

# REJECTING THE ORDOLIBERAL STANDARD OF CONSUMER CHOICE AND MAKING CONSUMER WELFARE THE HALLMARK OF AN ANTITRUST ATLANTICISM



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## I. INTRODUCTION

For the past three decades, the European Commission has made notable steps towards enforcing its competition law provisions using an economic standard of consumer welfare.<sup>2</sup> Notwithstanding the Commission's 2008 Guidance,<sup>3</sup> however, the protection of consumer choice or the "freedom to choose" appears to have been integral to the judgments of European courts in *Intel*,<sup>4</sup> *TeliaSonera Sverige*,<sup>5</sup> *Deutsche Telekom*,<sup>6</sup> and *France Telecom*.<sup>7</sup> As commentators continue to highlight,<sup>8</sup> this emphasis on the importance of choice suggests a break from the framework of consumer welfare used in the United States and a going-backward toward the ordoliberal paradigm that factored heavily into the formation of European competition law.<sup>9</sup>

Despite its persistent centrality to European competition law, ordoliberalism has not been generally understood by the American antitrust bar.<sup>10</sup> This short article will present the main tenets of an ordoliberal-consumer-choice approach to antitrust enforcement in a way that is digestible to practitioners schooled in the law and economics tradition. While an elegant and noteworthy conception of political economy, ordoliberalism and its standard of consumer choice constitute an anachronistic

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<sup>2</sup> See Korah, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 to Abusive Exclusionary Conduct by Dominant Undertakings: From Protecting Freedom to Enter a Market to an Efficient Allocation of Resources to Increase Consumer Welfare*, in *EUROPEAN COMPETITION LAW: THE IMPACT OF THE COMMISSION'S GUIDANCE ON ARTICLE 102 8* (L.F. Pace ed., 2011).

<sup>3</sup> COMMISSION COMMUNICATION — GUIDANCE ON THE COMMISSION'S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, 2009 O.J. (C45) 7 (Dec. 3, 2008) [hereinafter *COMMISSION GUIDANCE*].

<sup>4</sup> Case T-286/09, *Intel Corp. v. Comm'n*, [2014] ECR II-0000, ¶ 31.

<sup>5</sup> Case C-52/09, *TeliaSonera Sverige*, [2011] ECR I-527, ¶ 28.

<sup>6</sup> Case C-280/08, *Deutsche Telekom v. Comm'n*, [2010] ECR I-9555, ¶ 175.

<sup>7</sup> Case C-202/07, *France Telecom v. Comm'n*, [2009] ECR I-2369, ¶ 112.

<sup>8</sup> See, e.g., Blair & Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497, 2052 (2013).

<sup>9</sup> See GERBER, *LAW AND COMPETITION IN 20<sup>TH</sup> CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).

<sup>10</sup> Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 *AM. J. COMP. L.* 25-26 (1994) [hereinafter *Constitutionalizing the Economy*].

and highly controversial enforcement approach that is woefully ill-suited to the dynamism and globalization that typify the modern political economy.

## II. ORDOLIBERALISM

In the early 20<sup>th</sup> century, critiques of capitalism enjoyed collective dominance in the market for Western theories of political economy. Two critiques were prevalent in the United States. One critique, espoused by the progressives, was *political* in nature. Private capital, they argued, had grown too powerful in its ability to subvert democratic processes and had to be checked by appropriate legislation.<sup>11</sup> Another more moderate view that was ultimately incorporated into the New Deal could be instead characterized as a *social* critique of capitalism that focused on the poor working conditions and poverty that had befallen many in the working class. Across the Atlantic, in Germany, two other schools of political economy gained notoriety. One of these schools, located in Frankfurt, saw in capitalism an essential *economic* irrationality that called for the creation for a new social rationality to support a non-market form of economic activity.<sup>12</sup>

But it was Germany's Freiburg School that would define ordoliberalism. The Freiburg School, for whom Walter Eucken was its foremost economic exponent, interpreted the social theorist Max Weber as understanding capitalism to embody a *social* irrationality,<sup>13</sup> whereby the bureaucratic rationalization of capitalist forces alienated man's ethical and spiritual faculties – reducing him, as Weber famously portrayed, to an “Iron Cage.”<sup>14</sup> Starting from this premise of capitalism's social irrationality, ordoliberals like Eucken sought to construct a new form of economic market rationality that would offset the alienating effects of capitalism's social irrationality and, as such, constitute a third way between *laissez faire* and socialism in understanding the relation between the market and the state.<sup>15</sup>

For Eucken, the question of what methodology should be used to determine the ordoliberal relation between the market and the state – namely, market *order* – was paramount. Eucken's desiderata were twofold: first, that the knowledge associated with ordoliberal market order be normative, contrary to positivism; and, second, that it be objective, contrary to historicism.<sup>16</sup> To avoid these Scylla and Charybdis, Eucken looked to the phenomenological methodology of philosopher Edmund Husserl as the basis for grounding the ordoliberal *eidos* or principle of politico-economic order.<sup>17</sup> In Husserlian jargon,<sup>18</sup> the method of “phenomenological reduction” is achieved by both directing one's intentionality from the mental representations or images of physical objects in the world to more general mental “essences” – and thus achieving normativity – as well as “bracketing” these mental objects of intentionality and instead reflecting upon the act of intentionality itself – and thus achieving objectivity. In Husserl's phenomenological reduction, Eucken believed to have found a sufficient basis for grounding the normative and

11 These concerns were not alien to the passage of the Sherman Act. See Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 71, 96-101 (1982).

12 FOUCAULT, THE BIRTH OF BIOPOLITICS 105-106 (Senellart et al. eds., Burchell trans., 2008) (1979) [hereinafter BIOPOLITICS].

13 Id.

14 WEBER, THE PROTESTANT WORK ETHIC AND THE SPIRIT OF CAPITALISM 61, 123 (Parsons trans., Routledge Classics) (1905) [hereinafter PROTESTANT WORK ETHIC]. The reader will note that, on this analysis, the “rationalization” of capitalism itself entails a social “irrationality.” To grasp how, one must recognize Weber's distinction between “procedural” and “substantive” rationality. For Weber, the procedural or means-to-ends rational calculations that characterize capitalism threaten the substantive rationality whereby individuals determine their behavior consistent with more ultimate human values or ends. See, e.g. Ritzer, *The Weberian Theory of Rationalization and the McDonaldization of Contemporary Society*, in ILLUMINATING SOCIAL LIFE: CLASSICAL AND CONTEMPORARY THEORY REVISITED 42-43 (P. Kivisto ed., 2013).

15 See BIOPOLITICS, at 106; see also Ahlborn & Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, 2 COMPETITION POL'Y INT'L 197, 198 (2006) [hereinafter *Eucken and Ordoliberalism*].

16 Goldschmidt & Rauchenschwandtner, *The Philosophy of the Social Market Economy: Michel Foucault's Analysis of Ordoliberalism*, FREIBURG DISCUSSION PAPERS ON CONSTITUTIONAL ECONOMICS, No. 07/4, at 14-15 (2007), available at: <https://ideas.repec.org/p/zbw/aluord/074.html> [hereinafter *Social Market Economy*]. Put simply, positivism holds that knowledge is limited to empirical facts about the world and does not include knowledge of moral values; historicism, by contrast, holds that the moral knowledge is relative to its cultural context.

17 See BIOPOLITICS, at 103-04, 120; see also *Social Market Economy*, at 11-15; *Constitutionalizing the Economy*, at 40.

18 For a short overview of Husserl's method of phenomenological reduction, see Follesdal, *Husserl's Reductions and the Role They Play in His Phenomenology*, in A COMPANION TO PHENOMENOLOGY AND EXISTENTIALISM 106 (Dreyfus, Wrathall eds., 2006).

objective economic science that would unveil the ordoliberal *eidōs*.<sup>19</sup>

Eucken would tie this notion of *eidōs* or market *order* inextricably with Kant's moral theory of autonomy.<sup>20</sup> For Kant, human beings are ends in themselves whose autonomy consists not only in being free from the moral influence or rules imposed by others, but in determining the moral laws that bind them.<sup>21</sup> This latter notion of positive autonomy led Eucken to conceive of ordoliberal market order as one where individuals had a dignity, which in turn entailed a positive liberty of self-determination to participate in political and economic life.<sup>22</sup> In economic society, Eucken recognized that the central threat to this positive liberty and right of self-determination was market power.<sup>23</sup> For Eucken, competition was therefore understood fundamentally a means of *disempowering* market power – with its original aim, in theory, the atomistic ideal of perfect or complete competition.<sup>24</sup> Through complete competition, ordoliberal market order would thus wholly negate market power and protect individual autonomy.

A second ordoliberal conception of competition as a disempowering force would permit market power as long as dominant firms act “as-if” they were in a competitive market.<sup>25</sup> The “as-if” principle distinguishes between performance competition – conduct “that made products more attractive to consumers” – and impediment competition – conduct “designed to impede a rivals capacity to perform.”<sup>26</sup> Whereas the “as-if” principle condones performance competition, impediment competition implies a power to exclude rivals inconsistent with the ordoliberal ideal.<sup>27</sup> Ordoliberal disempowerment can also take the form of “workable competition” in a way similar to that of the Harvard School.<sup>28</sup> On this view, ordoliberalism would not be opposed to market power, but only proscribe *conduct* that “artificially” results in increased concentration and therefore offends individual dignity and autonomy.<sup>29</sup>

Moving from principles to standards, consumer choice exemplifies the ordoliberal conception of protecting competition as a disempowering force – to whatever degree – to secure the dignity and autonomy of individuals.<sup>30</sup> To do this, contemporary

19 Klump & Worsdorfer, *On the Affiliation of Phenomenology and Ordoliberalism: Links between Edmund Husserl, Rudolf and Walter Eucken*, 18(4) THE EUROPEAN JOURNAL OF THE HISTORY OF ECONOMIC THOUGHT 551, 556-67 (2011); see also *Social Market Economy*, at 10-12 (noting that “Eucken, when reconnecting his method to the phenomenological approach, also finds an objective theory of science, an objective... that corresponds to his search for a more ‘crisis-proof science’ and for the ‘true’ basis of science.”).

20 Worsdorfer, *On the Economic Ethics of Walter Eucken*, in 60 YEARS OF SOCIAL MARKET ECONOMY, FORMATION, DEVELOPMENT AND PERSPECTIVES OF A PEACEMAKING FORMULA 21 (Konrad Adenauer Stiftung ed., 2013), available at: [http://www.kas.de/wf/doc/kas\\_20040-544-2-30.pdf?100630164654](http://www.kas.de/wf/doc/kas_20040-544-2-30.pdf?100630164654) [hereinafter *Economic Ethics*]; see also *Constitutionalizing the Economy*, at 39.

21 For a short overview of Kantian ethics, see Wood, *The Supreme Principle of Morality*, in THE CAMBRIDGE COMPANION TO KANT AND MODERN PHILOSOPHY 342 (Guyer ed., 2006).

22 *Economic Ethics*, at 25-27; see also Adolphson, *Article 102 TFEU, Aimed at Serving the Ordoliberal Agenda or Consumers?*, JURISDISK FAKULTETEN – INSTITUTIONEN UPPSALA UNIVERSITET, at 14 (2001), (“[A]ccording to ordoliberalism, the conception of ‘economic freedom’ was to be understood as having the character of a positive liberty; all citizens should be able to enter and compete on markets.”), available at: [http://www.konkurrensverket.se/globalassets/forskning/uppsatser/ulf\\_adolphson\\_106-2011.pdf](http://www.konkurrensverket.se/globalassets/forskning/uppsatser/ulf_adolphson_106-2011.pdf).

23 *Economic Ethics*, at 29.

24 *Id.* at 27; see also *Eucken and Ordoliberalism*, at 200.

25 *Constitutionalizing the Economy*, at 52-53.

26 *Id.*

27 *Id.* But see Mestmacker, *The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008*, in EUROPEAN COMPETITION LAW: THE IMPACT OF THE COMMISSION'S GUIDANCE ON ARTICLE 102 25, 39-44 (L.F. Pace ed., 2011).

28 Unlike ordoliberalism, the Harvard School's emphasis on market structure is relevant with respect to its implications for economic welfare, rather than autonomy.

29 See Case T-219/99, *British Airways v. Comm'n*, [2003] ECR II-5917, ¶ 264 (“Article [102 FTEU] does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates on protecting the market structure from artificial distortions...”); see also Behrens, *The ordoliberal concept of ‘Abuse’ of a Dominant Position and its Impact on Article 102 TFEU*, EUROPA-KOLLEG HAMBURG, INSTITUTE FOR EUROPEAN INTEGRATION, No. 7/15, at 16 (2015), available at: <https://www.econstor.eu/bitstream/10419/120873/1/834998815.pdf> [hereinafter *Ordoliberal Abuse*].

30 See Behrens, *The Consumer Choice Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law*, EUROPA-KOLLEG HAMBURG, INSTITUTE FOR EUROPEAN INTEGRATION, Discussion Paper No. 1/14, at 4-5 (2014), available at: <https://www.econstor.eu/bitstream/10419/95925/1/780714202.pdf> (noting that the European Court of Justice has expressly shunned a consumer welfare standard in favor of a consumer choice standard which emphasizes “the relevance of market structure for the effectiveness of competition and ‘consumer choice’”) [hereinafter *Consumer Choice*].

consumer choice standards seek to ensure that the number of suppliers from which consumers are able to purchase goods is not improperly reduced by way of the actions of other firms.<sup>31</sup> While there is surely an intimate relation between consumer choice and the number of producers in the market, it is the autonomy of consumers that is the operative and logically prior principle.<sup>32</sup> As a result, the ordoliberal standard of consumer choice does not protect competitors for their own sake, but rather all “[m]arket participants, including competitors, are protected for the sake of the proper functioning of the competitive process.”<sup>33</sup>

While the ordoliberal standard of consumer choice appears to be the principal value of European competition law, contemporary enforcement appears to reflect a certain degree of value pluralism with respect to its policy goals. As highlighted by the *Intel* judgement,<sup>34</sup> it may be that *both* consumer choice and consumer welfare are relevant to determining whether business conduct violates Article 102.<sup>35</sup> Whereas conduct that artificially increases market concentration appears to raise a presumption that consumer choice is unlawfully reduced, to the extent that the Commission would consider artificial increases in market concentration to raise a presumption of harm to consumer welfare, it would need take the extra step of establishing such a connection using the empirical economic methodologies common to a modern consumer welfare approach.

### III. WHY CHOOSE CONSUMER CHOICE?

The demands of ordoliberalism as a theory of political economy are substantial. To begin with its sociological theory of alienation, of all the critiques of capitalism considered above – Progressivism, The Frankfurt School, The New Deal – ordoliberalism’s is surely the most abstract. Political power, class-based economic analysis, and concerns about absolute poverty all touch upon concrete and identifiable questions of human life in the world. But what is one to make of the claim that capitalist society alienates Eucken’s flavor of substantive rationality<sup>36</sup> which – following Weber – serves as a major basis for participation in economic life?<sup>37</sup> Of course, that man even has this particular type of rational capacity, *or* that it should be understood as alienated by capitalism, make ordoliberalism’s foundation unsupportable at worst, and downright old-fashioned at best.<sup>38</sup> And, even if the capitalism of Eucken’s time *did* act as an alienating force against, as it were, the human soul, modern capitalism is defined not by Smith’s pin-maker, but by dynamic forces that would seem to resemble precisely the sort of value-rich and creative rationality that Eucken feared to be at risk from capitalistic rationality.

Even if ordoliberalism’s sociological problematic is assumed, the possibility of any sort of objective and normative conception of order being grounded in Husserlian phenomenology is an extremely contestable notion. Whatever the ultimate “truth,” teleological worldviews like Husserl’s seem to have convinced only, at most, very few contemporary philosophers in either Europe or the United States. The phenomenological methodology underlying the objective science deployed by Eucken and the ordoliberals affirms the existence of mental objects. By contrast, many contemporary philosophers approach

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31 See Case C-52/09, *TeliaSonera Sverige*, [2011] ECR I-527, ¶ 28; see also *Consumer Choice*, at 23 (“Consumers’ freedom (or: consumers’ sovereignty for that matter) to cho[ose] between alternative products or services offered on the market is dependent upon the degree of decentralization of production.”).

32 *Consumer Choice*, at 23.

33 *Id.*

34 See Case T-286/09, *Intel Corp. v. Comm’n*, [2014] ECR II-0000, ¶ 31 (“Intel’s anti-competitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.”).

35 See generally COMMISSION GUIDANCE.

36 For the ordoliberals, this alienation was theological in nature. See *Economic Ethics*, at 30-35 (describing the “social crisis of the present” ordoliberals faced where “the loss of religious of ways of life and the suppression of religion in public has led to a sustained crisis in meaning and orientation” such that the ordoliberal task was to create “a new social way of life [is] necessary, which will allow the spiritual crisis to be overcome and the ethical-religious vacuum to be filled”).

37 PROTESTANT WORK ETHIC, at 14-19 (writing that “[i]f we should ask *why* should ‘money be made out of men’, Benjamin Franklin himself, although he was a colorless deist, answers in his autobiography with a quotation from the Bible... ‘Seest though a man diligent in his business? He shall stand before kings’ (Prov. Xxii 29)”). Eucken himself apparently wrote “I could not exist, nor work, if I did not have a clue of God’s existence.” *Economic Ethics*, at 33.

38 See *Economic Ethics*, at 15 (noting that Eucken “emphasized the need for an ethical-religious reformation” and that Eucken strove not just “for an ordoliberal post-war economic and social system, but also a Christian-based ordoliberal one”).



philosophy of mind from the perspective of physicalism.<sup>39</sup> On this view, all objects are either physical or ultimately reducible to the physical. If such physicalism is true, the implications of Husserl's methodology – namely, the existence of mental objects – are manifestly untenable, leaving ordoliberalism devoid of the methodological basis for its project of constructing market order.<sup>40</sup>

Even when granting ordoliberalism both its sociological and methodological priors, ordoliberalism's affinity for Kantian moral theory only accentuates its abstract and other-worldly character. As has been noted, Kant's conception of the individual as not only the subject but the *source* of the moral law that binds him may itself be nonsensical.<sup>41</sup> Yet, without the idea of Kantian self-legislation, Eucken's notions of dignity and positive political liberty, which provide the basis for conceiving of competition as disempowerment, would seem to lose complete foundation. Furthermore, by embracing Kantianism ordoliberalism again evinces its affinity for abstract rational principles rather than, as on the consumer welfare model, limiting its task to satisfying the broad set of real and concrete economic desires of human beings in the world.

Should one find no unease with any of ordoliberalism's sociological, methodological, and moral priors, the ordoliberal conception of complete competition as disempowerment would, as with ordoliberal sociology, seem to be the byproduct of an earlier economic era. As opposed to the static model, dynamic Schumpeterian competition recognizes market power as an *inherent* part of the competitive process. An ordoliberal market order requiring complete competition would therefore be fundamentally inapposite to the dynamic processes that characterize business conduct in the New Economy.<sup>42</sup> Even when considering its "as-if" variant, ordoliberalism still conceives of complete competition as its hypothetical ideal, and therefore in the very same kind of disempowering and antiquated terms that juxtapose competition with market power.

If ordoliberal disempowerment is to be understood in terms of "workable" competition that *is* consistent with market power and Schumpeterian competition, such coherence appears to depend upon the distinction between conduct that "artificially" results in increased concentration from that which is "natural" market behavior.<sup>43</sup> For this reason, contemporary ordoliberalism overlooks that markets are not only constructed,<sup>44</sup> but that markets and the human behaviors that constitute economic activity are *evolutionary* phenomena that cannot be defined in terms of any fixed natural criterion.<sup>45</sup> Indeed, *a fortiori*, the ordoliberal rejection of natural market order, discussed *supra*, may itself foreclose the possibility of defining the rules of the game in naturalistic terms.<sup>46</sup> Even if an ordoliberal "economic natural law" did exist, the ability to practically determine which particular conduct was proscribed by it, and why, would seem to suffer from all of the thorny problems attributable to natural law theories in the moral context.

Finally, an ordoliberal framework that attempts to accommodate both consumer choice and consumer welfare as policy goals faces serious conceptual and practical problems. Autonomy and welfare are likely incommensurable values when understood as common goals of an ordoliberal competition policy.<sup>47</sup> In the context of weighing desirables, "incommensurability"

39 See Bourget & Chalmers, *What Do Philosophers Believe?* 170(3) *PHILOSOPHICAL STUDIES* 465, 479 (2014) (finding that most of the philosophers surveyed are physicalists).

40 *BIOPOLITICS*, at 120.

41 See, e.g. Anscombe, *Modern Moral Philosophy*, 33 *PHILOSOPHY* 1 (1958) (criticizing the Kantian account of self-legislation as "absurd [because] it is always 1-0. The concept of legislation requires superior power in the legislator.").

42 See *Eucken and Ordoliberalism*, at 212-13.

43 See, e.g., *Ordoliberal Abuse*, at 16.

44 In contrast with classical liberalism, ordoliberalism does not see market rationality as "natural." For the ordoliberals, market order must be created by the state, which enables markets to flourish by providing the necessary legal framework and setting the "rules of the game." See *BIOPOLITICS*, at 119-20.

45 See generally HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1988). Criticizing ordoliberalism on this ground does not require one to accept Hayek's belief in spontaneous order. Indeed, some have argued that Hayek's writings on cultural evolution and spontaneous order are actually in tension with one another. See Vanberg, *Hayek's Legacy and the Future of Liberal Thought: Rational Liberalism vs. Evolutionary Agnosticism*, 5 *JOURNAL DES ECONOMISTES ET DES ETUDES HUMAINES* 451 (1994).

46 If correct, to the extent that an ordoliberal understanding of effective competition requires a natural criterion to identify anticompetitive conduct, ordoliberalism may *not* be readily separable from principles of complete or "as-if" competition.

47 See generally Sunstein, *Incommensurability & Valuation in Law*, 92 *MICH. L. REV.* 779, 849-51 (1993). To give an example, a career as a lawyer and a career as a musician have been identified as being incommensurable. There is no common basis to determine each career's value relative to the other. See RAZ, *THE MORALITY OF*

has been defined as a relation between values that do not share a common measure. Put another way, values for which the relation of incommensurability holds cannot be converted into a common numerical value.<sup>48</sup> As such, any enforcement framework considering the effects of business conduct on both consumer choice and consumer welfare may, therefore, be unable to evaluate conduct that, as an example, increases innovation but reduces consumer choice.<sup>49</sup> While it may be that consumer choice and consumer welfare are nonetheless comparable goods,<sup>50</sup> such a framework would still appear to be vague at best and, if there is no comparability, incoherent at worst.

## IV. CONCLUSION

While a consumer choice standard may be defended on grounds other than ordoliberalism,<sup>51</sup> divorced of this broader framework consumer choice may be merely salt that has lost its savor. Like ordoliberalism and consumer choice, American neoliberalism and consumer welfare are obviously not without their discontents. Proponents of consumer choice or consumer welfare should take great care not to “beg the question” against each other in their ongoing and important debate. Both are sophisticated systems of political economy that embody, at root, crucial differences. Ultimately, the decision of which theory of political economy and paradigm for competition policy should govern economic activity is a choice that policymakers must carefully make.

The ordoliberal variety of consumer choice, however, embodies a highly controversial comprehensive worldview that makes it less desirable than an economic welfare standard from the standpoint of representing any sort of international consensus. The reality of economic activity *in the world* is that business is global and being scrutinized by an increasingly growing number of competition regimes with different cultural histories – both Western and non-Western – and, therefore, invariably different views about the proper role of competition policy. The best standard for convergence, in light of this reality, is one which relies upon fewer definitive answers about larger moral and philosophical questions – not one that, as with ordoliberalism’s specific form of Western political economy, operates as though it has them all. By *this* standard, ordoliberalism’s rightful preeminence belongs in the history of economic thought and not in contemporary competition law jurisprudence or enforcement.

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FREEDOM 332, 341 (1986).

48 Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65, 66-67 (1990).

49 See Wright & Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2411 (noting that “economic theory and empirical evidence are replete with examples of business conduct that simultaneously reduces choice and increases welfare”).

50 Sunstein, *supra* note 47, at 798.

51 See Lande & Averitt, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007).