Index

abstraction, isolating 108
abuse of market power, Chicago School 61
active state concept 26
adhocracy 216
adversary concept
  adversarial tradition 154
  in jurisprudence 154–7
  in politics 150–54
agglutination of power 200
agonism 154
agonistic liberalism 151, 152
agrarian economic model 15–16, 18
Akman, Pinar 32, 97, 111, 113
Ancient Greek philosophy 10–15, 34, 124–5, 129
antagonism 154
anticompetitive agreements, pro-competitiveness of 269–71
antinomy 93, 94, 130
antitrust doctrine
  authorisation of mergers 18
  Brussels/Neo-Brussels Schools 110–18
  coherent application of law 4
  empirical techniques 64
  from EU perspective
    Brussels/Neo-Brussels Schools 110–18
  Ordoliberal roots of European antitrust 80–103
  expertise-based economics 72
  historicism doctrine 28, 74–5
  history of ideas 73
  internal competition 267–8, 269
  laissez-faire v. intentionalist
    perceptions of market process 73
  libido theory 158–9
  methodological holism 3
  neutral policy requirement 62
  normative and methodological components 47–9
  paradoxicality of antitrust 68
  progressive nature 79
  scope of antitrust goal, shaping 55–6
  theory 201
  from US perspective
    based on European economic and legal foundations 79–80
    cartels 86–7
    Chicago School 59, 63, 65, 66, 72
    economic efficiency 61
    effectiveness of antitrust rules 46, 47
    evolution of 38, 39
    global influence on competition law 79
    monolithic narrative of development of antitrust 58
    normative and methodological components 47–9
    norms 44–5
    opposition to an interpretive jurisprudence 43
    and Ordoliberalism 87, 95
    polarised views 44
    Post-Chicago School 70
    scope of antitrust goal, shaping 55–6
    wording and interpretation 36
    see also United States
antitrust paradox 168
antitrust regulation of competitive process, flaw in 172–6
re-authorisation 173, 175
Aquinas, St. Thomas 17
arbitrariness
  balancing 237–8, 241
  bounded 213–17
Aristotle 13–14, 129
art 144, 146
Arthur, Thomas C. 37, 38, 43, 143
Austin, John 250
Austrian School
competition from perspective of 26, 99, 104–10
deductive approach of 108
and Historical School 107, 108
neoclassical economics 108, 109
and Ordoliberalism 105, 106, 108
autopoeis of values 180–86
analytical two-step model 181–2, 183, 184
closeness of autopoeitic systems 184–5
decision-making 180–81
self-sufficiency and self-maintenance 182
axiomatic human rights-based
approach see deontological (non-consequentialist) approach to competition

balancing
arbitrariness 237–8, 241
balancing act
Chicago School 65
in constitutional jurisprudence 236–45
dialectics 131
and incommensurability of values 76, 194–8
marginal utility concept, application to 26
proportionality 187
regulatory circles 167
and self-destructive nature of competition 165
sub-acts 200
theoretical approaches 234
consequentialist approach to 244
constitutional 243
decision-making process, preconditions see
decision-making
inevitability of 188
interdisciplinarity 188, 199–206, 229
and interpretation of values 186–212
law of economics and economics of law 229–33
mechanics of 178–234
monosemic models 190–92
political balancing between values 25–6
scarcity of regulatory choices 188, 209–12
systemic approach to 193
values see values
Balkin, Jack M. 200, 202, 204, 233, 251
barriers to entry, Chicago School 61, 63
Bentham, Jeremy 21, 25, 65, 250
Berdiaev, Nicolas 104, 122, 131, 134, 135, 139–40, 159
Berlin, Isaiah 83, 97, 99, 104, 133, 135–40, 151, 152, 164, 189, 198, 219
Böhm, Franz 32, 82, 85–9, 92, 97–9, 102, 159, 205, 227, 296
Böhm-Bawerk, Eugen von 107
Bork, Robert H. 41, 56, 63, 68, 121, 148, 168–9, 190, 227
bounded arbitrariness of decision-making 213–17, 261
bounded objectivity 213
Brietzke, Paul H. 37, 38, 143
‘broader picture’ issues 4–5
Brussels/Neo-Brussels Schools of Antitrust 110–18
market integration ethos 114, 116, 117
and Ordoliberalism 110–14, 117
Buchanan, James M. 106, 143, 144, 147, 191, 224, 230
Budzinski, Oliver 22, 23, 30, 31, 48, 54, 57, 61, 64, 69, 70–72, 77, 81, 85, 98, 99, 103, 105, 118, 136, 146, 151, 158, 164, 167, 172, 199, 201, 212, 219
bureaucracy 216
capitalism
role of universities prior to 16–17
and Roman law 14
cartels 24, 38, 63, 98
in Germany 85–6
justification for 86–7
Chicago School 47–8, 52, 56–66, 72, 78, 117

see also Post-Chicago School
academic and political success 59
antitrust doctrine 59, 63, 65, 66
deductive techniques 72
as example of normative economics 78
features 61–2, 63
and Harvard School 57–8, 64, 75
as ideological movement 62
ideological opponents 66
law, contributions to 59–60
non-intervention tradition 57
v. Post-Chicago School 70, 71–3, 75, 76–8
premises in antitrust scholarship 59
rule of reason 47–8, 62–3
skepticism, legacy of 57

Christiansen, Arndt 42
Cicero 14
Clark, John B. 39, 105
Clark, John M. 51
classical economic theories 14, 50, 84
role of competition in 21–9

Coate, Malcolm B. 57
coefficient of utility 25
Cohen-Eliya, Moshe 243
collectivism 84, 137
commensurability concept 194
commoditisation of money 14
communication
between decision-makers and
influence groups 222–5
inter-value 223
intra-value 222, 223
trans-value 222
value of competition, and
communicative problems 225–9
between values and decision-makers 213
comparative advantage principle 29, 61, 62
competition
see also competition policy;
competitive process
anticompetitive agreements, pro-
competitiveness of 269–71
Austrian School perspective 26, 99, 104–10
‘broader picture’ 4–5
complete 32, 33
constitutional approach, practical
implications 265–73
cultural 145, 146, 147, 148, 155, 168
deohtological approach to
see deontological (non-
consequentialist) approach to
competition
doctrinal foundations of law
see doctrinal foundations
competition law
economic concept see economic
concept of competition
effect-oriented approach 53–4, 58
formal requirements for existence 3, 4
free 21–2, 23, 24, 30, 31, 147
good and bad 13, 125, 126
handicap 99
imperfect 51, 62
interaction with public interests 54
internal 3, 4, 265–9
internal limitation 164–5
between labour force and capital 27
legal rules v. legal principles 44
Marxian concepts 26–8
on the merits 99
neoclassical v. dynamic
understanding 30
normative value see normative value
of competition
Ordoliberal conception of 94–103
perfect see perfect competition
phenomenon of 3, 4, 44, 98
philosophical perspective 124–42
political 8, 144–5, 148, 155
preventive interpretation 17–18
primary objective of jurisprudential
account of 1–2
primary stage 27
protection of 141
in public domain 8, 142–3
pure 162
rivalry between approaches to 5, 6
self-destructive nature 122, 163–76
social market economy 5–6
theory, reconciling with practice 271–3
value of, and communicative problems 225–9
workability of, US 51–5
competition policy vi, vii, ix, x, xi, 1, 3, 117, 276
see also competition; competitive process
balancing mechanics 199, 226, 234
contemporary viii, 2
economic concept of competition, evolution 29, 30, 33
European 80, 95, 111
evolution of competition law from US perspective 54–7, 61, 69, 70
normative value of competition 126, 141, 176, 177
and positive/negative freedom 136–42
US perspective 79
competitive process vii, viii, ix, x, 1, 5–9, 258, 275, 276, 277
antitrust regulation of, flaw in 172–6
balancing 178, 234
decision-making 213, 222, 225, 226, 229
interpretation of values 188, 193, 198, 207
Chicago School 64
constitutional approach 193, 265–73
and dialectics 131
doctrinal foundations of competition law 35
EU perspective 83, 94–7, 102–105, 107, 109, 115
US perspective 36, 47, 49, 53–4, 56, 64, 66, 68
economic concept of competition, evolution 11, 33
classical economic theories 23, 26, 28
ideas before late 18th century 16, 17, 20
form- and effect-based assessments of performance of 53–4, 58
legal theoretical aspects 235, 245
normative value of competition 121–4, 131, 148, 149–50, 158, 177
adversary concept 151, 153, 155, 156
antitrust regulation of competitive process, flaw in 174, 176
regulatory circles 165, 167, 168, 170, 172, 260–61
and Ordoliberalism 97
v. perfect competition 30–33
positive feature 245
and societal well-being 177
Treaty on the Functioning of the European Union 260, 261, 264
complete competition 32, 33
Comte, Auguste 186
conflicts of values 188, 192–3
natural 206–208
consequentialism 6, 66–8, 244
constitutional approach to competition
balancing act in constitutional jurisprudence 236–45
economic constitution, concept 100
effects of constitutionalisation 179
internal competition, concept 265–9
norms, constitutional 239
and Ordoliberalism 96–7, 100
practical implications 265–73
consumer surplus 117
consumer welfare 1, 232, 263, 276, 277
balancing and interpretation of values 205, 207, 210
constitutional approach to competition 270, 272
decision-making process, preconditions 219, 222, 226, 227
foundations of competition law, doctrinal
from EU perspective 103, 116–18
from US perspective 38, 56–8, 60, 61, 70
normative value of competition 123, 149, 173, 174
contestability, assumptions theory 63
cost-benefit analysis 46, 81, 232, 234, 240, 245
creationist view on development of competition 20
Critical Legal Studies 66
cross-disciplinary studies 188, 203
cultural competition 145, 146, 147, 148, 155, 168
Index

Dabbah, Maher M. 19, 104, 121, 141, 142, 217
Darwin, Charles 73, 137
decision-making
ad hoc 182–3
autopoiesis of values 180–81
and balancing 189
bounded arbitrariness of decision-making 213–17, 261
communication between decision-makers and influence groups 222–5
preconditions of process 212–29
rock-paper-scissors effect 213, 220–22
and self-destructive nature of competition 165
subjective aspect 26
deliberative democracy, principles 133
democracy
agonistic 154
as best of the worst 146
deliberative 133
liberal see liberal democracy
pluralistic 153
deo-mystification of law 67
deoontology 2, 22, 24, 152
and formalism 240
freedom 152, 261
and Ordoliberalism 96, 99, 102–103
re-authorisation 262, 263
regulatory circles 168
and rights 96, 142, 208
v. utilitarianism 6–7
Derrida, Jacques 181
destrudo (destructive elements) 160
dialectical materialism 196
dialectics
and balancing 181
competition quia dialectics 127–30
and competitive process 131
concept 127, 129
development of dialectical thinking 12
dialectical spiral 132–3
dialogue 128, 129
dilemmas, aporias and paradoxes 129
of epistemology 128
externality 129
and German Idealism 130
and harmony 135
of Hegel 134–5
of history 196
as instrument of argumentation 130
laws of 1
and liberal democracy 132, 133–4
and necessity of tragic choices 134–6
noetic 127–8
of ontology 128
origins of 129
quantity–quality continuum 197
reflective 127–8
regulative 127–8
taijitu symbol 128
and value pluralism 131–4
and values 195
Dialogues (Plato) 13
dirigisme concept 19, 82–4, 114
distributive justice 24
division of labour, Platonic concepts 12–13
doctrinal foundations of competition law 35–120
evolution of competition law from EU perspective 79–118
Brussels/Neo-Brussels Schools of Antitrust 110–18
Ordoliberal roots of European antitrust 80–103
evolution of law from US perspective 36–79
Chicago School 47–8, 52, 56–66
consequentialism, as source of legal realism 66–8
Harvard School tradition 47, 50, 51, 54–6, 75, 118
normative and methodological components of antitrust doctrine 47–9
Post-Chicago School see Post-Chicago School
rule of reason v. reason of rule 39–47
scope of antitrust goal, shaping 55–6
Structure–Conduct–Performance (SCP) paradigm 48, 50, 52–3, 56, 58, 60, 75, 118
universalists and historicists, conflict between 74–5
workability of competition 51–5
intentionalism 35, 73
legalistic doctrinarism 2
pendulum narrative 53–4, 74, 118–19
dogmatism 156
Drexl, Josef 112, 115–17, 274–6
Durkheim, Emile 215
Dworkin, Ronald 240
Easterbrook, Frank H. 57, 60, 61
Ebenstein, William 185, 253, 254
Ebner, Alexander 90, 111
economic concept of competition 1, 164
archetype of economic reasoning, equilibrium principle as 30
classical theories see classical economic theories
constructed perspective 10–11
descriptive perspective 10, 11
equilibrium economics 25, 30, 31, 109, 162, 205, 270
evolution of 9, 10–34, 96
Ancient Greek philosophy 10–15, 34, 124–5, 129
ancient roots 11–16
antitrust ideas in 19th century 73
creationist v. evolutionary view 20
ideas before late 18th century 16–21
mercantilism 18–19
Roman philosophy 10, 11, 14, 34
social context, understood in 12
transition from feudal to capitalistic perception of economy 18
ideas before late 18th century 16–21
law as influence on economics 201–202
law of economics and economics of law 229–33
marginal utility concept, development 24–5
mathematic processes 30
and normative value of competition 149–50, 160
perfect competition v. competitive process 30–33
scarcity of regulatory choices 210
and self-destructive nature of competition 163–4
subjectivist and inductive economic schools 25
universal and deductive principles of mainstream equilibrium economics 25
economic constitution, concept 100
economic efficiency 12, 86, 119
evolution of competition law 56, 61, 62, 66
economic freedom concept 18, 113, 148
economic positivists, v. normativists 76–7
economic theory vii, xi, 9, 15, 46, 157, 206, 238
economic competition, ideas before late 18th century 16, 19, 29
evolution of competition law from EU perspective 81, 93, 98, 112
perfect competition v. competitive process 30, 31
Post-Chicago School 69, 73
economies of scale 53
Chicago School 61
economy of scale, concept 12
effect-oriented approach to competition 53–4, 58
empiricism 5, 22, 72, 197
criticism 191–2
historical 89, 93, 108
inductive 47
entrepreneurial discovery viii, 8, 104–105, 139, 163
entrepreneurial freedom viii, 158
entrepreneurial spirit 8, 15, 31, 109
Epicureans 16
equilibrium economics 44, 109, 162, 205, 270
economic concept of competition 25, 30, 31
eris (strife), concept of 12
eros, Platonic notion of 159
Eucken, Walter 23, 29, 32, 74, 75, 78, 80–83, 87, 88–90, 92–4, 96–8, 100–103, 108, 164, 189, 197, 205, 206, 218, 220, 227, 277
eugenics 183–4
European Union (EU)
creation of similarities 141
Index

evolution of competition law from perspective of 9, 79–118
integration process 116, 141
methodological motto of European competition policy 1
normative motto of European competition policy 1
evolution of competition law economic perspective see economic concept of competition
EU perspective see European Union (EU)
US perspective see United States exclusive dealing 41
fairness doctrine 172
feudalism
and distributive justice 24
transition from feudal to capitalistic perception of economy 18
Fichte, J.G. 130
Finlayson, James G. 135
Fischer, Jeffrey H. 57
Fish, Stanley 216, 218
Fiss, Owen M. 213
Flynn, John J. 66
formalism 42, 58, 116, 118, 240
Foucault, Michel 83, 104
Fox, Eleanor M. 61
free competition 147, 162
and economic concept of competition 21–4, 30, 31
free markets 12, 21, 67
free trade 21
freedom see also free competition; free market, origin of; free speech; free trade; freedom of contract; freedom of speech
beneficial consequences 147–8
broader concept 98–9
collective positive freedom 137
complete 139, 140
as condition 31
deontological principle 152, 261
and dialectics 132
economic 18, 113, 148
entrepreneurial viii, 158
ethos and idea of 147
fragility of 169
individual positive freedom 137
offensiveness of 171
personal 238
phenomenon of 142
philosophical concept 177
positive and negative freedom and competition policy 136–42
protection of 20
psychological perspective 160, 161, 162–3
pure 169
regulatory circles 165, 167, 169, 170, 171
and rights 142, 170, 171
and self-destructive nature of competition 164
as status 31
and utility 99
freedom of contract 39
economic concept of competition 24, 29
and Ordoliberalism 86, 87
freedom of expression see freedom of speech
freedom of speech 8, 243, 261
normative value of competition 129–30, 140, 145, 146, 168, 171, 176
Freiburg School 50, 80, 81, 113
and Ordoliberalism 94, 101, 102
Friedman, Milton, ‘The Methodology of Positive Economics’ 77
game-theoretic approach 150
Brussels/Neo-Brussels Schools 117–18
Chicago School 48, 69, 70–1, 72, 118
Gauthier, David 230
Gerber, David J. 13–15, 17, 19, 21, 32, 80, 83, 85, 86, 90, 93–5, 102, 104, 111, 112, 114, 118, 143, 157, 169, 254, 277
Germany
cartels in 85–6
constitutional style 243
Federal Constitutional Court and Lüth case 242–3
Historical School see Historical School
idealist philosophy 92
National-Liberal movement (19th Century) 83
positivistic tradition 247
post-war economic miracle 89–90
The Good Society (Lippmann) 84
governmentality, liberal 83
Gray, John 138
Greek philosophy see Ancient Greek philosophy
guilds 19, 24
Günther, Klaus 215

Habermas, Jürgen 239–40, 241
Hamiltonians, United States 38
handicap competition 99
happiness
Ancient Greek philosophy 13, 16
and utilitarianism 22, 25
Harvard School tradition, US 47, 50, 51, 54–6, 75, 118
and Chicago School 57–8, 64
Hayek, Friedrich A. von 26, 33, 83, 87, 91, 107, 109, 170, 199, 221, 256
Hedonists 16
Hegel, Georg Wilhelm Friedrich 130, 134–5, 196, 253
Heidegger, Martin 181
Heraclitus 129
Hesiod, works of 12, 124–5
hierarchies, negation of 189–94
Historical School
and Austrian School 107, 108
and evolution of American antitrust scholarship 79–80
and institutionalism 73
and Ordoliberalism 87–94
antinomy 93, 94
legal positivism 89, 91
rule of law 91, 92
similarities 94
historicism doctrine 28
conflict between universalists and historicists 74–5
homonymy 33
of values 188, 199–206
House of Representatives, US 39
Hovenkamp, Herbert J. 8, 28, 38, 39, 41, 48, 53, 54, 58, 60, 61, 63, 65–7, 70, 71, 74–6, 78, 80, 86, 94, 150, 158, 159, 170, 227, 231, 268, 273
humanisation of law 67
humanism 247
Husserl, Edmund Gustav Albrecht 108
hyperinflation 86
idealism, legal 255
imperfect competition 51, 62
in-/commensurability of values 25, 188
and balancing act 194–8
and commensurability 194
conditions 198
indifference, law of 195
Industrial Organisation methodology 219
and Brussels/Neo-Brussels Schools 117–18
and Post-Chicago School 71, 72, 75
influence groups 222–5
information failures 53
Inquiry into the Nature and Causes of the Wealth of Nations (Smith) 22
intellectual property 19
intentionalism 35, 73
inter-brand competition 273
interdisciplinarity 3, 65, 67, 229
and balancing 188, 199–206
internal competition 3, 4, 265–9
internal market, and open market 115–16
interpretation of values, and balancing 186–212
inter-state barriers/anti-competitive practices 114
interventionism, liberal 83
intra-brand competition 273
intradisciplinarity 203, 232, 250
‘invisible hand’ metaphor 22
Jeffersonians, United States 38
Jellinek, Georg 233
Jenny, Frederic 144
Jevons, William S. 25, 26, 195, 218
Joerges, Christian 83, 111
Jones, Franklin D. 19
jurisprudence
adversary concept in 154–7
balancing act in constitutional jurisprudence 236–45
compared to political philosophy 237
legal process 154–6
mechanical 185
primary objective of jurisprudential
account of competition 1–2
rights-based positivist tradition 250
sporadic operationalisation of 3
term 1
justice 24

kaleidoscopic constellation of values
213, 217–20
Kant, Immanuel 92, 93, 130, 136
Katz, Avery W. 78
Kelsen, Hans 46, 77, 91, 185, 196,
199, 207, 213–15, 230, 232, 233,
237–40, 246, 251, 253, 257
Kerber, Wolfgang 42
Keynes, John Neville 77, 78, 231
Kirzner, Israel M. 31, 107
Knight, Frank H. 144, 170, 247
Kramer, Matthew H. 248
Kress, Ken 215

labour forces and capital 27
Lachmann, Ludwig 107
laissez-faire tradition
and Austrian School 107–108
Austrian School 110
Austrian School perspective 106
Chicago School and Post-Chicago
School 62, 68, 73
economic concept of competition,
evolution 20, 27
Ordoliberalism 84
philosophical perspective of
competition 137
Lane, Jessica 226, 258
Lange, Bettina 185
Lariguet, Guillermo 244
Laski, Harold J. 137, 164
law
see also legal theoretical aspects of
competition
Chicago School contributions to
59–60
competition see competition
correlation of law and morality
246–53
de-mystification of 67
economics of, and economics of law
229–33
essence of, taken as set of social
norms 3
humanisation of 67
ideal and material 254–9
pure 253
subordination of 65
legal norms 214
legal positivism 233, 254, 255
exclusive 250–51, 258
inclusive 250
law and morality 247–8, 251–2
and legality 249–50
and logical positivism 185, 257
and Ordoliberalism 89, 91
and scientific positivism 185
and sociological positivism 185–6
legal process jurisprudence 154–6
legal realism, consequentialism as
source of 66–8
legal theoretical aspects of competition
235–59
balancing act in constitutional
jurisprudence 236–45
correlation of law and morality
246–53
ideal and material law 254–9
rule of reason, US 46
legalistic doctrinarism 2
Levinson, Sanford V. 202
lexical order 211
Lianos, Ioannis 185, 228
liberal democracy
see also values
adversary concept
in jurisprudence 154–7
in politics 150–54
and dialectics 132, 133–4
role of competition in 95, 122, 176
libido concept 8–9, 157–63
normative role 142–63
values 21, 151
liberal interventionism 83
liberalisation policies 18, 114
liberalism 17, 131, 147, 260
see also liberal democracy;
neoliberalism; Ordoliberalism
agonistic 151, 152
The normative foundations of European competition law

constitutialional choice 132
economic 17, 22
end-state 102
modern 84
monistic 153
and Ordoliberalism 83, 84
pluralistic 153
rule-oriented 101
liberty principle (Mill) 138
libido concept and psychological aspects of competition 8–9, 157–63
Liefmann, Robert 169
Lippmann, Walter 84
literalism 42, 43
Locke, John 21
logical positivism 185, 257
Luhmann, Niklas 182, 185, 193, 196, 204
MacCormick, Neil 249
Machiavelli, Niccolò 18
McNulty, Paul J. 31
Maher, Imelda 103
majority, rule of 133
marginal utility concept, development 24–5, 26
marginalist revolution 108
market failure 161–2
market incentives 6
markets
abuse of market power 61
ancient origins 12, 14
commonality of 114
competitive 5, 68
‘eroticism of market relations’ 159
European 114
free markets 12, 21, 67
incentives 6
market integration ethos 114, 116, 117
market results, workability of competition 53–4
open market/open market economy 115–16, 172
social market economy 5–6
state–market relationship, either-or perception 20
Markham, Jesse W. 51–2
Marmor, Andrei 192
Marshall, Alfred 26
Marx, Karl 26–8
Mason, Edward S. 162
Mathews, Jud 192, 221, 238
Maturana, Humberto 182
media pluralism 268–9
Menger, Carl 74–5, 107
mercantilism
development of 18–19
and feudalism 24
and United States 39
mergers 18, 63
meritocratic justice 24
merits, competition on the 99
Mestmäcker, Ernst-Joachim 90–91, 100, 112, 158
minimalism 146
Mises, Ludwig von 107, 108
modernism 181
Molle, Alexander 175
monetary policy 14
monism 16, 152
monopolies
and Austrian School 109
Chicago School 63
hostility towards 18–19
inefficiency 38
justification for 18–19
Marx on 27
origins of 14, 17
regulatory circles 169
social perception 162
in United States 37, 38
monosemic models 190–92
Monti, Giorgio 174, 231, 271
morality, and law 246–53
Morgan, Mary S. 36
Möschel, Wernhard 85–6
Mouffe, Chantal 153
Müller-Armack, Alfred 101–102
music 200
mythology, Greek 12, 125
natural law tradition 246–7, 249, 250
natural price 23
natural selection 137, 206
negation of hierarchies, and polysemy of values 189–94
negative freedom and competition policy 136–42
Neo-Chicago School 73
The normative foundations of European competition law

perfect competition
- Chicago School 64
- v. competitive process 30–33
- and imperfect competition 51
- and workability of competition 51–2

Peritz, Rudolph J. 42, 170
Perrotta, Cosimo 15–16
Petrochilos, George A. 13

phenomenological reduction 108
philosophical perspective, competition
phenomenon from 124–42
competition qua dialectics 127–30
dialectics and necessity of tragic choices 134–6
dialectics and value pluralism 131–4
freedom and competition policy 136–42
physiocracy 18
planned economy 27
Plato 12–13, 129, 159
The Republic 128
pluralism 8, 268–9, 273
see also value pluralism
Plutarch 14
polis theory 16
political competition 8, 144–5, 148, 155
political philosophy 237
politics
- adversary concept 150–54
- grassroots 277
- political competition see political competition
- regulatory circles 165–6
polysemy of values 188, 189–94
and monosemic models 190–92
Porat, Iddo 243
positive freedom and competition policy 136–42
positivism 67, 76, 257
anti-positivism 254
criticism of 252, 254
economic 78
legal see legal positivism
logical 185, 257
modern 250
as politically neutral 252
scientific 185
sociological 185–6
Post-Chicago School 47, 48, 60, 68–79, 119
antitrust doctrine 70
v. Chicago School 70, 71–3, 75, 76–8
and economic positivism 78
end of ‘monopoly’ of the Chicago-oriented rationale 70
game-theoretic approach 48, 69, 70–71, 72, 118
inductive analysis, reliance on 71
proactive nature 69
techniques 71
traditions 68–9
post-classical period 29
postmodernism 181
potential competition, theory of 63
private property 17, 18, 27, 29
production cycle, agrarian economies 15–16
property rights 81
proportionality, and balancing act 187
psychological perspective 8–9
quae sunt Caesars, Caesari approach, failure 2–3
quantity–quality continuum 188, 195, 196–7
Rawls, John 152, 211
Raz, Joseph 255
realism 42, 66–8
reason, rule of see rule of reason, US
re-authorisation
- antitrust regulation of competitive process, flaw in 173, 175
- deontology 262, 263
- regulatory circles 165–6, 261, 262
- recognition, rule of 250
- reductionism 20–21
- reflective dialectics 127–8
- regulative dialectics 127–8
- regulatory choices, scarcity 188, 209–12
- regulatory circles 165–72, 260–61, 263–4
  - first (big) circle 165–6, 168, 169, 172, 262
  - second (middle) circle 165, 166, 168, 170, 261, 262, 264
  - third (small) circle 167, 171, 262
- politics 165–6
- rationales for prohibition and re-authorisation 165–6, 261

Oles Andriychuk - 9781786436078
Downloaded from Elgar Online at 02/19/2019 05:18:08AM
via free access
resale price maintenance 41, 61
restrained liberalism 83
revisionism/non-revisionism 2
Ricardo, David 29
rights 192, 217, 222, 229, 236, 268
absolute nature of 229, 236, 240
civil 143
of competitors 62
civil 229, 235, 243
conflicting 142
constitutional 140
and deontology 96, 142, 208
economic 81
exclusivity of 243
and freedom 142, 170, 171
fundamental/basic 91, 119, 143, 237
and goals 179, 180
human 6, 20, 21, 224, 243, 250, 262, 274
inalienable 262
individual 39, 96, 99, 170
inflation in 274
language of 81, 96, 243
legal 97, 193, 234, 240, 241
limits of 237
of minorities 208, 274
moral 234, 254
natural 20
and Ordoliberalism 91, 96, 99, 101
procedural 115
property 81
protected 112, 149, 170, 180
sports media 268
treaty-protected 112
and values 243
Robins, Lionel 214
Robinson, Joan 77
rock-paper-scissors effect, decision-making 213, 220–22
Rödl, Florian 83
Roman philosophy 254
and economic concept of competition 10, 11, 14, 34
Ross, Alf 254
Royall, Sean M. 64, 73
rule of law 262, 274
ambivalence of concept 91, 92
and Ordoliberalism 90–92, 103
procedural approach to 91
substantive 92
rule of reason, US
see also under antitrust doctrine;
United States
application of concept 43–4
balancing concept 178
Chicago School 47–8, 62–3
difficulties with 41, 42
legal rules v. legal principles 44
need for 42
per se rules 44, 45
v. reason of rule 39–47
standards 45–6
rule of recognition 250
Säcker, Franz Jürgen 40, 52, 53–4, 175
Sanders, Anthony B. 92
Sartor, Giovanni 181
Schauer, Frederick 198
Schelling, F.W.J. 130
Schmitt, Carl 214
Schroeder, Jeanne L. 134–5, 197, 253
Schumpeter, Joseph A. 13, 15, 17, 22, 63, 105
Schwartz, Barry 190
Schweitzer, Heike 113
Scottish Enlightenment philosophers 104
S–C–P paradigm, US see Structure–Conduct–Performance (SCP) paradigm, US
Sebok, Anthony J. 154, 185–6
selective intervention doctrine 82
self-destructive nature of competition 122, 163–76
antitrust regulation of competitive process, flaw in 172–6
regulatory circles 165–72
self-discipline 161–2
self-sufficiency of law 246
Silvermintz, Daniel 16, 17
Skinner, Andrew S. 22
Smith, Adam 22, 23–4, 31, 77
Social Darwinism 21
social market economy 5–6, 83, 90, 101–102, 111
social utility concept 240
socialisation of state 82
society, interests of 3–4
Socio-Legal Studies 66
sociological positivism 185–6
The normative foundations of European competition law

Socrates 13
Somet, Alexander 243
Sosnick, Stephen H. 52
specialisation 227–8
Spencer, Herbert 73
spontaneous order 26
sports media, and internal competition 267–8
state
see also state–market relationship
active state concept 26
dirigisme concept 19, 82–4, 114
planning by 109
Schmittian conception of 82
socialisation of 82
state–market relationship 20
Ordoliberalism 80–81, 83, 84, 90–91
stock exchange trading companies 24
Stoicism 14
Streit, Manfred E. 88–9
Structure–Conduct–Performance (SCP) paradigm, US 48, 50, 52–3, 56, 58, 60, 75, 118
sublimation 158
Sullivan, Lawrence A. 70, 72
Svetiev, Yane 68–9, 70
Sweet, Alec S. 192, 221, 238
symbiotic theory 123
syncretism/non-syncretism 2–3
systems theory 182

Taoism 128
Teubner, Günther 185, 202
Thalmann, William G. 12, 124–5
The Internal Market and Competition, Protocol 275
‘The Ordo Manifesto’ 205
The Theory of Moral Sentiments (Smith) 22
Thucydidus 12
Tiedeman, Christopher G. 42
Torrens, Robert 29
tragic choices, necessity for 134–6
transaction costs 53
transdisciplinarity 204
travaux préparatoires 111
Treaty on European Union (TEU) 2

Treaty on the Function of the European Union 2
Article 101 and First Amendment 260–64
Commission’s application of rationale for Article 101 271–2
trusts 37, 38, 39, 86, 268
see also antitrust doctrine
Tumlir, Jan 85
type I errors, avoiding 61

Ungrund (abyss) 139, 159
United States
antitrust doctrine see under antitrust doctrine
balancing of values and rights 243
evolution of competition law from perspective of 9, 36–79
big industries, rapid growth 37–8
Chicago School 47–8, 52, 56–66
consequentialism as source of legal realism 66–8
evolutionary and pendulous perspectives 79
exclusive dealing 41
Harvard School tradition 47, 50, 51, 54–6, 75, 118
monopolisation regulation 37, 41
normative and methodological components of antitrust doctrine 47–9
Post-Chicago School see Post-Chicago School
rapid development of trusts 37
resale price maintenance 41
rule of reason v. reason of rule 39–47
S–C–P paradigm 50, 52–3, 56, 58, 60, 75
universalists and historicists, conflict between 74–5
workability of competition 51–5
Industrial Organisation methodology, and Post-Chicago School 71, 72, 75
legal culture 37
North American system of distribution of sports media rights 268
### Index

<table>
<thead>
<tr>
<th>Term</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Post-Chicago School see Post-Chicago School</td>
<td>341</td>
</tr>
<tr>
<td>Supreme Court 39–40, 41</td>
<td></td>
</tr>
<tr>
<td>voting system 145</td>
<td></td>
</tr>
<tr>
<td>universalists and historicists, conflict between 74–5</td>
<td></td>
</tr>
<tr>
<td>university 3</td>
<td></td>
</tr>
<tr>
<td>universities, role of 16–17</td>
<td></td>
</tr>
<tr>
<td>utilitarianism in art 146</td>
<td></td>
</tr>
<tr>
<td>Chicago School 65</td>
<td></td>
</tr>
<tr>
<td>v. deontological approach 6–7</td>
<td></td>
</tr>
<tr>
<td>and economic concept of competition 13, 16, 22</td>
<td></td>
</tr>
<tr>
<td>essence of 22</td>
<td></td>
</tr>
<tr>
<td>happiness 22, 25</td>
<td></td>
</tr>
<tr>
<td>normative value of competition 146, 148, 162</td>
<td></td>
</tr>
<tr>
<td>proto-utilitarian economic reasoning 17</td>
<td></td>
</tr>
<tr>
<td>psychological perspective 163</td>
<td></td>
</tr>
<tr>
<td>public goals 177</td>
<td></td>
</tr>
<tr>
<td>regulatory circles 168, 172</td>
<td></td>
</tr>
<tr>
<td>values 208</td>
<td></td>
</tr>
<tr>
<td>utility, laws of 25</td>
<td></td>
</tr>
<tr>
<td>value pluralism and dialectics 131–4</td>
<td></td>
</tr>
<tr>
<td>principles 219</td>
<td></td>
</tr>
<tr>
<td>values see also balancing: value pluralism</td>
<td></td>
</tr>
<tr>
<td>autopoiesis of 180–86</td>
<td></td>
</tr>
<tr>
<td>in-/commensurability of 25, 76, 188, 194–8</td>
<td></td>
</tr>
<tr>
<td>competing at regulatory level 261</td>
<td></td>
</tr>
<tr>
<td>conflicts of 188, 192–3, 206–8</td>
<td></td>
</tr>
<tr>
<td>correlation of law and morality 246–53</td>
<td></td>
</tr>
<tr>
<td>hierarchy of 221–2</td>
<td></td>
</tr>
<tr>
<td>homonymy of 199–206</td>
<td></td>
</tr>
<tr>
<td>interpretation 186–212</td>
<td></td>
</tr>
<tr>
<td>kaleidoscopic constellation of 213, 217–20</td>
<td></td>
</tr>
<tr>
<td>monistic approach to 153</td>
<td></td>
</tr>
<tr>
<td>natural conflict of 206–208</td>
<td></td>
</tr>
<tr>
<td>normative 49</td>
<td></td>
</tr>
<tr>
<td>Ordoliberalism 81</td>
<td></td>
</tr>
<tr>
<td>political balancing between 25–6</td>
<td></td>
</tr>
<tr>
<td>polysemy of 188, 189–94</td>
<td></td>
</tr>
<tr>
<td>qualification 188, 195</td>
<td></td>
</tr>
<tr>
<td>quantification 188, 194, 195, 201</td>
<td></td>
</tr>
<tr>
<td>and rights 243</td>
<td></td>
</tr>
<tr>
<td>utilitarian 208</td>
<td></td>
</tr>
<tr>
<td>Vanberg, Viktor J. 102</td>
<td></td>
</tr>
<tr>
<td>Varela, Francisco 182</td>
<td></td>
</tr>
<tr>
<td>vertical integration, Chicago School 61</td>
<td></td>
</tr>
<tr>
<td>Vickers, John 206–8</td>
<td></td>
</tr>
<tr>
<td>Viner, Jacob 13, 18, 22, 192, 197, 212, 214</td>
<td></td>
</tr>
<tr>
<td>vitalist tradition, psychology 159</td>
<td></td>
</tr>
<tr>
<td>voluntary simplicity 190</td>
<td></td>
</tr>
<tr>
<td>Waldron, Jeremy 240, 244, 245</td>
<td></td>
</tr>
<tr>
<td>Walras, Marie-Esprit-Léon 30</td>
<td></td>
</tr>
<tr>
<td>Weber, Max 215</td>
<td></td>
</tr>
<tr>
<td>welfare considerations 5, 7, 54, 72, 205, 275–6</td>
<td></td>
</tr>
<tr>
<td>see also consumer welfare Ordoliberalism 100–101</td>
<td></td>
</tr>
<tr>
<td>Wieser, Friedrich von 107</td>
<td></td>
</tr>
<tr>
<td>Wigger, Angela 87</td>
<td></td>
</tr>
<tr>
<td>Willgerodt, Hans 102</td>
<td></td>
</tr>
<tr>
<td>Willoughby, Westel W. 214</td>
<td></td>
</tr>
<tr>
<td>Wohlgemuth, Michael 84</td>
<td></td>
</tr>
<tr>
<td>Wolf, Dieter 275, 276</td>
<td></td>
</tr>
<tr>
<td>Wolff, Jonathan 160</td>
<td></td>
</tr>
<tr>
<td>workability of competition, US 51–5</td>
<td></td>
</tr>
<tr>
<td>form- and effect-based assessments of performance of competitive</td>
<td></td>
</tr>
<tr>
<td>process 53–4, 58</td>
<td></td>
</tr>
<tr>
<td>market results 53–4</td>
<td></td>
</tr>
<tr>
<td>Wright, Joshua D. 74</td>
<td></td>
</tr>
<tr>
<td>Xenophon 12, 16</td>
<td></td>
</tr>
<tr>
<td>Yankwich, Leon R. 39</td>
<td></td>
</tr>
<tr>
<td>Yin-and-Yang 128</td>
<td></td>
</tr>
<tr>
<td>Zeno 129</td>
<td></td>
</tr>
<tr>
<td>zero-sum contraposition 21</td>
<td></td>
</tr>
<tr>
<td>Zucca, Lorenzo 245</td>
<td></td>
</tr>
<tr>
<td>Zywicki, Todd J. 92</td>
<td></td>
</tr>
</tbody>
</table>