100
  - structural coupling and, 102
  - texts of reference, 95–7
  - transnational law and, 472–3, 474, 478
- Tadros, Victor, 250
- Takeover Directive (EU), 368, 392
- Takeovers
  - antitrust law and, 406, 407–8
  - bankruptcy and, 406
  - capital markets and, 410
  - combination of exit and voice and, 403
  - control and, 394–5, 406–9
  - draconian measures to prevent, 391–2
  - mechanisms of, 410–11
  - overview, 391–3, 394, 405, 411–13
  - proportionality test, 391–2
  - shareholders benefitting from, 411
  - shareholders versus management, 391, 392–3
  - texts of reference, 393
- Technology
  - digital technology (*See* Digital technology and private law)
  - private power and, 248
- Teubner, Gunther, 28, 50, 96, 97, 99, 178, 194–5, 276, 298–300, 302, 308–13, 472–4, 475, 477–82. *See also* Digital technology and private law; Transnational law
- Thaler, Richard, 75, 92
- Thatcher, Margaret, 352, 419–20
- Theory as practice, 5
- Theory of justice (Rawls)
  - basic rights and liberties in, 148–50
  - conditions for substantive solutions, 145–6
  - consent-based nature of, 143–5
  - criticism of, 150–1
  - justice as fairness, 143, 147
  - original position in, 144, 145, 146–7
  - overview, 134–5, 154–5
  - principles of, 148–50
  - private law and, 151
  - reflective equilibrium in, 147
  - social and economic inequalities in, 148–50
  - texts of reference, 133–4
  - veil of ignorance in, 146–7
- Theory of practice, 5
- Theory of the firm (Coase), 365–7. *See also* Corporations
  - employment law and, 366–7
  - individual versus firm, 365

- Theory of the firm (Coase) (cont.)  
 necessity of firm, 365  
 in neoclassical economics, 365  
 overview, 360  
 planning and, 365–6  
 price mechanism and, 365–6  
 transaction costs and, 365–6  
 uncertainty and, 366
- Theses of private law theory  
 application-oriented nature of private law, 3  
 comparative nature of private law, 2–3  
 pluralistic nature of private law, 1–2  
 state-centered or national, private law not  
 deemed, 3–4
- Thibaut, Anton, 186–7
- Thomasius, Christian, 122
- Thornhill, Chris, 96
- Tissier, Albert, 184
- de Tocqueville, Alexis, 185
- Tort law  
 accident defined in, 284  
 in Austria, 277  
 breast implants, 272  
 capitalism and, 295–6  
 cheapest cost avoider, 282–3, 287–8, 289  
 contract law and, 285–6  
 corporations, liability for violations of international  
 law, 415–16  
 corrective justice and, 275  
 damages in, 293  
 deep pocket justification for risk allocation, 288,  
 291–2  
 economic analysis of law (EAL) and, 276–7, 280  
 economic analysis of potential cost, 282–3  
 economics and, 73, 77  
 enterprise liability in, 278, 288–90  
 in European Union, 289–90, 296  
 evolution of, 275, 277–8  
 in France, 277, 281–2, 283–6  
 in Germany, 277  
 Industrial Revolution and, 277–8  
 law and economics and, 280, 286, 292  
 liberal market economies (LMEs) versus co-  
 ordinated market economies (CMEs), 278  
 loss spreading justification for risk allocation, 288,  
 290–1  
 marginal utility of money and, 290  
 negligence (*See* Negligence)  
 neoclassical economics and, 276  
 non-calculability of risk in, 281, 283, 292–7  
 organizational liability in, 278  
 overview, 297  
 product liability, 278–9, 285–6  
 risk allocation in, 287–8  
 risk society and, 281, 283, 292–7
- social justice versus economic efficiency in, 274–6,  
 280–1  
 strict liability in, 280, 285–6, 287–8  
 subjective versus objective liability in, 281–2  
 texts of reference, 272–4  
 transaction costs and, 82, 276–7  
 in United States, 296  
 vicarious liability in, 278  
 wealth distribution versus risk distribution, 294–7
- Total welfare  
 contract law and, 220  
 institutional economics and, 220
- Transaction costs  
 agency relationship in corporations and, 384  
 bounded rationality versus, 89–90  
 Coase theorem and, 80–2  
 corporations and, 360, 365–6  
 in European Union, 76–7  
 evolution of concept, 74–5  
 information and, 230  
 institutional economics versus, 87  
 lack of definition, 79  
 mistaken assumptions underlying, 81–2  
 in nuisance cases, 79–80  
 overview, 71, 84, 93–4  
 private ordering and, 491  
 reciprocal nature of problem, 80, 81  
 redistribution and, 79  
 state, role of, 82  
 texts of reference, 72–4  
 tort law and, 82  
 in United States, 75–6  
 welfare economics versus, 83–4
- Transfer of law  
 debate regarding, 440–1  
 in European Union, 440–1  
 evolution of, 439–40  
 functional method in private law (*See* Functional  
 method in private law)  
 law as a product (*See* Law as a product)  
 overview, 437  
 texts of reference, 437–9
- Transitional justice, 158
- Transnational corporations  
 codes of conduct, 6, 7  
 human rights and, 6–8  
 as hybrid form of organization, 7  
 rise of  
 sociology and, 67
- Transnational law  
 arbitration and, 481  
 civil society and, 478  
 constitutionalization of, 483  
 contract law and, 477, 480–1  
 domestic law versus, 481

- functional concept of, 472–4, 475–7
- functional definition of, 476
- globalization and, 474, 475
- legal positivism and, 476
- lex mercatoria* and, 478–80
- organizational contracts and, 315
- overview, 472
- Pax Americana and, 478
- public ordering versus private ordering, 482–3
- sociological understanding of rule-making in, 476–7
- structural coupling and, 475
- systems theory and, 472–3, 474, 478
- theoretical approaches to, 482
- traditional relation between law and nation-state and, 477
- transnational legal orders and, 480–1
- transnational situations and, 476
- Transnational private ordering, 28–9
- Trembling hand problem, 23
- Trstenjak, Verica, 115
- Trubek, David, 5, 157–8, 468
- Trust, organizational contracts and, 328, 334
- Tuori, Kaarlo, 310
- Tuori, Kaius, 118
- Turkey, Mediterranean model and, 427
- Tversky, Amos, 24, 91–2, 208–9, 210, 221–8. *See also* Contract law
- Twigg-Flesner, Christian, 301
- Uber, 240, 241
- Uncertainty
  - corporations and, 366
  - organizational contracts and, 324–5
- United Kingdom
  - Brexit, 128
  - City Code on Takeovers, 392
  - Conduct of Business Sourcebook (COBS), 231
  - contract law in, 175
  - Dexia Crediop S.p.A. v. Comune di Prato* (2017), 472, 475, 476, 477, 478, 480–1, 482–3
  - Financial Conduct Authority (FCA), 231
  - Financial Services Authority, 231
  - Glorious Revolution (1688), 120–1
  - inside versus outside question in, 40
  - kickbacks in, 231
  - New Labour, 342, 352
  - product liability in, 278–9
  - Redwood Master Fund Ltd v. TD Bank Europe Ltd* (2006), 60, 64, 65, 67, 69, 70
  - Retail Distribution Review (RDR) of 2013, 231
  - shareholder protection rights in, 124
  - transnational private ordering and, 28
- United Nations
  - constitutional order and, 309
  - corporate social responsibility (CSR) and, 421
  - Global Compact, 421, 428
  - Guiding Principles, 428
  - sales convention, 404
  - sustainable development goals, 190, 421
- United States
  - Alien Tort Statute, 415–16
  - American critical legalism in, 163
  - American Revolution (1775), 195–6
  - anti-discrimination law in, 261, 270
  - antitrust law in, 176, 251
  - Brown v. Board of Education* (1954), 163, 261, 265
  - Carroll Towing Co., United States v.* (2nd Cir. 1947), 17, 36, 46–7, 55–6, 289
  - Civil Rights Act of 1964, 196, 261, 265–6
  - Civil Rights Act of 1968, 261
  - Civil Rights Movement in, 193, 394
  - Commerce Clause, 463
  - Delaware law, importance of, 391–2
  - digital technology in, 301–2, 307
  - Doe v. Wal-Mart Stores Inc.* (9th Cir. 2009), 6–8
  - Equal Protection Clause, 265
  - Federal Trade Commission, 489
  - First Amendment, 495
  - Fourteenth Amendment, 265
  - Godby v. Montgomery County Board of Education* (M.D. Ala. 1998), 193, 203, 204
  - individual versus collective in, 106
  - inside versus outside question in, 40
  - internet platforms, freedom of expression of, 495
  - Kiobel v. Royal Dutch Petroleum Co.* (2013), 28, 311, 415–16, 421, 422, 427, 430, 432–3
  - law and economics in, 72
  - law as a product in, 452
  - legal realism in (*See* American legal realism)
  - Lochner v. New York* (1905), 163, 174, 195–6
  - National Security Agency (NSA), 313–14
  - New Deal, 174, 381–2
  - organizational contracts in, 319
  - privacy law in, 298
  - product liability in, 279
  - protest in, 394
  - racial discrimination in, 198
  - Securities Act of 1933, 234
  - Securities and Exchange Commission (SEC), 407
  - Securities Exchange Act of 1934, 234
  - shareholder protection rights in, 124
  - Sherman Antitrust Act, 251
  - Shlensky v. Wrigley* (Ill. 1968), 370–1, 380–1, 389, 420
  - state action doctrine in, 495
  - subprime lending in, 207, 219, 220
  - tort law in, 296
  - transaction costs in, 75–6
  - transnational private ordering and, 28
  - Unitrin, Inc. v. American General Corp.* (Del. 1995), 391–3, 403, 409–10, 412

- United States (cont.)  
*U.S. Bank National Association v. Windstream Services, LLC v. Aurelius Capital Master, Ltd* (S.D.N.Y. 2019), 484, 488, 492, 493–4  
 values in private law in, 160, 163, 165  
 Vietnam War and, 394
- Unitrin, Inc., 391–3
- University of California, Berkeley, 396–7
- University of Chicago, 404, 405
- University of Maastricht, 445
- University of Munich, 446
- Used cars, imperfect distribution of information and, 243–4
- Valcke, Catherine, 118
- Values in private law  
 abstract versus concrete rights and, 161–2  
 American critical legalism and, 163  
 critical legal studies and, 159–60, 162–3  
 criticism of legal reasoning and, 163–4  
 delegitimation of legal institutions, danger of, 164  
 hard cases, 160  
 intermediary position, 159  
 judges, role of, 160–1  
 legal positivism and, 158–9  
 legal realism and, 159–60, 162–3, 164  
 methodology and, 159  
 overview, 156, 165  
 philosophical judge (Hercules) and, 162  
 policies versus principles, 160–1  
 politics and, 163  
 precedent and, 162  
 principle-based adjudication, 161  
 separation of powers and, 162  
 texts of reference, 156–8  
 United States, European Union compared, 160, 163, 165  
 value-based legal reasoning and, 163–4
- van Themaat, Peter Verloren, 461
- Varieties of capitalism (VoC)  
 actor-related approach, 424  
 business strategy infrastructure and, 426  
 comparative law and, 417  
 co-ordinated market economies (CMEs) (See Co-ordinated market economies (CMEs))  
 corporate social responsibility (CSR) compared, 422, 424, 430  
 corporations, tort liability for violations of international law, 415–16  
 corporatism and, 423  
 criticisms of, 418–19  
 culture, role of, 425–6  
 decline of, 417  
 definition of institution for purposes of, 423  
 dependent market economies (DPM), 417, 417  
 emergence of, 416  
 European Union and, 424  
 history, role of, 425–6  
 informal rules, role of, 425–6  
 institutional complementarities and, 426  
 institutional economics and, 416–17  
 institutional infrastructure and, 426  
 institutions, role of, 425  
 legal origin theory (LOT) and, 417, 427  
 liberal market economies (LMEs) (See Liberal market economies (LMEs))  
 Mediterranean model, 417, 427  
 modernization and, 423  
 national economies and, 424  
 new production regimes and, 423–4  
 organizations, role of, 425  
 overview, 414  
 regulation and, 415  
 relational perspective, 425  
 texts of reference, 416–418
- Vettori, Giuseppe, 168, 176–8. *See also* Constitutionalization of private law
- Vicarious liability in tort law, 278
- Vietnam War, 394
- Vishny, Robert W., 11, 112–13, 117, 123–7. *See also* Legal Origin Theory
- Vliegenthart, Arjan, 417
- VoC. *See* Varieties of capitalism (VoC)
- Vogel, David, 416, 424, 427–31. *See also* Corporate social responsibility (CSR)
- Volkswagen, 315–17
- Voltaire, 120–1
- Vorverständnis* (preconception), 39, 47, 48–9
- Wagner, Richard, 54
- Wallerstein, Immanuel, 478
- Wal-Mart, 6–8
- Watson, Alan, 444
- Weber, Max, 26, 29, 61, 62–9, 95, 98, 183, 252, 257, 294, 320, 322, 345, 422, 497, 499. *See also* Sociology and private law
- Weiler, Joseph H.H., 394, 457
- Welch, Jack, 373
- Welfare state  
 contract law and, 188–91  
 in Germany, 199  
 material justice in private law, welfare state model of, 194, 200–3  
 welfare economics, 40, 83–4
- Wells, Harwell, 126, 127
- White, Harrison Colyar, 333
- White Paper on European Governance, 442, 458, 461



## Index

541

- Wieacker, Franz, 11, 112, 113, 118–23, 124, 126, 128, 194–5, 196, 197–200, 203–4, 258, 264–5, 444. *See also*  
 Legal history; Material justice in private law
- Wielsch, Dan, 484–5
- Wiethölter, Rudolf, 194–5
- Wilhelmsson, Thomas, 172, 181, 188–91. *See also*  
 Democratization of private law
- Williamson, Oliver, 30, 63, 72–3, 74, 77–8, 84–9, 93–4, 139, 238–9, 250, 276–7, 317–18, 319, 321, 322, 323, 324–9, 331–2, 333, 337–8, 366, 397, 398, 406, 505, 507, 508–9, 511. *See also* Institutional economics; Organizational contracts
- Windscheid, Bernhard, 105
- Wirtschaftsdemokratie* (economic democracy), 254–5
- Wisdom of the crowds, 14–15
- Wittgenstein, Ludwig, 143
- World Bank, 117, 427
- World Trade Organization (WTO), 309
- Wright, Aaron, 303
- Wrigley, William Jr., 371
- Yahoo, 308
- Yale University, 396, 404, 405
- Zeitlin, Jonathan, 468, 469
- Zimmermann, Reinhard, 115, 120, 124
- Zingales, Luigi, 127
- Zuckerberg, Mark, 370
- Zumbansen, Peer, 28, 309
- Zweigert, Konrad, 113–14, 117, 175, 437–9, 441, 443–6, 447, 448, 453. *See also* Functional method in private law